

**Restricted Access to the Superior Courts of Zimbabwe  
Emanating from Discriminatory Prescription Periods in  
civil matters brought under the Police Act (11:01), the  
Labour Act (28:01) and The Insurance Act (24:01)**

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**ABSTRACT**

*For several years, several arguments have been advanced to justify the apparent discrimination emanating from the various pieces of legislation providing for the prescription. Notably are the Prescription Act (08:11), Police Act (11:01), Insurance Act (24:01) and the Labour Act (28:01). Some of the arguments for procedural discrimination based on prescription are that the insurer, for example, handles many claims and it would be unfair to have a situation where the claim can be prosecutable for a period of three years, while those anchoring for the police argue that it is impossible to preserve the evidence for a period of three years as police officers and records may be relocated. A further distinction is that with individual civil claims, the burden of proof is with the parties, and it does not matter to have a prescription period of three years. In this paper, it is argued that there should be uniformity in prescription periods and that insurers and the police must avoid the consequence of their action because of reduced prescription.*

**INTRODUCTION**

In this paper, the prescription is defined, and a discussion will be made on provisions on prescription periods when the prescription is deemed interrupted and its impact on claims at law. A comparison of prescription periods is made with

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South Africa. Hence various prescription periods under the Prescription Act, Insurance Act and Police Act are discussed and recommendations made.

### WHAT IS PRESCRIPTION?

Prescription is when a claim is no longer prosecutable or claimable at law. A prescribed claim is an extinguished claim. It remains due but is not capable of being fulfilled at law. In Zimbabwe, a litigant must plead prescription in their pleadings, although it can be raised as a special plea.

### PRESCRIPTION OF GENERAL CIVIL CLAIMS IN ZIMBABWE

The Prescription Act sets out various prescriptions and then provides a general prescription period for civil claims not specifically provided in the Act.<sup>897</sup> For an ordinary debt or a civil claim not mentioned in the Prescription Act (08:11), section 15(d) of the Prescription Act provide that the period of prescription is three years.<sup>898</sup> Section 14 of the Prescription Act provides that a debt shall prescribe after the lapse of time in the relevant enactment.<sup>899</sup> This means a debt prescribes if there is a relevant law that governs that specific contract or claim or, in some cases, the prescription period will be in that contract or agreement that gave birth to the claim. Similarly, a scenario where there is a subsidiary debt which is dependent on the principal debt shall only prescribe after the principal debt is prescribed.<sup>900</sup> Section 14(3) of the Prescription Act also provides that the payment of a debt even after the prescription period will be considered as a debt that has been settled even if the debtor knew or did not know that

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897 Section 2 of Prescription Act (Chapter 8:11) of Zimbabwe also referred herein to as the Act.

898 Section 15 (d) of Prescription Act (Chapter 8:11) of Zimbabwe

899 Section 14 of the Prescription Act (Chapter 8:11) of Zimbabwe

900 Section 14 of the Prescription Act (Chapter 8:11) of Zimbabwe

the prescription period had lapsed<sup>901</sup>. If a debtor willfully prevents the creditor from knowing that he or she has a debt, a prescription will begin to run when the creditor becomes aware of the debt.<sup>902</sup> A debt will not be deemed due until the creditor becomes aware of it. The act also provides for situations where the prescription will be delayed.<sup>903</sup> These include situations where the creditor is unable to be part of a contract, like he or she is a minor, insane or mentally handicapped and when the debtor and creditor are married to each other or are partners, and the debt arose from the partnership<sup>904</sup>. In addition, if the debtor is outside Zimbabwe or the debt is subject to a dispute relating to arbitration, a prescription will be delayed.<sup>905</sup> The prescription will also be interrupted if the debtor acknowledges liability or if the two parties postpone the date money is supposed to be paid<sup>906</sup>.

In *Gwiriri vs Star Africa Corporation Limited and Another*<sup>907</sup> Dube J relied on the<sup>908</sup> ruled that the requirements of prescription as provided in s19(3) of the Prescription Act are case that (a) there must be process (b) the process must be served on the debtor and (c) by that process the creditor must claim payment of the debt.<sup>909</sup> Hence for process to interrupt prescription, the claimant is required to prosecute the claim to final judgment and not abandon the matter.<sup>910</sup> In *Gwiriri* case the court went on to rely on

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901 Section 14 (3) Prescription Act (Chapter 8:11) of Zimbabwe

902 Prescription Act (Chapter 8:11)

903 *Ibid*

904 *ibid*

905 *Ibid*

906 *Ibid*

907 *Gwiriri v Star Africa Corporation Ltd & Another* (HC 11308/2011)

908 *Du Bruyn vs Joubert* 1982 (4) SA 69

909 See supra note 12. See also Section 15 (2) of the Prescription Act 68 of 1969 of South Africa

910 See supra note 13 at p69

a number of cases in relation to interruption of prescription.

Comparably to Dube J's interpretation of s19(3) of the Prescription Act is the interpretation given to section 15 (2) of the Prescription Act 68 of 1969 of South Africa. In the case of *Van Der Merwe v Protea Insurance Co Ltd*<sup>911</sup> in interpreting a section similar to s19 of the Zimbabwean Prescription Act, Smalberger J held that the whole purpose of s 15(2) is that, if a creditor fails to prosecute successfully his claim under the process which interrupts prescription, either in the court in which such process commences legal proceedings, or on appeal to a higher tribunal, or, having been successful in the initial prosecution of his claim, abandons the judgment in his favour, or it is set aside on appeal at the instance of the debtor, the running of prescription is deemed not to have been interrupted.<sup>912</sup>

In *Titus v Union & SWA Insurance Co Ltd*, the Court held that the "process in question" is clearly that by which the prescription was originally interrupted.<sup>913</sup> The Court went on further to hold that the process referred to must be the process which is successfully prosecuted to final judgment by the creditor, and not any other.<sup>914</sup> The Court ruled also that reference to "final judgment," in the context, contemplates judgment in the court in which the process is instituted or if the creditor is unsuccessful in such court, any higher tribunal in which the creditor is ultimately successful on appeal in relation to the "process in question."<sup>915</sup> Hence when a creditor is successful in the

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911 *Van Der Merwe v Protea Insurance Co Ltd* 1982 (1) SA 770 (E)

912 *Supra* note 16 at 773 C-D and compare with Section 15 (2) of the Prescription Act (8.11) of Zimbabwe

913 *Titus v Union & SWA Insurance Co Ltd* 1980 (2) SA 701 at 723.

914 See *supra* note 12

915 *ibid*

court in which the process in question commences legal proceedings, prescription stands interrupted until the judgment is abandoned or set aside on appeal.<sup>916</sup> It is therefore clear that the in Zimbabwe a creditor is required to successfully prosecute his claim to final judgment before prescription is deemed to have been interrupted.<sup>917</sup> The creditor is not simply required to prosecute his claim to final judgment” and that “there must be a successful prosecution to final judgment in the sense that the creditor must obtain a judgment in its favour.”<sup>918</sup>

Thus s19 (3)(b) of the Prescription Act<sup>919</sup> is clear that if the creditor successfully prosecutes his claim under the process in question to final judgment but abandons the judgment or the judgment is set aside, then the prescription shall not be deemed to have been interrupted. As the respondents’ have correctly pointed out in their heads of argument, one can only abandon a judgment given in one’s favour.<sup>920</sup> Similarly, in the context of s19(3)(b) of the Prescription Act, only a judgment in one’s favour can be set aside on appeal or review.<sup>921</sup> Hence the correct interpretation of the section is that there must be a successful prosecution to final judgment in the sense that the creditor must obtain a judgment in its favour. The effect of s19 (2) is that process issued in respect of a debt and served on a debtor within three years of the cause of action has the effect of interrupting prescription.<sup>922</sup> The running of prescription shall not be deemed to have been interrupted, in terms of s

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916 *Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 (A) at 827G-828A, compare with also

917 *Ibid*

918 *Chiwawa v Mutzuris & Ors* HC 7429-2006 and compare with *Evins* supra.

919 Section 19 (3) (b) of the Prescription Act (8.11) of Zimbabwe

920 *Ibid*

921 *Ibid*

922 *Ibid*

19 (3), if the creditor a) does not prosecute the proceedings under that process to finality or b) successfully prosecutes the claim under the process in question to final judgment, but he abandons the judgment or the judgment is set aside.<sup>923</sup> The mischief behind the section is that the creditor must successfully prosecute the matter to final judgment and get a judgment in his favour. If he does not, he is entitled to pursue the matter until he gets the final judgment in his favour. He is only entitled to successfully prosecute to final judgment the proceedings under the process in question, that is, the process by which the prescription was originally interrupted and not any other.

The issue of prescription also was also extensively discussed in the case of *Jennifer Nan Brooker vs Richard Mudhanda and Others*<sup>924</sup> where the Supreme Court held that the party who alleges prescription must allege and prove the date of the inception of the period of prescription.<sup>925</sup> The court also in *Brooker supra* ruled that for purposes of calculating the relevant time when prescription begins to run in respect of a debt regard must be had to the date when the cause of action arose.<sup>926</sup> After a demand has been made the period of prescription begins to run. The court also held that the defence of prescription should not be raised by way of exception but must be specifically pleaded.<sup>927</sup> In a plea of prescription, the onus is on the defendant to show that the claim has prescribed but if in reply to the plea the plaintiff alleges that the prescription was interrupted or waived, the onus would be on the plaintiff to show that it was interrupted or waived.

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923 Ibid

924 *Richard Nan Brooker vs Richard Mudhanda and Others* SC 5/18

925 Ibid

926 Ibid

927 Ibid

In *John Conrad Trust vs The Federation of Kushanda Pre-Schools Trust*,<sup>928</sup> the court ruled that the Prescription Act does not exclude third parties from raising prescriptions as a defence.<sup>929</sup> What prescribes is a debt and not any of the parties concerned. It is, therefore, open to third parties to raise the defence of prescription in appropriate cases once the prescription has run its course. Once the prescription has run its course, it deprives the aggrieved party of the remedy or relief sought, regardless of whether one has a valid claim on the merits.<sup>930</sup> Thus, an owner forfeits his right to vindicate his property once the prescription has run its full course.<sup>931</sup> The prescription does not deal with the merits since it simply seeks to extinguish old stale debts not claimed within the prescribed time limits.<sup>932</sup>

#### **PRESCRIPTION OF CLAIMS IN LABOUR CLAIMS IN ZIMBABWE**

In Zimbabwe, section 94 of the Labour Act is the provision that deals with prescription in labour matters.<sup>933</sup> In section 94 of the Labour Act, it is provided that ‘no labour officer shall entertain any dispute or unfair labour practice unless it had otherwise come to his attention within two years from when the dispute or unfair labour practice first arose.’<sup>934</sup> In *City of Gweru vs Munyari*, Ziyambi J ruled that the Labour Relations Officer was correct in dismissing the matter on the ground that it had prescribed.<sup>935</sup> The applicant had brought the labour dispute way after the then-prescribed period of 180 days mentioned in section 94

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928 *John Conrad Trust vs The Federation of Kushanda Pre-Schools Trust* SC 12/2017.

929 *Ibid*

930 *Ibid*

931 *Ibid*

932 *Ibid*

933 Section 94 of the Labour Act (Chapter 28:01).

934 Section 94(1) Labour Act (Chapter 28:01) of Zimbabwe

935 *City of Gweru vs Munyari* SC 15/05

of the Labour Act.<sup>936</sup>The Supreme Court also held that the Labour Court had made a mistake of law by ignoring the issue of prescription and continuing to hear the matter and giving a judgment and that the Labour Court had no jurisdiction in the matter since it had already prescribed.<sup>937</sup>This means that in Zimbabwe the prescription period for labour matters is two (2) years.

In *Muwonde vs Forestry Commission*, Manyangadze J held that from a reading of section 94 (1) that the period stipulated for referral of a matter to a labour officer is two years from the date when the unfair labour practice complained of arose, i.e., from the date when the cause of action arose.<sup>938</sup> However, the two-year prescription will not apply to 'an unfair labour practice which is continuing when it is referred to or comes to the attention of a labour officer. The period of when prescription, as provided in section 94 of the Labour Act<sup>939</sup>, is deemed to have first arisen on the date when the acts or omissions forming the subject of the dispute or unfair labour practice first occurred or the party wishing to refer the dispute or unfair labour practice to the labour officer first became aware of the acts or omissions in question.<sup>940</sup> Section 94 of the Labour Act also provides for a party who cannot reasonably be expected to have known of the act or omission on the date it first occurred to approach the labour officer outside the two-year prescription period.<sup>941</sup> If a party, therefore, fails normally to raise their claim within the prescribed two years, their claim is deemed lapsed or extinguished.

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936 Section 94 of the Labour Act (Chapter 28:01) of Zimbabwe

937 See supra note 40

938 *Muwonde vs Forestry Commission* LC-MC-03-2015

939 Section 94 of the Labour Act (Chapter 28:01) of Zimbabwe

940 Section 93 of Labour Act (28:01) of Zimbabwe

941 Section 94 Labour Act (Chapter 28:01) of Zimbabwe



In *Jeffrey Dube N.O vs Casmyn Mining t/A Turk Mine*, the Labour Court held that an employee who decides not to act until the unfair labour practice has been prescribed cannot possibly argue that because they are still being affected, that unfair labour practice should be deemed as continuing.<sup>942</sup> Such interpretation would render section 94(1) of the Labour Act redundant and superfluous.<sup>943</sup> The exception in section 94 of the Labour Act does not apply because the dispute was not continuing when it was referred to the labour officer.<sup>944</sup> In other words, once a matter prescribes, that is the end of the matter; it cannot be revived in a judicial forum.<sup>945</sup>

#### **PRESCRIPTION OF INSURANCE CLAIMS AGAINST THE INSURER AND THE INSURED IN ZIMBABWE**

Prescription of insurance claims in Zimbabwe is governed by section 17(3) of the Prescription Act.<sup>946</sup> The Prescription Act provides that a debt arising out of an advance or loan made by an insurer, whether in respect of a life policy as of the Insurance Act<sup>947</sup> (section 3), issued by insurance arrangement. With the Prescription Act silent on specific time periods for insurance claims, it means insurance claims will fall under ordinary debts (section 15(d) of the Prescription Act) hence the period for prescription if not stated in the insurance contract will be three years.<sup>948</sup> However, in most insurance contracts, there will be clauses which then govern when one must raise the claim that the insurer or secured solely by the cession of such life policy to

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942 *Jeffrey Dube N.O vs Casmyn Mining t/A Turk Mine* LC/MT/60/18

943 *Ibid*

944 *Ibid*

945 *Chengetai Mapundu vs ZIMRA* LC/H/41/13

946 Section 17 (3) Prescription Act (Chapter 8:11) of Zimbabwe

947 Section 3 of the Insurance Act [Chapter 24:07]

948 Section 15 (d) of the Prescription Act

the insurer shall not become prescribed before the debt arising out of such policy becomes prescribed. This means that the prescription period will usually be stated in that insurance policy/contract that established the insurable relationship. There is, however the Road Traffic Act (13:11)<sup>949</sup> claims which also limits the period for claims against the insurers. In terms of s25 of the Road Traffic Act, it is provided as follows:

1. A person who has a claim against a person insured or indemnified in respect of any liability in relation to which a statutory policy has been issued shall be entitled
  - (a) in his own name to recover from the insurer any amount, not exceeding the amount covered by the statutory policy, for which the person insured or indemnified is liable; and
  - (b) to claim and recover from a person insured or indemnified only so much of his claim as exceeds the amount recovered by him from the insurer:

Provided that—

- (i) the rights of any such person who claims directly from the insurer shall, subject to subsection (2), be no greater than the rights of the insured against the insurer;
- (ii) the right of recovery directly from the insurer shall become prescribed upon the expiry of a period two (2) years from the date on which such claim arose.

The prescription period, accordingly, is two years against the insurer and the insured. This means the period to bring a claim against an insurer is one year less than in a general claim against any other person. This means there is a

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949 Section 25 Road Traffic Act (13:11)

shorter duration to bring such a claim before the prescription extinguishes the claim.<sup>950</sup>

In *Manjoro v the Minister of Home Affairs & Others (HH 153/2018)*<sup>951</sup>, a case involved the applicant claiming damages for her unlawful arrest by the police, Muremba J ruled that the applicant, in that case, was not supposed to rely on the Prescription Act for her claim rather she had to use the Police Act<sup>952</sup> since civil suits against the police are under the Police Act. Section 70 of the Police Act provides the procedure for civil claims against the police.<sup>953</sup> The prescription period as ruled in that case is eight months.<sup>954</sup> This is shorter than the time periods in the Prescription Act.

In *Masenga vs Minister of Home Affairs*<sup>955</sup>, another case the plaintiff issued summons claiming damages arising out of a shooting incident involving the Zimbabwe Republic Police Riot Squad.<sup>956</sup> The plaintiff was wounded in his arm. It was held that civil proceedings against the state or a police officer should, in terms of section 70 of the Police Act, be commenced within 8 months after the cause of action has arisen.<sup>957</sup>

## **PRESCRIPTION ON DEBTS OWED TO THE STATE IN ZIMBABWE**

The claim on debts owed to the state is governed by the Prescription Act. Section 15 of the Prescription Act provides that for the debts owed to the state, the period for a

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950 Section 25 of the Road Traffic Act

951 *Manjoro v The Minister of Home Affairs & Others* HH 153/2018

952 Section 70 of the Police Act (Chapter 11:10)

953 *Ibid*

954 See supra note 56.

955 *Masenga vs Minister of Home Affairs* 1998 (2) ZLR 183 (H)

956 *Ibid*

957 Section 70 of the Police Act (Chapter 11:10) and *Stambolie vs the Commissioner of Police* 1989(3) ZLR 287 (SC)

prescription shall be thirty years.<sup>958</sup> A debt owed to the state can be monies relating to the respect of any tax, royalty, tribute, the share of profits or other similar charge or consideration related to the right to exploit minerals or other substances.<sup>959</sup> A state debt can be related to a debt owed to the state arising from an advance of money or a sale or a lease of land by the state; the period of prescription is fifteen years unless a longer period applies in respect of the debt.<sup>960</sup> Concerning any debt owed to the state which has not been specifically mentioned above, the prescription period of the debt is six months.

#### PREScription OF LABOUR CLAIMS IN SOUTH AFRICA

In the *Gaushubelwe vs Pieman's Pantry (Pty) Ltd*<sup>961</sup> case the South African Constitutional Court had to consider the question of whether the Prescription Act<sup>962</sup> applied to unfair dismissal and whether referral of a dispute to the CCMA interrupted the running of prescription.<sup>963</sup> The starting point to this issue was section 16(1) of the Prescription Act.<sup>964</sup> The section reads that "Subject to the provisions of subsection 2(b), the provisions of this Chapter shall, save in so far as they are inconsistent with the provisions of any Act of Parliament which prescribes a specified period within which a claim is to be made or an action is to be instituted in respect of a debt or imposes conditions on the institution of an action for the recovery of a debt, apply to any debt arising after the commencement of this Act."<sup>965</sup>

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958 Section 15 of the Prescription Act (Chapter 8:11)

959 *Ibid*

960 Section 16 of the Prescription Act (Chapter 8:11)

961 *Gaushubelwe vs Pieman's Pantry (Pty) Ltd* [2018] ZACC 7

962 Prescription Act 68 of 1969 (SA)

963 *Gaushubelwe vs Pieman's Pantry (Pty) Ltd* [2018] ZACC 7

964 Prescription Act 68 of 1969 (SA)

965 Prescription Act 68 of 1969 (SA)

Three detailed judgments in the Gaushebelwe case adopted differing approaches on what takes precedence in labour dispute claims in regard to prescription periods. The Labour Relations Act<sup>966</sup> and the Prescription Act<sup>967</sup> had different periods. In the first judgment, Zondo AJ mentioned that provisions of the Labour Relations Act are inconsistent with the provisions of the Prescription Act in that there are material differences between the two acts as they set different periods within which litigation must be instituted. The judgment also stated that failure to comply with periods stipulated by the Labour Relations Act is not fatal and may be condoned on good cause shown, whereas a creditor loses the right to enforce its claim once the claim has been prescribed. This means that unlike in Zimbabwe, where failing to institute proceedings within the period prescribed is fatal, in some instances, according to the Labour Relations Act, it can be condoned for a good reason shown.<sup>968</sup>

In the second judgment, Zondo DCJ concurred with the first but adopted another line of reasoning. He argued that the dispute resolution system created by the Labour Relations Act is a self-standing system that was carefully crafted to strike a fair balance between the interests of workers and those of employers. If the Prescription Act applied to litigation in terms of the Labour Relations Act this balance would be disturbed. The Prescription Act imposes a disadvantage on employees by giving employers two “sledge-hammers” (time periods in the LRA and PA) that they can use to “kill” the employees’ claims.

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966 Labour Relations Act 66 of 1995(SA)

967 Prescription Act 68 of 1969 (SA)

968 Supra note 71

The majority judgment, however, differed and stated that there is no consistency between the Labour Relations Act and the Prescription Act and that although the two acts both deal with periods, they focus on different aspects of their application in one litigation process. The Labour Relations Act provides a specific time frame for initiating and proceeding with litigation and provides a mechanism to seek an indulgence in the form of condonation if these time frames are not met.<sup>969</sup> It does not set an outer limit to the litigation process for extinction, but a claim is extinguished if the employee cannot find a good cause. On the other hand, a claim is extinguished through prescription if the relevant period set in the Prescription Act lapses. Hence there is no inconsistency between the two Acts; the majority judgment ruled. The Prescription Act applies to litigation under the Labour Relations Act, and also, prescription had been interrupted by the referral of the matter to conciliation. The majority judgment also concluded that the commencement of proceedings before the Commission for Conciliation, Mediation and Arbitration was an interruption of prescription. Through an amendment of section 145 by insertion of 145(9) of the Labour Relations Act<sup>970</sup> that as of 1 January 2016 in respect of awards issued after this date, the prescription is interrupted if an application is made to review and set aside an award.

#### **PRESCRIPTION AND INSURANCE CLAIMS IN SOUTH AFRICA**

Time-bar clauses are a common feature in insurance contracts in South Africa. They provide a contractually agreed time within which an insured must institute action against an insurer. The amount of time varies among

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<sup>969</sup> *Ibid*

<sup>970</sup> *Supra* note 71

insurance contracts. According to section 11 of the Prescription Act, insurance debts prescribe after three years.<sup>971</sup> Section 12(1) of the Act confirms that this period will run as soon as the debt is due.<sup>972</sup> In South Africa, the prescription of insurance claims is also governed by the Long- and Short-Term Policyholder Protection Rules (PPRs) promulgated under the Long-Term Insurance Act 52 of 1998<sup>973</sup> and the Short-term Insurance Act 53<sup>974</sup>, respectively. Rule 17 of both the Short-Term and Long-Term PPRs provides the procedures for insurance claims. Rules 17.6.3(b) state that if an insurance provider gives notice to the insured disputing or repudiating the quantum, the notice must inform the insured that it may, within a period of not less than 90 days of receiving the notice, make representations to the insurer in respect of the decision. Rule 17.6.8 states that any time-bar clause for the institution of legal action may not include the period in Rule 17.6.3 (b) in the calculation of the time-bar period and must allow a period of less than six months after the expiry of the period in Rule 17.6.3(b) for the institution of legal action. Rule 17.6.10 states that, for the purpose of section 12(1) of the Act, a debt is due only after the expiry of the period in Rule 17.6.3(b).

If a long-term insurance contract does not include a time bar clause, the prescription of a disputed claim will only start to run after the expiry of the period in Rule 17.6.3(b) during which the insured can make representations, which must not be less than 90 days.<sup>975</sup> This was confirmed in the

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971 Section 11 Prescription Act 68 of 1969 (SA)

972 12 (1) Prescription Act 68 of 1969 (SA)

973 Rule 17.6.3 Long-Term Insurance Act 52 of 1998

974 Rule 17.6.8 Short-term Insurance Act 53 of 1998

975 Rule 17.6.3 Long-Term Insurance Act 52 of 1998

South African case of *Muller vs Sanlam*.<sup>976</sup> If a long-term insurance contract includes a time-bar clause, the period referred to in it will only start running after the expiry of the period in Rule 17.6.3(b).<sup>977</sup> Notwithstanding the time bar clause, the minimum period to be afforded to an insured to institute legal action from the expiry of the period in Rule 17.6.3(b) is six months.<sup>978</sup> If the short-term insurance contract does not include a time-bar clause, and the short-term PPRs apply, the prescription of a disputed claim will start to run after the expiry of the period in Rule 17.6.3(b), which must not be less than 90 days<sup>979</sup>. The short-term PPRs do not apply prescriptions will start from when the debt is due, which must be determined according to standard prescription principles. If the short-term insurance contract includes a time bar clause and the short-term PPRs apply, the period time-bar clause will only start running after the expiry of the period in Rule 17.6.3(b)<sup>980</sup>. The minimum period to be afforded to an insured to institute legal action from the expiry of the period in Rule 17.6.3(b) is six months, and the short-term PPRs do not apply; the time-bar period must be strictly observed<sup>981</sup>.

In *Santam Insurance Limited vs Mathekgana*<sup>982</sup> the court stated that when a party reported an insurance claim as a criminal matter (insurance claims are usually civil matters), prescription was suspended because the party could not be expected to have instituted an action whilst the criminal case was pending.<sup>983</sup> The court ruled that “ *It is only once*

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976 *Muller vs Sanlam* (1162/2015)[2016] ZASCA 149

977 Rule 17 (6.3) Long-Term Insurance Act 52 of 1998

978 Rule 17 (6. 3) Long-Term Insurance Act 52 of 1998

979 Rule 17 (6.8) Short-term Insurance Act 53 of 1998

980 Rule 17 (6.8) Short-term Insurance Act 53 of 1998

981 Rule 17 (6.8) Short-term Insurance Act 53 of 1998

982 *Ibid*

983 *Ibid*



*the criminal court has decided that the period of prescription will resume running.*<sup>984</sup> The court relied on section 15 of the Prescription Act, which states that the running of prescription shall be interrupted by the service of the debtor of any process whereby the creditor claims payment of the debt.<sup>985</sup> If a debt is referred to arbitration, a prescription will be interrupted.

#### **PRESCRIPTION OF DEBTS OWED TO THE STATE IN SOUTH AFRICA**

In South Africa, the Prescription Act is the one that governs the prescription of debts owed to the state.<sup>986</sup> The Act is almost identical to the Zimbabwean Prescription Act<sup>987</sup> in regard to debts owed to the state. In respect of a debt owed to the state that concerns royalties, share of profits, the right to mine minerals or other substances, or any debt in relation to taxation, section 11(a)(iv) of the act states that the period for prescription is thirty years<sup>988</sup>. According to section 11(b) with respect to debts owed to the state that includes a loan of money, lease or sale of land, the period for prescription is 15 years.<sup>989</sup>

#### **PRESCRIPTION OF CIVIL CLAIMS IN SOUTH AFRICA**

The main Act in relation to prescription in relation to civil claims in South Africa is the Prescription Act.<sup>990</sup> Section 10 of the act states that a debt shall prescribe after the lapse of time in the relevant law.<sup>991</sup> This means debt will prescribe if there is a relevant law that governs that specific contract or claim or in some cases the prescription

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984 *Ibid*

985 Section 15 Prescription Act 68 of 1969 (SA)

986 *Ibid*

987 *Ibid*

988 Section 11 (a) Prescription Act 68 of 1969 (SA)

989 Section 11 (b) Prescription Act 68 of 1969 (SA)

990 Section 10 Prescription Act 68 of 1969 (SA)

991 Section 12 (3) Prescription Act 68 of 1969 (SA)

period will be in that contract or agreement that gave birth to the claim. Also, a subsidiary debt which is dependent on the principal debt shall only prescribe after the principal debt has prescribed.<sup>992</sup> Section 12(3) states that the payment of a debt even after the prescription period will be considered as a debt that has been settled even if the debtor knew or did not know that the prescription period had lapsed.<sup>993</sup> If a debtor willfully prevents the creditor from knowing that he or she has a debt, a prescription will begin to run the time the creditor becomes aware of the debt.<sup>994</sup> A debt will only be deemed due once the creditor becomes aware of it.<sup>995</sup> The act also provides for situations where the prescription will be delayed. These include situations where the creditor is unable to be part of a contract, like he or she is a minor, insane or mentally handicapped<sup>996</sup>. Other circumstances are when the debtor and creditor are married to each other or are partners, and the debt arose from the partnership.<sup>997</sup> Also if the debtor is outside Zimbabwe or the debt is subject to a dispute relating to arbitration, a prescription will be delayed.<sup>998</sup> Prescription will also be interrupted if the debtor acknowledges liability or if the parties postpone the date money is supposed to be paid.<sup>999</sup>

*In the case of Trinity Asset Management (Pty) Limited vs Grindstone Investment 132 (Pty) Limited*<sup>1000</sup>, it was held by the court that prescription begins to run from the date of

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992 *Ibid*

993 *Ibid*

994 *Ibid*

995 *Ibid*

996 *Ibid*

997 *Ibid*

998 *Ibid*

999 *Ibid*

1000 *Trinity Asset Management (Pty) Limited vs Grindstone Investments 132 (Pty) Limited* (CCCT 248/16)

demand.<sup>1001</sup> The main objective of extinctive prescription is to create certainty and finality. The service of summons claiming payment on the debtor ultimately interrupted the running of the prescription.<sup>1002</sup> On the other note, in *Van Zyl vs Road Accident Fund*<sup>1003</sup> the court, held that prescription does not run against one who has no capacity to institute an action.<sup>1004</sup> This principle has its roots in natural justice, which distinguishes between what is reasonable and logical. The court also pronounced that where a party suffers from a persistent mental condition, the prescription will ultimately be interrupted or will not begin to run.<sup>1005</sup> The court also stated that section 13(1) of the Prescription Act which provides for an extension of prescription beyond the period specified in the Road Accident Fund Act,<sup>1006</sup> is therefore excluded in relation to claims under the Road Accident Fund. The manifest purpose of section 23 of the Road Accident Fund is to narrow the circumstances (reduce the time for prescription) and in terms of claims according to the Road Accident Fund.<sup>1007</sup> The Act takes precedence over the Prescription Act.

In *Kruger vs National Director of Public Prosecutions*<sup>1008</sup> Zondo DCJ held that the person raising the prescription bears the onus of proving that the claimant had knowledge of all facts from which the claim arose before it can be said that the prescription could commence running.<sup>1009</sup> Zondo DCJ was of the view that a police docket played a pivotal

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1001 *Ibid*

1002 *Ibid*

1003 *Van Zyl NO vs Road Accident Fund* (CCT 200/16)

1004 *Ibid*

1005 *Ibid*

1006 Road Accident Fund Act 56 of 1996

1007 *Ibid*

1008 *Kruger vs National Director of Public Prosecutions* (CCT 336/17)

1009 *Ibid*

role in determining whether Mr Kruger had sufficient knowledge required in terms of section 12(3) of the Prescription Act met.<sup>1010</sup>

## CONCLUSIONS

The above discussion is clear that there is discrimination in prescription periods, and there is no tangible basis to allow such discrimination. In conclusion, the paper advances the recommendation to harmonise the prescription periods. A conclusion is made that shorter prescription periods, for example, those provided for claims against insurers and police, are discriminatory. The challenge litigants experience is that prescription periods are varied depending on what nature of claim a litigant intends to raise or against whom. Some prescriptions are lengthy while others are shorter, raising issues around discrimination on access to court based on prescription. This paper argues that prescription periods must be uniform unless a party waives their right to a longer period thereof.

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<sup>1010</sup> *bid*