

INTRODUCTION

JENNIFER FABER

- **21 years experience as a practicing attorney**
- **Master Tax Practitioner**
- **Tax Administration & Litigation**
- **Commercial Litigation**
- **Commercial Restructuring**
- **Drafting of Commercial Agreements**
- **High Level Legal Opinions**
- **Estate Planning**
- **Family Law**



OVERVIEW OF SEMINAR

1	Debt collection procedures in the ordinary course
2	Debt collection procedures against organs of state
3	Prescription
4	Questions

DEBT COLLECTION PROCEDURES IN THE ORDINARY COURSE

ACTION PROCEDURE	APPLICATION PROCEDURE
» Dispute of fact	» No material dispute of fact
» Letter of demand	» Letter of demand
» Instituted by way of summons	» Instituted by notice of motion and affidavit
» Trial (oral evidence)	» Motion proceedings (evidence restricted to affidavit)
» Judgement	» Judgement
» Execution	» Execution
» Garnishee Order	» Liquidation / Sequestration Order
» More expensive & time consuming	» Less expensive and not time consuming

DEBT COLLECTION PROCEDURES AGAINST ORGANS OF STATE

The Institution of Legal Proceedings against Certain Organs of State Act (40 of 2002) sets out the uniform rules with regards to claims against the State and its organs.

Organ of State: Any national, provincial or local government department or any organ or institution exercising a function as defined in the Constitution or any person for whose debt an organ of State is liable.

The Act defines debt as follows:

“debt” means any debt arising from any cause of action–

(a) which arises from delictual, contractual or any other liability, including a cause of action which relates to or arises from any–

(i) act performed under or in terms of any law; or

(ii) omission to do anything which should have been done under or in terms of any law; and

**(b) for which an organ of state is liable for payment of damages, (own emphasis)
whether such debt became due before or after the fixed date.**

DEBT COLLECTION PROCEDURES AGAINST ORGANS OF STATE

Section 3 of the Act states that a person must first give written notice of the intention to institute legal proceedings against an organ of state within 6 months of the date on which the debt became due.

- Not applicable to contractual claims
- Organ of State may also consent in writing to the institution of legal proceedings
- Condonation available in case of non-compliance

Section 4 of the Act states that the Notice must be served by hand delivery, certified mail and in some instances email.

DEBT COLLECTION PROCEDURES AGAINST ORGANS OF STATE

Section 5 of the Act states that any legal proceedings instituted **MUST** be served in accordance with the State Liability Act (20 of 1957) **AND** before the expiry of 60 days after Section 3 Notice (if applicable).

Section 2 of the State Liability Act states that the following parties must be served with a copy of the proceedings:

1. Executive authority of the respective department
2. Head of department
3. State Attorney

DEBT COLLECTION PROCEDURES AGAINST ORGANS OF STATE

UNIFORM RULES OF COURT

Rules Regulating the Conduct of Proceedings in the High Court

RULE 4(9): Summons or notice instituting proceedings must be served in accordance with the provisions of any law regulating proceedings against and service of documents upon the State or organ of State

RULE 6(13): In any application against the State, period allowed for the filing of an intention to oppose is 15 days *(as opposed to 5 days)*

RULE 19(2): In any action against the State, period allowed for the filing of an intention to defend is 20 days *(as opposed to 10 days)*

PREScription

Prescription occurs when a debtor's liability to pay a specific debt is extinguished as a result of the passing of a prescribed time period.

Prescription Act (68 of 1969)

- **General Rule: Debt prescribes after 3 years**
- **When does prescription start running?: When debt becomes due**
- **When is prescription interrupted? When debtor acknowledges liability or when summons or notice of motion is served by Sheriff on the debtor**

PREScription

The Institution of Legal Proceedings against Certain Organs of State Act (40 of 2002)

Section 1(2):

“This Act does not apply to any debt–

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

Section 2:

A Debt will be extinguished due to prescription when –

- **It became due before the fixed date, and if not extinguished by prescription and in respect of which legal proceedings were not instituted before the date**
- **after the date.**

Any period of prescription applicable to debt before fixed date, will no longer be applicable after the fixed date.

The expired portion of any period of prescription applicable to a debt referred to must be deducted from the said period of prescription contemplated in Chapter III of the Prescription Act, and the balance of the period of prescription so arrived at will constitute the new unexpired portion of prescription for such debt, applicable as from fixed date.

PREScription

CONTRACTUAL CLAIM	DELICTUAL CLAIM
<p>Company X issues invoice dated 01/03/2023 to the Gauteng Department of Health in terms of a contract.</p> <p>Company X is aware of the particulars of the debtor and details of the claim, therefore debt becomes due on 01/03/2023.</p> <p>Prescription starts running from 01/03/2023.</p> <p>Company X has until 28/02/2026 to institute a claim for the unpaid invoice.</p> <p>Prescription stops if Department acknowledges liability or if Company X issues summons prior to 01/03/2026.</p> <p>Section 3 Notice not required.</p>	<p>Person X suffered an injury on 01/03/2023 due to the negligence of a Gauteng hospital.</p> <p>Person X must institute his claim by 28/02/2026 to avoid the claim prescribing.</p> <p>BUT Person X must remember to give 6 months notice to the relevant department informing them of his intention to institute action (before 01/09/2023)</p> <p>Should Person X institute action against the hospital having failed to give the required notice on or before 28/02/2026 and the state relies on this failure, the claim will have prescribed by the time Person X can request condonation.</p>

QUESTIONS



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