

REPUBLIC OF SOUTH AFRICA

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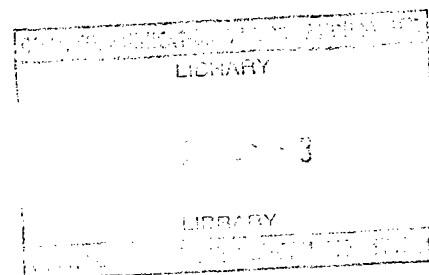
# INSTITUTION OF LEGAL PROCEEDINGS AGAINST ORGANS OF STATE BILL

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*(As presented by the Portfolio Committee on Justice and Constitutional Development  
(National Assembly), after consideration of the Limitation of Legal Proceedings against  
Government Institutions Bill [B 65—99]) (The English text is the official text of the Bill)*

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( MINISTER FOR JUSTICE AND CONSTITUTIONAL DEVELOPMENT )



[B 65B—99]

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## GENERAL EXPLANATORY NOTE:

- [                      ]      Words in bold type in square brackets indicate omissions from existing enactments.
- \_\_\_\_\_      Words underlined with a solid line indicate insertions in existing enactments.
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# BILL

**To regulate the prescription of certain debts for which certain organs of state are liable; to make provision for notice requirements in connection with the institution of legal proceedings against certain organs of state in respect of certain debts; to repeal or amend certain laws; and to provide for matters connected therewith.**

**B**E IT ENACTED by the Parliament of the Republic of South Africa, as follows:—

## Definitions

1. (1) In this Act, unless the context indicates otherwise—
- (i) “creditor” means a person who intends to institute legal proceedings against 5 an organ of state for the 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, as the case may be;
  - (ii) “Constitution” means the Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996); 10
  - (iii) “debt” means any debt arising from any unlawful act or omission for which an organ of state is liable for payment of damages, including any delict or liability without fault in terms of a statutory provision, but does not include a debt arising from a breach of contract;
  - (iv) “fixed date” means the date of commencement of this Act; 15
  - (v) “national department” means—
    - (a) a department mentioned in the first column of Schedule 1 to the Public Service Act, 1994 (Proclamation No. 103 of 1994), but excludes a provincial administration; or
    - (b) an organisational component mentioned in the first column of Schedule 20 3 to that Act;
  - (vi) “notice” means a notice contemplated in section 3(1)(a);
  - (vii) “organ of state” means—
    - (a) any national or provincial department;
    - (b) a municipality contemplated in section 151 of the Constitution; 25
    - (c) any functionary or institution exercising a power or performing a function in terms of the Constitution, or a provincial constitution referred to in section 142 of the Constitution;
    - (d) the Commissioner for the South African Revenue Service, in so far as he or she performs a duty imposed, or exercises a power conferred, on him 30

- or her by the Customs and Excise Act, 1964 (Act No. 91 of 1964), and includes an officer as defined in section 1 of that Act;
- (e) the South African Maritime Safety Authority established by section 2 of the South African Maritime Safety Authority Act, 1998 (Act No. 5 of 1998);
  - (f) The South African National Roads Agency Limited contemplated in section 3 of The South African National Roads Agency Limited and National Roads Act, 1998 (Act No. 7 of 1998); and
  - (g) any person for whose debt an organ of state contemplated in paragraphs (a) to (f) is liable;
- (viii) “provincial department” means—
- (a) a provincial administration mentioned in the first column of Schedule 1 to the Public Service Act, 1994 (Proclamation No. 103 of 1994); or
  - (b) a department within a provincial administration and mentioned in the first column of Schedule 2 to that Act.
- (2) For purposes of this Act, legal proceedings are instituted by service of any process, excluding a notice, on an organ of state in which a creditor claims payment of a debt.

### **Prescription of debts, amendment or repeal of laws and transitional arrangements**

2. (1) Subject to subsection (2), the laws referred to in the Schedule are hereby amended or repealed to the extent set out in the third column of the Schedule.
- (2) This Act does not apply to any debt—
- (u) which has been extinguished by prescription before the fixed date; or
  - (b) in respect of which any legal proceedings were instituted before the fixed date, and any such legal proceedings must be continued and concluded as if this Act had not been passed.
- (3) Subject to section 3, a debt which became due—
- (a) before the fixed date and in respect of which legal proceedings were not instituted before that date; or
  - (b,) after the fixed date, will be extinguished by prescription as contemplated in Chapter III of the Prescription Act, 1969 (Act No. 68 of 1969).
- (4) (a) The expired portion of the period of prescription of a debt referred to in subsection (3)(a), must be deducted from the period of prescription contemplated in Chapter III of the Prescription Act, 1969.
- (b) If the unexpired portion of the period of prescription of a debt referred to in paragraph (a) will be completed within 12 months after the fixed date, that period of prescription must be regarded as not having been completed before 12 months have elapsed after the fixed date.

### **Notice of intended legal proceedings to be given to organ of state**

3. (1) No legal proceedings for the recovery of a debt may be instituted against an organ of state unless—
- (a) the creditor has given the organ of state in question notice in writing of his or her or its intention to institute the legal proceedings in question; or
  - (b) the organ of state in question has consented in writing to the institution of legal proceedings without such notice.
- (2) A notice must—
- (a) within six months from the date on which the debt became due, be served on the organ of state in accordance with section 4(1); and
  - (b) briefly set out—
    - (i) the facts giving rise to the debt; and
    - (ii) such particulars of such debt as are within the knowledge of the creditor.
- (3) For purposes of subsection (2)(a)—
- (a) a debt may not be regarded as being due until the creditor has knowledge of the identity of the organ of state and of the facts giving rise to the debt, but a creditor must be regarded as having acquired such knowledge as soon as he or she or it could have acquired it by exercising reasonable care, unless the organ of state wilfully prevented him or her or it from acquiring such knowledge; and
  - (b) a debt which became due and—

- (i) which has not been extinguished by prescription: and
  - (ii) in respect of which legal proceedings were not instituted,
- before the fixed date, must be regarded as having become due on that date.

(4)(a) If an organ of state relies on a creditor's failure to serve a notice in terms of subsection (2)(a), the creditor may apply to a court having jurisdiction for condonation of such failure.

(b) The court may grant an application referred to in paragraph (a) if it is satisfied that—

- (i) the debt has not been extinguished by prescription;
- (ii) good cause exists for the failure by the creditor; and
- (iii) the organ of state was not unreasonably prejudiced by the failure.

(c) If an application is granted in terms of paragraph (b), the court may grant leave to institute the legal proceedings in question, on such conditions regarding notice to the organ of state as the court may deem appropriate.

## Service of notice

4. (1) A notice must be served on an organ of state by delivering it by hand or by sending it by certified mail or, subject to subsection (2), by sending it by electronic mail or by transmitting it by facsimile, in the case where the organ of state is—

- (a) a national or provincial department mentioned in the first column of Schedule 1, 2 or 3 to the Public Service Act, 1994 (Proclamation No. 103 of 1994), to the officer who is the incumbent of the post bearing the designation mentioned in the second column of the said Schedule 1, 2 or 3 opposite the name of the relevant national or provincial department;
- (b) a municipality, to the municipal manager appointed in terms of section 82 of the Local Government: Municipal Structures Act, 1998 (Act No. 117 of 25 1998);
- (c) a functionary or institution referred to in paragraph (c) of the definition of “organ of state”, to the chairperson, head, chief executive officer, or equivalent officer, of that functionary or institution, or where such functionary is a natural person, to that natural person;
- (d) the Commissioner for the South African Revenue Service or an officer referred to in paragraph (d) of the definition of “organ of state”, to that Commissioner;
- (e) the South African Maritime Safety Authority, to the chief executive officer of that Authority appointed under section 22 of the South African Maritime Safety Authority Act, 1998 (Act No. 5 of 1998);
- (f) The South African National Roads Agency Limited, to the chief executive officer of that Agency appointed under section 19 of The South African National Roads Agency Limited and National Roads Act, 1998 (Act No. 7 of 1998); or
- (g) a person referred to in paragraph (g) of the definition of “organ of state”, to that person.

(2) If a notice has been sent by electronic mail or transmitted by facsimile as contemplated in subsection (1), the creditor must—

- (a) take all reasonable steps to ensure that the notice has been received by the officer or person to whom it was so sent or transmitted; and
- (b) within seven days after the date upon which that notice was so sent or transmitted, deliver by hand or send by certified mail a certified copy of that notice to the relevant officer or person referred to in subsection (1), which must be accompanied by an affidavit by the creditor or the person who sent or transmitted the notice—
  - (i) indicating the date on which and the time at which, and the electronic mail address or facsimile number to which, the notice was so sent or transmitted;
  - (ii) containing any proof that it was sent or transmitted;
  - (iii) setting out the steps taken in terms of paragraph (a); and
  - (iv) indicating whether confirmation of the receipt of the notice has been obtained and, if applicable, the name of the officer or person who has given that confirmation.

### Service of process

5. (1) (a) Any process in terms of which any legal proceedings contemplated in section 3(1) are instituted must be served in the manner prescribed by the rules of the court in question in respect of the service of process.

(b) Despite paragraph (a), any process in terms of which any legal proceedings 5 contemplated in section 3(1) are instituted and in which the—

- (i) Deputy president, in respect of anything done pursuant to the Intelligence Services Act, 1994 (Act No. 38 of 1994), or 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, as 10 the case may be;
- (ii) Minister of Safety and Security is the defendant or respondent, may be served on—
  - (aa) the National Commissioner of the South African Police Service as defined in section 1 of the South African Police Service Act, 1995 (Act 15 No. 68 of 1995); or
  - (bb) the Provincial Commissioner of the South African Police Service as defined in section 1 of the South African Police Service Act, 1995, of the “province in which the cause of action arose; or
- (iii) Minister of Correctional Services is the defendant or respondent, may be 20 served on—
  - (aa) the Commissioner of Correctional Services appointed under section 3(3) of the Correctional Services Act, 1998 (Act No. 111 of 1998); or
  - (bb) the Provincial Commissioner as defined in section 1 of the Correctional Services Act, 1998, of the province in which the cause of action arose. 25

(2) No process referred to in subsection (1) may be served as contemplated in that subsection before the expiry of a period of 30 days after the notice, where applicable, has been served on the organ of state in terms of section 3(2)(a).

(3) If any process referred to in subsection (1) has been served as contemplated in that subsection before the expiry of the period referred to in subsection (2), such process 30 must be regarded as having been served on the first day after the expiry of the said period.

### Short title

6. This is the Institution of Legal Proceedings against Organs of State Act, 2000.

**SCHEDULE****(Laws amended or repealed by section 2(1))**

<b>No. and year of law</b>	<b>Short title</b>	<b>Extent of amendment or repeal</b>
<b>Act No. 38 of 1927</b>	<b>Black Administration Act, 1927</b>	The repeal of section 32A.
Act No. 57 of 1951	Merchant Shipping Act, 1951	1. The repeal of section 343. 2. The amendment of section 344 by the deletion of subsection (4).
Act No. 44 of 1957	Defence Act, 1957	The repeal of section 113.
Act No. 91 of 1964	Customs and Excise Act, 1964	The repeal of section 96.
Act No. 94 of 1970	Limitation of Legal Proceedings (Provincial and Local Authorities) Act, 1970	The repeal of the whole.
Act No. 18 of 1973	Mental Health Act, 1973	The amendment of section 68 by the deletion of subsection (4).
Act No. 90 of 1979	Education and Training Act, 1979	The repeal of section 42A.
Act No. 70 of 1988	Education Affairs Act (House of Assembly), 1988	The repeal of section 108.
Act No. 122 of 1992	Audit Arrangements Act, 1992	The repeal of section 52.
Act No. 38 of 1994	Intelligence Services Act, 1994	The repeal of section 26.
Proclamation No. 103 of 1994	Public Service Act, 1994	The repeal of section 39.
Act No. 68 of 1995	South African Police Service Act, 1995	The repeal of section 57.

No. and year of law	Short title	Extent of amendment or repeal
Act No. 7 of 1998	The South African National Roads Agency Limited and National Roads Act, 1998	<p>The amendment of section 59—</p> <p>(a) by the deletion of subsections (1) and (2); and</p> <p>(b) by the substitution for subsection (3) of the following subsection:</p> <p>“(3) Neither the Agency nor [any person mentioned in subsection (1)(b)]—</p> <p><u>(a) any of the members of the Board;</u></p> <p><u>(b) the Chief Executive Officer;</u></p> <p><u>(c) any of the other employees of the Agency acting in the performance of their duties;</u></p> <p><u>(d) any person acting, on behalf of the Agency on the authority of the Board; or</u></p> <p><u>(e) any person who operates or has constructed a national road,</u></p> <p>will be liable for any damage or loss suffered by any person through the use of any part of the national road other than the roadway or as a result of the closure or deviation of a national road under this Act.”.</p>
Act NO. 111 of 1998	Correctional Services Act, 1998	The repeal of section 130.

## MEMORANDUM ON THE OBJECTS OF THE INSTITUTION OF LEGAL PROCEEDINGS AGAINST ORGANS OF STATE BILL

### 1. BACKGROUND

The Limitation of Legal Proceedings against Government institutions Bill, 2000, as originally introduced into Parliament, emanated from the South African Law Commission's supplementary report on the investigation into time limits for the institution of legal proceedings against the State (project 42). The Portfolio Committee on Justice and Constitutional Development (National Assembly), after having considered the above-mentioned Bill and the submissions which it received in respect of that Bill, presented the Institution of Legal Proceedings against Organs of State Bill, 2000.

### 2. OBJECTS OF THE BILL

2.1 The principal object of the Bill is to harmonize, and create uniformity in respect of, the provisions of existing laws providing for different notice periods for the institution of legal proceedings against certain organs of state for the recovery of certain debts.

2.2 Clause 1 contains a list of definitions. The concept of "organ of state" (which, although widely defined is still more narrowly defined than in the Constitution) is at the core of the Bill and includes all national and provincial departments, municipalities, functionaries or institutions exercising a power or performing a function in terms of the Constitution or a provincial constitution and any person for whose debt such an organ of state is liable. Another important feature of clause 1 is the wide definition of "debt", which means all debts arising from any unlawful acts or omissions for which organs of state are liable for payment of damages (including any delict or liability without fault in terms of a statutory provision), but does not include debts arising from a breach of contract.

2.3.1 Clause 2 provides for the prescription of certain debts, the amendment or repeal of certain provisions and transitional arrangements. In order to create uniformity, various provisions which regulate the institution of legal proceedings against organs of state, by prescribing specific periods within which claims are to be made or actions are to be instituted in respect of debts and the prescription of such debts, are amended or repealed. Clause 2 also provides that the Bill will not apply to any debt which has been extinguished by prescription before the date of commencement of the Bill (hereinafter referred to as the "fixed date") or any debt in respect of which any legal proceedings were instituted before that date. The effect of the amendments or repeal is, among others, that as from the fixed date, the running of prescription of a debt which became due before the fixed date and in respect of which legal proceedings were not instituted at that date (hereinafter referred to as an "old debt"), is interrupted. Clause 2 therefore provides that any old debt or any debt which became due on or after the fixed date will, as from that date, be extinguished by prescription as contemplated in Chapter III of the Prescription Act, 1969 (Act No. 68 of 1969).

2.3.2 In respect of old debts of which the running of prescription has been interrupted on the fixed date, a "new" prescription period, subject to clause 3, commences to run in terms of the Prescription Act, 1969. This will have the effect that, in terms of this Bill, there will always be an extension of the period of prescription of an old debt. Therefore the expired portion of the period of prescription of an old debt must be deducted from the new period of prescription which commences to run on the fixed date.

2.3.3 In order to enable a creditor, in the case of an old debt, to comply with the notice requirements provided for in the Bill, provision is made that where the unexpired portion of the period of prescription of such a debt will be completed within twelve months after the fixed date, that period of prescription must be regarded as not having been completed before twelve months have elapsed after that date.

2.4 Clause 3 imposes a duty on a creditor to give an organ of state written notice of his or her or its intention to institute legal proceedings for the recovery of a debt against that organ of state, unless the organ of state in question consents in writing to the institution of legal proceedings without such notice. Provision is further made that such a notice must be served on the organ of state within six months after the debt became due and for the information to be contained therein. Clause 3 further provides that a creditor may apply to the court for condonation of his or her or its failure to give notice, and that the court may grant condonation if it is satisfied that the debt in question has not been



extinguished by prescription, that good cause exists for the failure by the creditor and that the organ of state was not unreasonably prejudiced by the failure. Provision is made in clause 5 that no process by which legal proceedings are instituted in terms of this Bill, may be served before the expiry of a period of 30 days after the notice has been served on the organ of state, and that such process, if it has been served before the expiry of that period, must be regarded as having been served on the first day after the expiry of the said period.

2.5 Clause 4 regulates the manner in which, and the persons on whom, notices must be served. Provision is made that a notice may be served by delivering it by hand or by sending it by certified or electronic mail or by transmitting it by facsimile. Clause 4 further sets out certain requirements to be complied with by a creditor if a notice has been sent by electronic mail or transmitted by Facsimile.

2.6 In terms of clause 5 any process by which legal proceedings are instituted in terms of this Bill, must be served on an organ of state in the manner prescribed by the rules of court. However, certain exceptions are made in respect of, among others, the Minister of Safety and Security and the Minister of Correctional Services.