

ASHLEY SLAMAT

— ATTORNEYS AT LAW —

Success. Understood.

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

The purpose of the Act is to regulate the prescription of and harmonize the periods of prescription of debts for which certain organs of state are liable. Furthermore, to provide for the notice requirements in connection with the institution of legal proceedings against certain organs of state in respect of the recovery of debts from the State.

Section 1: Definitions –

“Creditor” – is a person who intends to institute legal proceedings against an organ of state for recovery of a debt or who has instituted such proceedings, and includes such person’s tutor or curator if such person is a minor or mentally ill or under curatorship.

“Debt” – is any debt arising out of:

- Delictual, contractual or other liability and cause of action which arises from an act or omission under any law, for which an organ of state is liable to pay damages whether the debt became due before or after the fixed date.

“fixed date” – is the commencement date of this Act.

“organ of state” – is any

- National / Provincial department,
- Municipality contemplated in s151 of the Constitution,
- Functionary or institution exercising a power or performing functions in terms of the Constitution, or provincial constitution as in s142 of the Constitution,
- South African Maritime Safety Authority,

- South African National Roads Agency Limited,
- Any person for whose debt an organ of state contemplated in above paragraphs is liable.

This Act does not apply to –

- A debt which has been extinguished by prescription before the fixed date,
- A debt 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 or
- 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.

Section 2:

Legal proceedings may be instituted against an organ of state when:

- The creditor has given the organ of state in question notice in writing of his/her intention to institute the legal proceedings in question;
- The organ of state in question has consented in writing to the institution of the legal proceedings without such notice or upon receipt of a notice which do not comply with all the requirements.

Requirements for the notice to an organ of state –

- It be served on the organ of state within 6 months from the date on which the debt became due; and
- It must briefly set out:
 - The facts giving rise to the debt and
 - Particulars of such debt as are in the knowledge of the creditor, having acquired such knowledge with reasonable care, unless an organ of state wilfully prevented him/her from acquiring such knowledge.

If an organ of state relies on a creditor's failure to serve a notice in terms of the above, the creditor may apply to a court having jurisdiction for condonation of such failure if it is satisfied that:

- The debt has not been extinguished by prescription,
- Good cause exists for the failure by the creditor, and
- The organ of state was not unreasonable prejudiced by the failure.

Section 4: Service of Notice on an organ of state:

- Delivery by hand,
- Sending by certified mail,
- Sending with electronic mail,
- Transmitting by facsimile (if the organ of state is as per above definition).

If the Notice has been sent with electronic mail or transmitted by facsimile as above the creditor must:

- Take all reasonable steps to ensure that the Notice has been received by the officer or person to whom it was sent or transmitted; and
- Within 7 days, after it has been served by one of the above ways, be accompanied by an affidavit by the creditor or the person who sent or transmitted the Notice:
 - indicating the date and time on which the notice was sent or transmitted,
 - containing any proof that it was sent or transmitted,
 - setting out the steps taken in terms of the above, and
 - indicate whether confirmation of the receipt of the Notice has been obtained and the name of the officer or person who has given that confirmation.

Section 5: Service of the process:

- According with the rules of court if legal proceedings are instituted;
- Any process by which legal proceedings are instituted in which the Minister for Intelligence is the defendant or respondent, may be served on the Director-General: National Intelligence Agency or the Director General: South African Secret Service.

- If the Minister for Safety and Security is the Defendant or Respondent may be served on the National Commissioner of the S.A.P.S. or the Provincial Commissioner of the S.A.P.S. of the province in which the cause of action arose.
- If the Minister of Correctional Services is the Defendant or Respondent, may be served on the Commissioner of Correctional Services or the Provincial Commissioner of Correctional Services of the Province in which the cause of action arose.
- No process may be served before the expiry of 30 day period after the Notice has been served on the organ of state.
- If a process has been served before the above expiry date the process must be regarded as having been served on the first day after the expiry date of the said period.