



Pioneer in peer-reviewed,  
open access online law publications

## Authors

Michelle Kelly-Louw  
Philip Stoop

## Affiliation

University of South Africa

## Email

kellym@unisa.ac.za  
stooppn@unisa.ac.za

## Date Submission

11 July 2019

## Date Revised

18 August 2019

## Date Accepted

6 September 2019

## Date published

12 December 2019

Editor Dr G Viljoen

## How to cite this article

Kelly-Louw M and Stoop P  
"Prescription of Debt in the  
Consumer-Credit Industry" *PER /  
PELJ* 2019(22) - DOI  
[http://dx.doi.org/10.17159/1727-  
3781/2019/v22i0a6571](http://dx.doi.org/10.17159/1727-3781/2019/v22i0a6571)

## Copyright



## DOI

[http://dx.doi.org/10.17159/1727-  
3781/2019/v22i0a6571](http://dx.doi.org/10.17159/1727-3781/2019/v22i0a6571)

## Abstract

A person may acquire rights or be released from obligations through the passage of time. This is known as prescription. The objective of prescription is to achieve legal certainty and finality in the relationship between a debtor and a creditor, with the focus on protecting a debtor (consumer) against the unfairness of having to defend old claims. Old claims are therefore after the elapsing of specific time periods extinguished through prescription. A debtor must then specifically raise prescription as a defence against claims from creditors based on prescribed debts. The prescription of consumer debts is regulated by the *National Credit Act* 34 of 2005 (when the credit agreement falls under the NCA) and the *Prescription Act* 68 of 1969. The *Prescription Act* generally regulates all aspects of the prescription, which would also include consumer debts, while section 126B of the *National Credit Act* regulates and prohibits certain practices related to prescription, such as the selling of prescribed consumer debts or the continued collection or re-activation of prescribed consumer debts. In this article several practical aspects related to prescription and the *National Credit Act* are discussed, such as the impact of non-compliance with section 96 and section 129(1)(a) of the NCA on prescription. Section 126B is specifically analysed, and the question whether section 126B absolutely prohibits certain abusive practices related to the prescription of consumer debts is answered. Several shortcomings of the current legislation are also pointed out. In this article some aspects of the draft *Prescription Bill* proposed by the South African Law Reform Commission are also considered. In particular, we focus on the impact the Bill may have on the consumer-credit industry.

## Keywords

Prescription of debt; consumer credit; extinctive prescription; consumer protection; section 126B of the *National Credit Act*.

.....

## 1 Introduction and background

A person may acquire rights or be released from obligations through the passage of time. This is known as prescription. Through acquisitive prescription a person acquires rights and through extinctive prescription a person may be released from obligations through the passage of time.<sup>1</sup> The focus in this article is on extinctive prescription.

The underlying policies and justifications for the prescription of debts (extinctive prescription) do not always seem so clear or fair.<sup>2</sup> In short, extinctive prescription entails that if a creditor neglects to claim payment on a debt for a certain period of time, the debt will ultimately be extinguished (or fall away). Generally, the main purpose of extinctive prescription is the achievement of legal certainty and finality in the relationship between a debtor and a creditor, with the focus on protecting a debtor against the unfairness of having to defend old claims.<sup>3</sup> Prescription aims to give legal certainty to a debtor, in the sense that he (in this text, words in the masculine gender are to be taken as being inclusive of the feminine gender) will know for exactly how long he will be liable to repay a specific type of debt. This prevents a situation where the payment of a debt is demanded from a debtor many years later, when the liability for the debt arose so long ago that there is little to no evidence available to prove or disprove the existence of the debt.<sup>4</sup> It also encourages creditors to generally exercise their rights, specifically to collect their debts timeously and without unnecessary delay.<sup>5</sup>

---

\* Michelle Kelly-Louw. Bluris LLB LLM LLD (Unisa), Dip Insolvency Law and Practice (UJ). Professor in the Department of Mercantile Law, UNISA. E-mail: kellym@unisa.ac.za. This article is based on a paper entitled "Proposed Draft Prescription Bill and Its Impact on the Credit Industry" delivered by Michelle Kelly-Louw at the 2018 *Credit and Decision Analytics Conference* held in Fancourt, George, South Africa on 6 September 2018. We also gratefully acknowledge the financial assistance of the National Research Foundation.

\*\* Philip N Stoop. BCom LLB LLM (Pret) LLD (Unisa). Professor, Department of Mercantile Law, UNISA. E-mail: stooppn@unisa.ac.za.

<sup>1</sup> See Loubser 1988 *SALJ* 51-52.

<sup>2</sup> For a general discussion of what the justifications of extinctive prescription are, see Loubser 1988 *SALJ*; Loubser *Extinctive Prescription* 22-24; Saner *Prescription in South African Law* para 1.2; Loubser 2016 *Stell LR* 374-376 where he refers to De Wet *Regsgeleerde Lesings* 135-144; Loubser "JC de Wet and the Theory of Extinctive Prescription" 397-398; and *Food and Allied Workers' Union obo Gaoshubelwe v Pieman's Pantry (Pty) Limited* 2018 5 *BCLR* 527 (CC) paras [50], [143]-[148].

<sup>3</sup> See SALRC *Harmonisation of Existing Laws* 10; Saner *Prescription in South African Law* para 1.2 at 1-4; and Loubser 2016 *Stell LR* 374-376.

<sup>4</sup> Also see *Murray & Roberts Construction (Cape) (Pty) Ltd v Upington Municipality* 1984 1 SA 571 (A) 578F-H; and *KLD Residential CC v Empire Earth Investments 17 (Pty) Ltd* 2017 3 All SA 739 (SCA) para 13.

<sup>5</sup> See SALRC *Harmonisation of Existing Laws* 10; and Saner *Prescription in South African Law* para 1.2 at 1-4; and *Road Accident Fund v Mdeyide* 2011 2 SA 26 (CC) para 2.

Prescription is aimed "at enhancing judicial economy and efficiency in the administration of justice" which is best achieved when parties are forced to have "their disputes adjudicated upon promptly, while evidence is available and the memory of the witnesses is still fresh."<sup>6</sup>

The prescription of debts arising from consumer-credit agreements is regulated by the *Prescription Act*, which since it commenced on 1 December 1970 has not been extensively amended (the last amendment to the Act being made in 2015).<sup>7</sup> Any issue of prescription not specifically regulated by the *Prescription Act* or another piece of legislation (for example, the *Institution of Legal Proceedings against Certain Organs of State Act* 40 of 2002<sup>8</sup> and the *Magistrates' Court Act* 32 of 1944) is likely to be regulated by the common law.<sup>9</sup> The prescription of debt that arises from a credit agreement governed by the *National Credit Act* 34 of 2005 (NCA) is jointly governed by the NCA and the *Prescription Act* 68 of 1969 (the *Prescription Act*). Before the introduction of section 126B of the NCA by the *National Credit Amendment Act* 19 of 2014, the NCA contained no provisions dealing specifically with the prescription of a debt arising from a credit agreement governed by the NCA.<sup>10</sup> The *Prescription Act* regulates the exact prescription periods, interruptions, delays and general aspects of prescription, while the NCA regulates and prohibits the behaviour of credit providers regarding the selling, collecting and reactivation of prescribed debt. There is some overlap between these two pieces of legislation as they relate to debt resulting from credit agreements falling within the scope of the NCA.

In general, if a debtor in an applicable time period makes no payment towards settling a debt, does not acknowledge owing the debt or agree to pay it; or if the creditor does not demand payment from a debtor, start legal action against him or communicate with him in any manner and within the applicable time period, a debt becomes prescribed. This entails in essence that the debt (including a subsidiary debt which arose from such a principal

---

<sup>6</sup> SALRC *Harmonisation of Existing Laws* 10; also see Loubser *Extinctive Prescription* 23; and Loubser 2016 *Stell LR* 374-376.

<sup>7</sup> In 1960 JC de Wet had been tasked by the Law Reform Commission to draft a memorandum for the reform of the *Prescription Act* 18 of 1943. The memorandum contained draft legislation which was eventually adopted with minor changes as the *Prescription Act* 68 of 1969. See Loubser "JC de Wet and the Theory of Extinctive Prescription" 397-398.

<sup>8</sup> See, eg, *Minister of Police v Yekiso* 2019 2 SA 281 (WCC) in which the *Prescription Act* and the *Institution of Legal Proceedings against certain Organs of State Act* both applied.

<sup>9</sup> See Saner *Prescription in South African Law* para 1.4; and Christie and Bradfield *Christie's Law of Contract* 501. For a discussion of the common law see Saner "Prescription" para 104.

<sup>10</sup> See Van Heerden "Enforcement of Credit Agreements" (2016) para 12.17.2.

debt, such as interest or a surety)<sup>11</sup> is extinguished and the creditor forever loses its right to claim payment based on the debt.<sup>12</sup> Over the years the selling, collecting and reactivation of prescribed debts became a massive source of revenue for the debt-collection industry, "much of [the debt] having been written off by credit providers and sold to collectors for a few cents in the rand."<sup>13</sup> Credit providers<sup>14</sup> (as the NCA refers to a creditor as a "credit provider", this is the term that will be used hereafter) would sell their prescribed debts to debt collectors, who would then contact consumers (as the NCA refers to a debtor as a "consumer",<sup>15</sup> this is the term that will be used hereafter) demanding the payment of these debts. Not being aware of their rights, consumers often made payments on these prescribed debts and in doing so unknowingly "re-activated" them.<sup>16</sup> Debt collectors often inflated prescribed debts with more interest and costs and attempted to collect these from consumers for their own account.<sup>17</sup> Although the *Prescription Act's* objective is to give consumers some protection against collectors harassing them to pay on stale and inflated prescribed debts, it does not prohibit debt collectors from attempting to do so.<sup>18</sup>

The *Prescription Act* requires the consumer to be aware of prescription and to specifically raise it as a defence when faced with a demand for payment in order to reap the benefits of it.<sup>19</sup> Not being aware of their rights in this regard, consumers in practice often failed to raise the defence of prescription, resulting in their paying on the prescribed debts and/or signing acknowledgments of debt (liability) for the prescribed debts and thereby

---

<sup>11</sup> Section 10(2) of the *Prescription Act*; *Saner Prescription in South African Law* para 3.3.1 at 3-36; and *Jans v Nedcor Bank Ltd* 2003 6 SA 646 (SCA).

<sup>12</sup> Bradfield *Christie's Law of Contract* 560; Muswere 2016 <https://www.fin24.com/Debt/News/everything-you-need-to-know-about-prescribed-debt-20160619>.

<sup>13</sup> See Knowler 2018 <https://www.businesslive.co.za/bt/money/2018-02-24-prescribed-debt-a-confusing-and-contentious-issue/>.

<sup>14</sup> See the definition of "credit provider" in s 1 of the *National Credit Act* 34 of 2005 (NCA).

<sup>15</sup> See the definition of "consumer" in s 1 of the NCA.

<sup>16</sup> See the discussion of s 10(3) of the *Prescription Act* in para 2 below. It should be noted that "reactivation of prescribed debt" is not synonymous with "reactivation of debt" by paying the arrears under the NCA. See *Nkata v FirstRand Bank Limited* 2016 4 SA 257 (CC), where the latter is discussed.

<sup>17</sup> See Knowler 2018 <https://www.businesslive.co.za/bt/money/2018-02-24-prescribed-debt-a-confusing-and-contentious-issue/>.

<sup>18</sup> See Knowler 2018 <https://www.businesslive.co.za/bt/money/2018-02-24-prescribed-debt-a-confusing-and-contentious-issue/>.

<sup>19</sup> Section 17 of the *Prescription Act*; also see Knowler 2018 <https://www.businesslive.co.za/bt/money/2018-02-24-prescribed-debt-a-confusing-and-contentious-issue/>.

"reactivating" them.<sup>20</sup> As this practice was not outlawed, the debt-collecting industry continued to collect on prescribed debt. This abusive practice prompted the Legislature to make amendments to the NCA in 2015<sup>21</sup> by including section 126B in the NCA, which now prohibits any credit provider or debt collector from selling, continuing to collect payment on or reactivating a prescribed debt under a credit agreement governed by the NCA. Section 126B of the NCA also amended and expanded the operation of the prescription defence for consumers relating to debt arising from credit agreements governed by the NCA. It appears that nowhere else in the world does a provision in credit law exist similar to section 126B of the NCA.<sup>22</sup>

It has already been indicated above that the prescription of debt that arises from a credit agreement governed by the NCA is jointly governed by the NCA and the *Prescription Act*. The *Prescription Act* generally regulates all aspects of the prescription of debts (which would also include the prescription of consumer debts under the NCA), while section 126B of the NCA regulates and prohibits certain practices related to the prescription of consumer debts, such as the selling of prescribed consumer debts or the continued collection or re-activation of prescribed consumer debts. In this article section 126B is specifically analysed, and the question whether section 126B absolutely prohibits certain abusive practices related to the prescription of consumer debts is answered. However, before we analyse section 126B of the NCA, specific practical issues are addressed to provide a better understanding of the impact of the NCA on the prescription of debts.<sup>23</sup> These issues include what the position will be if a consumer (under the NCA) is outside South Africa, what the position will be if a consumer's address (under the NCA) has changed or will change, and what the impact of non-compliance with section 96 (on the change of a consumer's address) of the NCA will be on prescription if the consumer fails to notify the credit provider of his change of address and section 129(1)(a) notice and summons consequently never comes to the attention of the consumer. In this article we also point out several shortcomings of the current legislation. Some aspects of the draft *Prescription Bill* proposed by the South African Law Reform Commission are also considered. In particular, we focus on the impact the Bill may have on the consumer-credit industry. We consider only the prescription of debt arising from credit agreements governed by the NCA, the changes brought about to the prescription of debt by section 126B

---

<sup>20</sup> See para 2 below where the reactivation of debt is discussed.

<sup>21</sup> See the *National Credit Amendment Act* 19 of 2014.

<sup>22</sup> Otto 2015 *TSAR* 756.

<sup>23</sup> See para 3 below.

of the NCA, and how prescription impacts generally on debts in the consumer-credit industry.<sup>24</sup> We also consider relevant aspects of the proposed draft *Prescription Bill* recently issued by the South African Law Reform Commission<sup>25</sup> and highlight a few of the major proposed changes likely to have an impact on the consumer-credit industry.

## 2 Prescription of debts

Before we discuss the impact of the NCA on prescription it is important first to consider general aspects of prescription law such as when a debt becomes prescribed.

When a debt becomes prescribed depends on the following four questions:<sup>26</sup>

- What type of debt it is? The type of debt determines the applicable prescription period, resulting in the second question.
- What is the applicable prescription period that is involved?
- When did the prescription period begin to run?
- Was the prescription delayed or interrupted?

The time period after which a specific type of debt prescribes is set out in section 11 of the *Prescription Act* read with section 10(1). The important periods for credit providers in the consumer-credit industry to observe are:<sup>27</sup>

- three years for ordinary debt, for instance, unsecured credit;<sup>28</sup>

---

<sup>24</sup> This article is not meant to be a complete discussion of the law of prescription, but merely focusses on the prescription of debts under the NCA.

<sup>25</sup> See SALRC *Harmonisation of Existing Laws*.

<sup>26</sup> See Jansen van Rensburg 2015 <https://www.schoemanlaw.co.za/wp-content/uploads/2015/02/prescription-on-template.pdf>; also see Loubser "JC de Wet and the Theory of Extinctive Prescription" 400-417.

<sup>27</sup> Also see Harms *Procedural Timetables* 195-198; *Standard Bank of South Africa Ltd v Miracle Mile Investments 67 (Pty) Ltd* 2017 1 SA 185 (SCA) para [4]; and *BKB Limited v Bezuidenhout* 2019 ZAECHC 18 (5 March 2019) para [18].

<sup>28</sup> Section 11(d) of the *Prescription Act*.

- 30 years for debt related to a mortgage bond<sup>29</sup> (a special notarial bond in terms of the *Security by Means of Movable Property Act* 57 of 1993 is included in the term "mortgage");<sup>30</sup>
- six years for a debt arising from a bill of exchange or other negotiable instrument or a notarial contact,<sup>31</sup> unless a longer period applies in respect of the debt in question in terms of section 11(a) or (b); and
- 30 years for debt where a credit provider obtained a judgment against the consumer for the debt.<sup>32</sup> When a credit provider has obtained a judgment for unsecured credit the debt thereon will not be prescribed in three years as is the normal period for unsecured credit, but the period will be 30 years because a judgment was obtained against the consumer for that specific debt.<sup>33</sup>

When the prescription of a debt begins to run is regulated by section 12 of the *Prescription Act*.<sup>34</sup> Generally, prescription commences only once "the debt is due",<sup>35</sup> in other words, when it is recoverable or enforceable.<sup>36</sup> However, if the consumer willfully prevents the credit provider from coming to know of the existence of the debt, prescription does not begin to run until the credit provider becomes aware of the existence of the debt.<sup>37</sup> Furthermore, a debt is not deemed to be due until the credit provider has knowledge of the identity of the consumer and of the facts from which the

---

<sup>29</sup> Section 11(a)(i) of the *Prescription Act*.

<sup>30</sup> See *Factaprops 1052 CC v The Land and Agricultural Development Bank of South Africa* 2017 4 SA 495 (SCA). However, see Sonnekus 2017 TSAR 597-609, where he criticises the judgment of the Supreme Court of Appeal in *Factaprops* and other cases. For a full discussion of the prescription period for a debt secured by a mortgage bond, see Saner *Prescription in South African Law* para 3.3.2(a)(i) 3-36–3-39.

<sup>31</sup> Section 11(c) of the *Prescription Act*.

<sup>32</sup> Section 11(a)(ii) of the *Prescription Act*. For a full discussion, see Saner *Prescription in South African Law* para 3.3.2(a)(ii) at 3-39–3-40.

<sup>33</sup> See Jansen van Rensburg 2015 <https://www.schoemanlaw.co.za/wp-content/uploads/2015/02/prescription-on-template.pdf>.

<sup>34</sup> Also see *Food and Allied Workers' Union obo Gaoshubelwe v Pieman's Pantry (Pty) Limited* 2018 5 BCLR 527 (CC) para [210], where the court points out that s 12 provides considerable flexibility and protection to a creditor.

<sup>35</sup> Section 12(1) of the *Prescription Act*.

<sup>36</sup> As there is no definition given in the Act of when a debt is "due", the term must be given its ordinary and general meaning. For a detailed discussion of this and s 12, as a whole, see Saner *Prescription in South African Law* para 3.3.3 at 3-66–3-140 and the authorities cited there; and for when the debt under a loan agreement containing an acceleration clause becomes enforceable and prescription accordingly begins to run, see *Standard Bank of South Africa Ltd v Miracle Mile Investments 67 (Pty) Ltd* 2017 1 SA 185 (SCA).

<sup>37</sup> Section 12(2) of the *Prescription Act*.

debt arises; and provided that the credit provider is deemed to have such knowledge if he could have obtained it by exercising reasonable care.<sup>38</sup>

There are instances, however, where the running of prescription will be delayed or interrupted, and the *Prescription Act* deals with these circumstances.<sup>39</sup> The intention is not to fully discuss these instances here, but to merely highlight those relevant for the purposes of our article. Some of the circumstances where prescription will either be delayed or interrupted include where:

- the consumer has expressly or tacitly acknowledged the *liability*<sup>40</sup> and not just his indebtedness (as the term "acknowledgement of liability" is not defined, it must be given its ordinary meaning and common law and case law must be used to interpret its precise meaning);<sup>41</sup> once the liability (that is, indebtedness)<sup>42</sup> is acknowledged, prescription will run afresh from the day of the acknowledgment or from the new date that has been agreed between the parties as constituting the new due date for the debt;<sup>43</sup>
- the consumer has made payment on the debt;<sup>44</sup>
- the credit provider has taken legal action (called judicial interruption) against the consumer (that is, the service on the consumer of any process - for instance, notice of motion, a rule *nisi*, a pleading in reconvention and any other document whereby legal proceedings are commenced) whereby the credit provider has claimed payment on the debt;<sup>45</sup> and it is important to note here that it is the serving of a summons (for example) on the consumer and not merely the issuing of a summons or the serving of a default notice in terms of section 129 of the NCA that interrupts the running of prescription;<sup>46</sup> and in order to

---

<sup>38</sup> Section 12(3) of the *Prescription Act*, and see *Motokonya v Minister of Police* 2018 5 SA 22 (CC).

<sup>39</sup> Sections 13-15 of the *Prescription Act*; and for a detailed discussion, see Saner *Prescription in South African Law* paras 3.3.4–3.3.6.

<sup>40</sup> Section 14(1) of the *Prescription Act*.

<sup>41</sup> See Saner *Prescription in South African Law* para 3.3.6; *Benson v Walters* 1984 1 SA 73 (A) 86H and the other authorities cited.

<sup>42</sup> *Benson v Walters* 1984 1 SA 73 (A) 86H.

<sup>43</sup> Section 14(2) of the *Prescription Act*.

<sup>44</sup> Section 10(3) read with s 14(1) of the *Prescription Act*.

<sup>45</sup> Section 15 of the *Prescription Act*.

<sup>46</sup> See *Arendsnes Sweefspoor CC v Botha* 2013 5 SA 399 (SCA); *Investec Bank Ltd v Ramurunzi* 2014 4 SA 394 (SCA) paras 21-26; Koekemoer and Pretorius 2014 *Ann Surv SA L* 1053-1055; and also see *Food and Allied Workers' Union obo Gaoshubelwe v Pieman's Pantry (Pty) Limited* 2018 5 BCLR 527 (CC) paras [195]-



benefit the credit provider must successfully prosecute his claim under the process to final judgment, unless the debtor acknowledges liability,<sup>47</sup> the credit provider abandons his judgment or the judgment is set aside;<sup>48</sup>

- the consumer is resident outside South Africa;<sup>49</sup>
- the consumer is married to or is a business partner of the credit provider;<sup>50</sup>
- the credit provider is a minor, insane, or under curatorship, or is prevented by superior force, including any law or any order of court, from interrupting the running of prescription as contemplated in section 15(1);<sup>51</sup>
- the debt is the object of a dispute in arbitration;<sup>52</sup>
- the debt is the object of a claim filed against the estate of a consumer who is deceased or against the insolvent estate of the consumer;<sup>53</sup> or
- the creditor or the consumer is deceased and an executor of the relevant estate has not yet been appointed.<sup>54</sup>

Section 13(2) of the *Prescription Act* provides that a debt that arises from a contract and that would, but for the provisions of section 13(1), become prescribed before a reciprocal debt that arises from the same contract becomes prescribed, does not become prescribed before the reciprocal debt becomes prescribed.

---

[204], where the Constitutional Court held that whilst most of the documents to which reference is made in s 15(6) ordinarily constitute documents associated with courts and the litigation advanced there, the reference made in s 15(6) to "any document whereby legal proceedings are commenced" viewed through the prism of s 39(2) of the *Constitution of the Republic of South Africa*, 1996, is indicative of a broader and more generous approach to what may constitute such a document.

<sup>47</sup> Section 15(2) of the *Prescription Act*.

<sup>48</sup> Section 15 read with s 13(1)(a) of the *Prescription Act*; see *Sentrachem Limited v Terreblanche* 2017 ZASCA 16 (22 March 2017); *Silhouette Investments Ltd v Virgin Hotels Group Ltd* 2009 4 SA 617 (SCA); and for a full discussion of judicial interruption of prescription, see *Saner Prescription in South African Law* paras 3.3.8 and 3.3.11.

<sup>49</sup> See s 13(1)(b) of the *Prescription Act*.

<sup>50</sup> Section 13(1)(c) and (d) of the *Prescription Act*.

<sup>51</sup> Section 13(1)(a) of the *Prescription Act*.

<sup>52</sup> Section 13(1)(g) of the *Prescription Act*.

<sup>53</sup> Section 13(1)(g) of the *Prescription Act*.

<sup>54</sup> Section 13(1)(h) of the *Prescription Act*.

To establish whether there has been an acknowledgement of liability such as to effect an interruption of prescription, the enquiry will inevitably always be a factual one with regard to the intention of the debtor.<sup>55</sup> Such an intention will be manifested tacitly by the words and actions of the consumer in the specific circumstances of the case.<sup>56</sup> For instance, where a consumer makes a payment on a debt, such a payment is generally considered to constitute the consumer's tacit acknowledgement of the liability (the indebtedness) that could interrupt the running of prescription.<sup>57</sup> Of course, a tacit or express acknowledgment of liability by the consumer after the debt has already prescribed cannot operate to interrupt the prescription of such a debt. Section 14(1) makes it evident that the section deals with the interruption of a period that is still "running". Therefore, if the prescription period has been completed there can be no application of section 14, as there is no running prescription to be interrupted.<sup>58</sup>

Section 10(3) of the *Prescription Act* stipulates that the payment by the consumer of a debt (including a subsidiary debt which arose from such a principal debt, such as suretyship or interest)<sup>59</sup> after it has been extinguished by prescription is regarded as payment. Section 10(3) is aimed to protect someone who has received the payment of a debt (for instance, a credit provider) that has prescribed prior to the payment by the lapse of the specific time period in the Act.<sup>60</sup> In essence, this means that the payment made to the credit provider on a prescribed debt cannot be claimed back.<sup>61</sup>

It has been argued that prescription under the *Prescription Act* confers a defence on the debtor in the form of a substantive right to refuse performance while the prescribed obligation remains intact and can still be complied with. In other words, although section 10(1) of the *Prescription Act* provides that a debt is extinguished by prescription after the lapse of the prescription period, there are specific qualifications.<sup>62</sup> One qualification that is provided for in section 10(3) provides that the payment by the debtor of a prescribed debt is regarded as the payment of a debt. In addition,

---

<sup>55</sup> *Saner Prescription in South African Law* 3-177.

<sup>56</sup> *Saner Prescription in South African Law* 3-177–3-180 and the authorities cited; and *Agnew v Union and South West Africa Insurance Co Ltd* 1977 1 SA 617 (A) 623A-C.

<sup>57</sup> See s 10(3) read with s 14(1) of the *Prescription Act*.

<sup>58</sup> *Saner Prescription in South African Law* 3-183.

<sup>59</sup> See s 10(2) of the *Prescription Act* and *Standard Bank of SA Ltd v Oneanate Investments (Pty) Ltd* 1995 4 SA 510 (C) 557D-558A.

<sup>60</sup> *Saner Prescription in South African Law* para 3.3.1 at 3-35; and *Kuhne & Nagel AG Zurich v APA Distributors (Pty) Ltd* 1981 3 SA 536 (W) 538G-H.

<sup>61</sup> *Saner Prescription in South African Law* para 3.3.1 at 3-35.

<sup>62</sup> Loubser "JC de Wet and the Theory of Extinctive Prescription" 408-411.

prescription does not take effect by operation of law, but only if raised in pleadings.<sup>63</sup> These qualifications to extinguishment by prescription under section 10(1) mean that after the prescription period has elapsed, the debt retains all the characteristics of a subsisting debt, but the debtor acquires a substantive right or defence which will, if invoked, render him exempt from performance.<sup>64</sup> Therefore, if prescription is not invoked in terms of section 17 and performance is still rendered, it will be regarded as due performance in terms of section 10(3).<sup>65</sup> Therefore, when a payment is made on a prescribed debt, the payment is regarded as due performance. Alternatively, where the consumer is unaware of the fact that the debt has prescribed and enters into an acknowledgment of debt (a new agreement), the consumer effectively re-activates the debt.<sup>66</sup> Although these statements hold true for consumers of debt in general, the situation is somewhat different when it involves consumers where the debt resulted from a credit agreement governed by the NCA. The law concerning the prescription of debt governed by the NCA was changed in this regard when section 126B was inserted into the NCA and came into force on 13 March 2015.<sup>67</sup>

### 3 The influence of the NCA on prescription: practical aspects

It has already been indicated above that the prescription of debt that arises from a credit agreement governed by the NCA is jointly governed by the NCA and the *Prescription Act*.<sup>68</sup> The introduction of section 126B of the NCA has an impact on the selling and collecting of prescribed debts under credit agreements regulated in terms of the NCA. However, before we consider

---

<sup>63</sup> Section 17 of the *Prescription Act*; Loubser "JC de Wet and the Theory of Extinctive Prescription" 408-409.

<sup>64</sup> Loubser "JC de Wet and the Theory of Extinctive Prescription" 409.

<sup>65</sup> See, however, Loubser "JC de Wet and the Theory of Extinctive Prescription" 409-410, where he states that if after the prescription period has elapsed the debtor expressly or tacitly acknowledges liability, prescription is not interrupted in terms of s 14(1) because the debt has been extinguished and can therefore not be interrupted or extended by agreement.

<sup>66</sup> In this regard one should keep the distinction between the "strong" and "weak" effects of prescription in mind. In terms of "strong" prescription, a debt no longer exists once the prescription period has lapsed, and in terms of "weak prescription" the debtor is granted a right to refuse performance, but if he pays, payment is regarded as valid payment. Also see Loubser "JC de Wet and the Theory of Extinctive Prescription" 410-411.

<sup>67</sup> See Proc R10 in GG 38557 of 13 March 2015.

<sup>68</sup> See ss 2(7) and 4(7) of the *Prescription Act* for what the position will be if there is an inconsistency between a provision of this NCA and another Act (the *Prescription Act* in this case).

section 126B of the NCA in paragraph 4 below, it is essential first to address a few practical issues.

### **3.1 The position when a consumer is outside of South Africa**

The first issue is what the position will be if a consumer is outside South Africa. In terms of section 13(1)(b) of the *Prescription Act*, the prescription of a debt is delayed if the debtor is outside South Africa.

### **3.2 The position when a consumer's address has changed or will change**

A second issue is what the position will be if a consumer's address has changed or will change. Section 96(1) of the NCA requires notices to be delivered at the address provided by the recipient of the notices (the consumer, for purposes of this article).<sup>69</sup> Furthermore, section 96(2) of the NCA provides that a party to a credit agreement (the consumer for the purposes of this article) should inform the other party (the credit provider) of any change of address by notifying the other person (the credit provider) via registered mail or electronic mail of the new address.<sup>70</sup> Van Heerden is of the opinion that when a change of address is not effected in accordance with section 96(2) of the NCA, the notice of the change of address is not valid for the purposes of the NCA.<sup>71</sup>

### **3.3 The effect of a consumer's failure to notify a credit provider of his change of address**

In *Balkind v Absa Bank Ltd*<sup>72</sup> the consumer failed to notify the credit provider of his change of address, and the section 129(1)(a) notice and summons consequently never came to the attention of the consumer. The court held, however, that in the absence of any indication that the debtor deliberately avoided receipt of the credit provider's notice, the judgment was rescinded, although the notice was dispatched to the consumer's chosen address.<sup>73</sup> In *Robertson v Firstrand Bank t/a Wesbank*<sup>74</sup> the consumer also failed to notify the credit provider of his change of address, so the court allowed the credit

---

<sup>69</sup> See Van Heerden "Enforcement of Credit Agreements" (2018) paras 12.4.4 and 12.4.5.

<sup>70</sup> See Van Heerden "Enforcement of Credit Agreements" (2018) paras 12.4.5 and 12.4.6.

<sup>71</sup> Van Heerden "Enforcement of Credit Agreements" (2016) para 12.4.6. Also see *Kubyana v Standard Bank of SA Ltd* 2014 3 SA 56 (CC) paras [28]-[30] and [48].

<sup>72</sup> *Balkind v Absa Bank Ltd* 2013 2 SA 486 (ECG).

<sup>73</sup> *Balkind v Absa Bank Ltd* 2013 2 SA 486 (ECG) para [64].

<sup>74</sup> *Robertson v Firstrand Bank t/a Wesbank* 2015 ZAECGHC 7 (24 February 2015).

provider to use the consumer's address initially chosen in the agreement for the delivery of notices and summons.<sup>75</sup> Van Heerden is of the opinion that the position in *Robertson* is correct: if a consumer fails to notify a credit provider of his change of address as required by the NCA, the credit provider is entitled to use the consumer's *domicilium* address as chosen in the credit agreement.<sup>76</sup> It is therefore submitted that if a consumer deliberately fails to notify a credit provider of his change of address in accordance with section 96 of the NCA, and the credit provider therefore fails to bring a section 129(1)(a) notice to the attention of the consumer, the consumer's failure to inform the credit provider of his change of address may operate as a form of *estoppel* to prevent the consumer from raising a defence based on prescription, because bringing the section 129(1)(a) notice to the consumer's attention is one of the prerequisites for instituting legal proceedings against the consumer under the NCA.<sup>77</sup> It is also submitted that it makes no sense to prevent a credit provider from instituting legal proceedings due to his non-compliance with section 129(1)(a) if his non-compliance stems from the non-compliance of the consumer with the requirement that he inform the credit provider of his change of address in accordance with section 96 of the NCA – mere delivery of a section 129(1)(a) notice to the consumer's *domicilium* address as chosen in the credit agreement should then be regarded as full compliance (also see paragraph 3.4 for a detailed discussion of the impact of non-compliance with section 129(1)(a)).

So what will the impact of non-compliance with section 96 of the NCA be on prescription? It has been indicated that the credit provider should not be prevented from instituting legal proceedings against a consumer who intentionally fails to inform the credit provider of his change of address to evade the service of a section 129(1)(a) notice in order to frustrate the enforcement of a valid claim against him – and likewise, he should not be able to raise prescription in these circumstances. Again, it would simply be wrong to penalise a credit provider with prescription where a consumer deliberately makes it impossible for the credit provider to contact him to claim or demand payment of an outstanding debt, for instance, by changing his contact details and/or address without notifying the credit provider. In

---

<sup>75</sup> *Robertson v Firststrand Bank t/a Wesbank* 2015 ZAECGHC 7 (24 February 2015) paras [32]-[36]. Also see Van Heerden "Enforcement of Credit Agreements" (2016) para 12.4.6.

<sup>76</sup> Van Heerden "Enforcement of Credit Agreements" (2018) para 12.4.6.

<sup>77</sup> Also see *Balkind v Absa Bank Ltd* 2013 2 SA 486 (ECG) [para [64], where the court considered estoppel as a defence which prevented the consumer from raising a defence based on the non-receipt of a s 129(1)(a) of the NCA notice, where the consumer failed to notify the credit provider of his change of address.

other words, it makes no sense to penalise a credit provider for non-compliance, if the non-compliance is caused by the consumer's failure to comply with section 96 of the NCA. That brings us back to the main issue, namely what the effect of non-compliance with section 129(1)(a) will be on prescription.<sup>78</sup>

### **3.4 The impact of resultant non-compliance with section 129(1)(a) on prescription**

In *Investec Bank Limited t/a Investec Private Bank v Ramurunzi*<sup>79</sup> the Supreme Court of Appeal had to decide whether a summons was defective because it was not preceded by the delivery of a section 129 notice to the consumer, or put differently, whether a summons served before the notice in terms of section 129 had been delivered to the consumer interrupted the running of prescription.<sup>80</sup> The NCA is silent regarding the effect of non-compliance with section 129 on prescription. Section 130(4)(b), an unusual provision, requires a court to adjourn proceedings so that a credit provider can rectify his failure to comply with the relevant provisions of the NCA before the matter can be resumed. If a consumer has not received a section 129 notice, a court should therefore adjourn proceedings so that a credit provider can give notice as required. The SCA held that a credit provider then gives a consumer the benefit of notice of his options (which is ordinarily given before a summons is issued and served). In this light, the proceedings are therefore not void in the absence of a section 129 notice.<sup>81</sup> The court also held that the aim of section 130(4)(b) is to ensure that although summons has been served, the consumer is still furnished with a section 129 notice, so that he knows the available options before the debt is enforced.<sup>82</sup> The court further held that this is in line with the common law related to prescription: a summons and the particulars of a claim can be cured, where defective, after the period of prescription has run out.<sup>83</sup> The

---

<sup>78</sup> The effect of non-compliance with s 129(1)(a) on prescription is discussed in detail in Van Heerden and Boraine 2015 *THRHR* 457-475. See specifically at 470-472 the discussion of the judgment of the Supreme Court of Appeal in *Investec Bank Ltd v Ramurunzi* 2014 4 SA 394 (SCA). Also see Van Heerden "Enforcement of Credit Agreements" (2018) para 12.17.2.

<sup>79</sup> *Investec Bank Ltd v Ramurunzi* 2014 4 SA 394 (SCA).

<sup>80</sup> *Investec Bank Ltd v Ramurunzi* 2014 4 SA 394 (SCA) para [2].

<sup>81</sup> *Investec Bank Ltd v Ramurunzi* 2014 4 SA 394 (SCA) para [23]. The SCA based this decision on *Sebola v Standard Bank of South Africa Ltd* 2012 5 SA 142 (CC) para 52-53, where Cameron J held that "[t]he proceedings have life, but a court must 'adjourn' the matter, and make an appropriate order requiring the credit provider to complete specified steps before resuming the matter. The absence of notice leads to a pause, not to nullity."

<sup>82</sup> *Investec Bank Ltd v Ramurunzi* 2014 4 SA 394 (SCA) para [24].

<sup>83</sup> *Investec Bank Ltd v Ramurunzi* 2014 4 SA 394 (SCA) para [24].

court then also held that "[e]ven an excipiable summons, or one that is amended so as to introduce a new cause of action (where substantially the same debt is being claimed) has the effect of interrupting prescription."<sup>84</sup> However, the court held that a section 129 notice would not itself interrupt prescription if delivered before summons was served.<sup>85</sup> Van Heerden and Boraine therefore submit that a section 129 notice in fact plays a limited role in the context of prescription, but it remains very important, because without the notice a credit provider will not be able to proceed with enforcement after summons has been issued (section 15(2) of the *Prescription Act* requires finality) and non-compliance may be regarded as an abuse of the court that warrants dismissal of the action.<sup>86</sup>

According to Van Heerden and Boraine there may also be further scenarios, each with its own consequences:<sup>87</sup>

- a) A section 129(1)(a) notice has been issued but the credit provider fails to issue and serve summons, therefore the debt will be prescribed, for instance within three years, because the notice does not interrupt the running of prescription.
- b) A section 129(1)(a) notice has been issued and summons has been issued and served, for instance within three years, but the credit provider fails to allege compliance with section 129(1)(a): the summons can be amended in terms of section 130(4)(b)(ii) to reflect compliance with section 129(1)(a).
- c) No section 129(1)(a) notice has been delivered by the credit provider and no summons has been served: the debt will be prescribed, for instance within three years from the time the debt became due.
- d) No section 129(1)(a) notice has been delivered before summons has been issued and served, but summons has been issued and served before the debt prescribes: based on section 130(4)(b) the summons interrupts prescription and despite the non-compliance with section 129(1)(a) the summons will not be void and a court has to adjourn the matter and make an appropriate determination setting out steps

---

<sup>84</sup> *Investec Bank Ltd v Ramurunzi* 2014 4 SA 394 (SCA) para [24].

<sup>85</sup> *Investec Bank Ltd v Ramurunzi* 2014 4 SA 394 (SCA) para [24].

<sup>86</sup> Van Heerden and Boraine 2015 *THRHR* 473-474. Also see Van Heerden "Enforcement of Credit Agreements" (2018) para 12.17.2.

<sup>87</sup> Van Heerden and Boraine 2015 *THRHR* 473-474. Also see Van Heerden "Enforcement of Credit Agreements" (2018) para 12.17.2.

the credit provider has to complete before the matter may be resumed.

- e) Prior to the prescription of the debt no section 129(1)(a) notice has been delivered before or after summons has been served, so the consumer never gets an opportunity to receive and respond to the notice: in the light of section 15(2) of the Prescription Act the credit provider is then not successfully prosecuting his claim to final judgment and the interruption of prescription will therefore be undone. Alternatively, compliance with section 129(1)(a) after an unreasonable period of inaction since the service of summons may lead to the claim's being dismissed due to the abuse of a court process.<sup>88</sup>

It is submitted that the following related scenario may also exist:

- f) A debt prescribes because summons has not been issued and served as a result of non-compliance with section 129(1)(a), where a consumer deliberately escapes the enforcement of a debt by not giving notice of a change of address in terms of section 96: the consumer's failure to inform the credit provider of his change of address may operate as a form of *estoppel* to prevent the consumer from raising a defence based on prescription when the debt is eventually enforced.

More scenarios may exist where a consumer deliberately fails to give notice of a change of address in terms of section 96 and it remains to be seen how courts will deal with it. One should in this event rely on *Robertson*: if a consumer fails to notify a credit provider of his change of address as required by the NCA, the credit provider is entitled to use the consumer's *domicilium* address as chosen in the credit agreement. Alternatively, it is submitted that in the light of the discussions in this paragraph a credit provider should not be prevented from instituting legal proceedings or enforcing a debt against a debtor who intentionally fails to inform the credit provider of his change of address to evade the service of a section 129(1)(a) notice in order to frustrate the enforcement of a valid claim against him – and likewise, he should not be able to raise prescription in these circumstances.

---

<sup>88</sup> Van Heerden "Enforcement of Credit Agreements" (2018) para 12.17.2.



### **3.5 The commencement of prescription where a credit agreement contains an acceleration clause**

Another issue connected to the prescription of consumer debt relates to the commencement of prescription where a credit agreement contains an acceleration clause that entitles the credit provider to claim the whole outstanding amount. The court dealt with this issue in *Standard Bank of South Africa Ltd v Miracle Mile Investments 67 (Pty) Ltd*.<sup>89</sup> In this case the court had to decide whether the debt was due under section 12(1) of the *Prescription Act* when the principal debtor breached its obligation or when the creditor elected to enforce an acceleration clause to render the whole outstanding amount payable.<sup>90</sup> The court held that where an acceleration clause gives the creditor the right of election to enforce the clause upon default by the debtor, the debt in terms of the acceleration clause becomes due in terms of section 12(1) of the *Prescription Act* only when the creditor has elected to enforce the clause. Before the election by the creditor, prescription does not begin to run.<sup>91</sup> That is because the election to enforce the acceleration clause transforms the instalment debts into a single debt for the full outstanding amount.<sup>92</sup>

It was indicated at the outset of this contribution<sup>93</sup> that section 126B of the NCA brought about changes to the prescription of consumer debt and to how prescription impacts generally on debts in the consumer-credit industry. It is therefore also important to consider the impact of section 126B in the context of the prescription of consumer debt. The impact of section 126B of the NCA will therefore be considered in the following paragraph.

## **4 Section 126B of the NCA and prescription**

Section 126B of the NCA provides:

- (1)(a) No person may sell a debt under a credit agreement to which this Act applies and that has been extinguished by prescription under the Prescription Act, 1969 (Act 68 of 1969).

---

<sup>89</sup> *Standard Bank of South Africa Ltd v Miracle Mile Investments 67 (Pty) Ltd* 2017 1 SA 185 (SCA). Also see a discussion of this case in Van Heerden "Enforcement of Credit Agreements" (2018) para 12.17.2.

<sup>90</sup> *Standard Bank of South Africa Ltd v Miracle Mile Investments 67 (Pty) Ltd* 2017 1 SA 185 (SCA) para [2].

<sup>91</sup> *Standard Bank of South Africa Ltd v Miracle Mile Investments 67 (Pty) Ltd* 2017 1 SA 185 (SCA) para [15].

<sup>92</sup> *Standard Bank of South Africa Ltd v Miracle Mile Investments 67 (Pty) Ltd* 2017 1 SA 185 (SCA) para [15].

<sup>93</sup> See para 1 above.

- (b) No person may continue the collection of, or re-activate a debt under a credit agreement to which this Act applies—
  - (i) which debt has been extinguished by prescription under the Prescription Act, 1969 (Act 68 of 1969); and
  - (ii) where the consumer raises the defence of prescription, *or would reasonably have raised the defence of prescription had the consumer been aware of such a defence*, in response to a demand, whether as part of legal proceedings or otherwise. [Emphasis added.]

As said at the outset of this article, section 126B was introduced to curb the abusive practice that existed at the time, where credit providers and/or debt collectors were continuously selling or collecting prescribed debt and tricked consumers, who were unaware of the law regarding prescription, into making payments on their prescribed debts in order to reactivate these debts. One could also say that section 126B(1)(a) is aimed at cedents by prohibiting them from selling debts that have been extinguished by prescription under the *Prescription Act*, and section 126B(1)(b) is aimed at cessionaries by prohibiting them from collecting or reactivating prescribed debts.<sup>94</sup>

Section 126B(1)(b) at first sight seems to make it impossible to collect or reactivate a prescribed debt that falls under the NCA. However, there are two qualifications to the prohibition in section 126B(1)(b): a person may not collect or reactivate a debt if the debt has prescribed in terms of the *Prescription Act*; and where the consumer in fact raises the defence of prescription or would reasonably have raised it had he been aware of the defence, in response to a demand or as part of legal proceedings. It is therefore submitted that the prohibition in section 126B(1)(b) does not contain absolute prohibition, but a qualified prohibition. If a consumer is, for example, made aware of the defence of prescription but deliberately fails to invoke prescription in terms of section 17 of the *Prescription Act* and continues to make voluntary payments, even if the debt has prescribed, the performance may still be regarded as due performance in terms of section 10(3) of the *Prescription Act*. Section 126B(1) also does not prohibit a consumer from entering into an acknowledgment of debt.<sup>95</sup> In terms of

---

<sup>94</sup> The transfer of a right by agreement is known as "cession". The person who transfers the right is called the "cedent", and the person to whom it is transferred, the "cessionary". Also see Otto 2015 TSAR 770.

<sup>95</sup> See, eg, the facts in *Kaknis v Absa Bank Limited; Kaknis v Man Financial Services SA (Pty) Ltd* 2017 4 SA 17 (SCA) (hereinafter *Kaknis*) para 5, where the consumer signed an acknowledgment of the debt after the debt had become prescribed. Also see *Standard Bank of South Africa Ltd v Miracle Mile Investments 67 (Pty) Ltd* 2017 1 SA 185 (SCA) fn 3, where it is emphasised that s 14(1) of the *Prescription Act* provides that the running of prescription shall be interrupted by an express or tacit acknowledgement of liability by the debtor. S 14(2) provides that if prescription is

section 14(1) of the *Prescription Act* prescription is interrupted by an acknowledgment of liability by the debtor and section 14(2) provides that if prescription is interrupted by an acknowledgment of liability by the debtor, prescription commences to run afresh from the day of the interruption if the parties postpone the date upon which the debt again becomes due. Therefore, the prohibition in section 126B(1)(b) of the NCA to collect or reactivate prescription is not absolute:<sup>96</sup> it does not prohibit the acceptance of payment by the debtor of a prescribed debt under section 10(3) of the *Prescription Act*, and if a consumer is aware of the defence of prescription but deliberately fails to invoke it under section 17 of the *Prescription Act*.

Section 126B of the NCA also deals with the consumer's right to raise the defence of prescription and somewhat changes the consumer's right to raise this defence as governed by the *Prescription Act*. In terms of section 17 of the *Prescription Act*, in order for a consumer to benefit from the defence of prescription, he must raise the defence of prescription in the relevant document filed of record in the proceedings.<sup>97</sup> A court will not of its own motion take notice of prescription,<sup>98</sup> but may allow the prescription to be raised at any stage of the proceedings.<sup>99</sup> It is submitted that the second qualification under section 126B(1)(b)(ii) of the NCA extends the rule under section 17 of the *Prescription Act* to some extent: the prohibition of the collection of prescribed debt does not apply only when a defence of prescription has been invoked under section 17 of the *Prescription Act* but also when a consumer "would reasonably have raised the defence of prescription had the consumer been aware of such a defence" (own emphasis added). The meaning of the aforementioned phrase is still uncertain and it remains to be seen what impact it is going to have on section 17 of the *Prescription Act*. It is suspected, however, that the legislature intended to leave some leeway for a consumer who has failed to raise the defence of prescription – and a presiding officer then has a discretion to take notice of prescription. Any uncertainty will be removed by the draft *Prescription Bill*.<sup>100</sup> The draft *Prescription Bill* will change the need to specifically raise the defence of prescription and provides in clause 13(4) for a court during judicial proceedings to consider if a debt has prescribed.

---

interrupted in terms of subsection (1), prescription shall commence to run anew from the date on which the interruption takes place, or from any date thereafter the parties agree to postpone the due date to.

<sup>96</sup> Also see below in this paragraph the discussion of the minority judgment in *Kaknis* paras 19 and 20.

<sup>97</sup> Section 17(2) of the *Prescription Act*.

<sup>98</sup> Section 17(1) of the *Prescription Act*, and *Saner Prescription in South African Law* 3-261.

<sup>99</sup> Section 17(2) of the *Prescription Act*.

<sup>100</sup> See the discussion in para 5 below.

It must be noted that nothing in the *Prescription Act* or in section 126B of the NCA prohibits a consumer from renouncing or waiving his right to rely on prescription expressly or tacitly, provided he was not misled into doing so.<sup>101</sup> It is generally acceptable for a consumer to expressly or even tacitly renounce or waive his right to rely on prescription in an acknowledgment of liability for a debt that has already prescribed. The situation is less clear and seems unacceptable where the consumer renounces or waives his right to rely on prescription before the debt has prescribed.<sup>102</sup> However, a renouncement or waiver of the consumer's right to rely on prescription still has to pass the hurdles set by section 90 of the NCA, that regulates unlawful provisions in credit agreements. It may be the case that a renunciation or waiver of the consumer's right to rely on prescription may be unlawful because the purpose or effect of it is to defeat the purposes of the NCA or to deceive the consumer.<sup>103</sup>

Section 126B(1)(b) seemingly permits a consumer to raise the defence of prescription at any stage, even in an instance where the consumer previously agreed, for example, to reactivate the prescribed debt by making a payment on the prescribed debt, but was unaware of the availability of the prescription defence when he did so.<sup>104</sup>

In *Kaknis v Absa Bank Limited; Kaknis v Man Financial Services SA (Pty) Ltd*,<sup>105</sup> the Supreme Court of Appeal considered whether section 126B of the NCA applied retrospectively. The consumer in this case had concluded various instalment agreements during 2006 to 2008 involving motor vehicles, trucks, trailers, quad bikes and a jet ski with two different credit providers. The consumer later defaulted on the repayments. He applied for debt review and was successful in obtaining a debt restructuring order.<sup>106</sup> He complied with the order until 8 July 2011 by making payment to the distribution agent; thereafter he failed to make further payments.<sup>107</sup> The debt arising from these credit agreements prescribed three years later on 8 July 2014.<sup>108</sup> On 3 October 2014, after the debts had already prescribed and about five months before section 126B of the NCA came into operation, the

---

<sup>101</sup> Saner *Prescription in South African Law* para 3.3.7. Also see below in this paragraph the discussion of the minority judgment in *Kaknis* 20.

<sup>102</sup> For a detailed discussion, see Saner *Prescription in South African Law* para 3.3.7 and the authorities cited; also see Loubser "JC de Wet and the Theory of Extinctive Prescription" 424-425 for a discussion on the anticipatory waiver of prescription.

<sup>103</sup> Section 90(2)(a)(i) and (ii) of the NCA.

<sup>104</sup> See Bracher 2017 <https://www.financialinstitutionslegalsnapshot.com/2017/02/section-126b1b-of-the-national-credit-act-is-not-retrospective>.

<sup>105</sup> *Kaknis v Absa Bank Limited; Kaknis v Man Financial Services SA (Pty) Ltd* 2017 4 SA 17 (SCA).

<sup>106</sup> *Kaknis* paras 1-3, 33.

<sup>107</sup> *Kaknis* para 4.

<sup>108</sup> *Kaknis* para 4.

consumer signed an acknowledgment of debt with his two credit providers, but defaulted on the acknowledgment of debt again and made no further payments.<sup>109</sup> When the credit providers issued summons and applied for summary judgment, the consumer argued before the court *a quo* (that is, the Eastern Cape Local Division of the High Court) that their claims had prescribed and he relied on section 126B of the NCA. He argued that he was unaware at the time that he could rely on prescription as a defence and, if he had been aware of it, he would not have signed the acknowledgment of debt. The credit providers contended that the acknowledgment of debt had reactivated the prescribed debt.<sup>110</sup> The court *a quo* (per Msizi AJ) dismissed his defence and held that section 126B did not apply to any credit agreements concluded before 13 March 2015. The court *a quo* thus found that the debts had not prescribed and granted judgment in favour of the credit providers.<sup>111</sup>

The majority judgment of the Supreme Court of Appeal also concluded that the section did not operate retrospectively (per Van der Merwe JA with Mathopo JA and Nicholls AJA concurring).<sup>112</sup> The majority held that no statute is to be construed as impairing vested rights which were acquired under existing laws, unless it is clearly intended by the Legislature for the statute to have that effect. It is the rule of law that a statute will affect only future matters. Should there be doubt regarding the retrospective effect of a provision, the presumption against retrospectively is rebuttable.<sup>113</sup> The majority held that the consumer could rely on the benefits, protection and the working of the defence of prescription as stipulated in the NCA only as from the date that section 126B came into operation. They stressed that although the main purpose of the NCA is the protection of consumers, the consumers' rights must be balanced against the rights of credit providers.<sup>114</sup> The majority concluded that the acknowledgments of debt relied upon by the credit providers were valid and the summary judgments were correctly granted.<sup>115</sup>

The minority judgment in *Kaknis* (per Shongwe JA with Willis JA concurring) is also of interest from a consumer protection perspective,<sup>116</sup> although it is not binding. The minority judgment stated that it would have upheld the appeal and the court *a quo* had minimised the protection of consumers and "overemphasised the protection and undue compromise of certainty in

---

<sup>109</sup> paras 5 and 33.

<sup>110</sup> *Kaknis* paras 5, 7, 34 and 35.

<sup>111</sup> *Kaknis* para 6.

<sup>112</sup> See the full judgment in *Kaknis* paras 32-41.

<sup>113</sup> *Kaknis* paras 37-39.

<sup>114</sup> *Kaknis* para 38.

<sup>115</sup> *Kaknis* paras 40-41.

<sup>116</sup> See the judgment of the minority in *Kaknis* paras 1-27.

commercial transactions".<sup>117</sup> The minority stressed that the intention of the legislature in introducing section 126B of the NCA was evident in "that it sought to protect consumers in general, but more particularly the naive and vulnerable ones" and was included for good reason, most probably because consumers, unaware of the law regarding prescription, were held liable for old debts enforced by debt collectors, buyers of prescribed debt or credit providers.<sup>118</sup> According to the minority, section 126B intended to:<sup>119</sup>

... cure a situation where a debt which had become prescribed, the credit provider should not benefit from a debt which had become prescribed because the 'poor' consumer is unaware of the defence of prescription. If the consumer would reasonably have raised the defence of prescription had he ... been aware of such a defence, section 126B would come to the consumer's rescue in order to prevent unfairness or injustice, which would have [befallen] the 'poor' consumer.

The minority also considered the application of section 126B and made useful and valid comments regarding the parameters of this section.<sup>120</sup> According to the minority, the prohibition of the collection or reactivation of debt is not absolute and certain requirements must be present for it to apply.<sup>121</sup> For instance, the defence of prescription ought to be raised in response to a demand by the credit provider (or debt collector) and this could be done at any time, even during opposition to a summary judgment, as in the case before the court. If the consumer was aware of the defence of prescription, he should raise it, but if he was unaware the consumer must prove that he would "reasonably have raised" the defence.<sup>122</sup> The prescription period must have ended and the consumer must not have been responsible for preventing the credit provider from knowing of the debt. Furthermore, the consumer must not have acknowledged liability for the debt during the running of the prescription period, as provided for in section 14 of the *Prescription Act*, which would have interrupted the running of prescription and there must also not be present other circumstances set out in section 13 of the *Prescription Act* that would have delayed the operation of prescription. A consumer should also not have waived the defence of prescription. Section 126B(1)(b)(ii) in a nutshell extends the protection of the defence of prescription to consumers who are not aware of the existence of the defence. Should the consumer be made aware of the defence, for example, by the credit provider, this protection "falls away, as they would have waived the defence".<sup>123</sup>

---

<sup>117</sup> *Kaknis* para 23.

<sup>118</sup> *Kaknis* para 18.

<sup>119</sup> *Kaknis* para 18.

<sup>120</sup> *Kaknis* paras 19 and 20.

<sup>121</sup> *Kaknis* para 19.

<sup>122</sup> *Kaknis* para 19.

<sup>123</sup> *Kaknis* para 20.

The minority stated that if section 126B did not apply retrospectively, then the legislature failed to reconcile the trend set by the Constitutional Court where it stressed the protection of the consumer.<sup>124</sup> According to them, a conclusion that section 126B did not have retrospective effect would create an "odd situation" where credit agreements concluded prior to section 126B's coming into operation would offer less protection to consumers than those entered into after section 126B came into effect, thereby creating a difference between categories of consumers.<sup>125</sup> Although the minority judgment acknowledged that it was common cause that section 126B did not expressly provide that it is intended to apply with retrospective effect, it stated that the question that required analysis was whether "it provides for retrospective application by necessary implication".<sup>126</sup> The minority judgment was of the view that the principle against retrospective operation of law was not absolute, particularly where the consequences of holding that an act was non-retrospective would lead to an "absurdity or practical injustice".<sup>127</sup> Although Willis JA concurred with the minority judgment, he also added a few additional comments in a separate judgment. The following is of relevance here:<sup>128</sup>

... among the reasons we have the law of prescription is to set persons free from the burden of debt. The question we have to ask ourselves is whether, under our constitutional dispensation, it is better, in the transitional period, to set consumers forever free from debt that has prescribed or to allow credit providers the freedom to revive debt that has prescribed through the mechanism of 'acknowledgement'.

It is therefore submitted that the majority in *Kaknis* leaves the consumer-credit industry with two categories of contracts to which the NCA applies and different rules for each category in respect of its enforceability once the debt has prescribed: credit agreements concluded prior to section 126B's coming into operation would offer less protection to consumers than those entered into after section 126B came into effect, thereby creating a difference between categories of consumers. The majority judgment regarding the retrospectivity of legislation may be correct, but it is undesirable to have different rules for the same situation. The lack of one uniform rule is certainly not in the interest of consumer protection. However, one should always keep in mind in promoting protection and equity in the

---

<sup>124</sup> *Kaknis* para 23.

<sup>125</sup> *Kaknis* para 23.

<sup>126</sup> *Kaknis* para 16.

<sup>127</sup> See *Kaknis* paras 10-16, 29 and the authorities relied upon.

<sup>128</sup> See *Kaknis* para 30.

credit market that the rights and responsibilities of credit providers and consumers must be balanced to achieve sustainability.<sup>129</sup>

Therefore, the situation of prescribed debt reactivated prior to section 126B of the NCA will still be governed by the *Prescription Act* and the common law as it applied before section 126B came into operation and as it still applies to prescribed debt in general (that is, debt not arising from a credit agreement governed by the NCA). This would mean that if the defence of prescription was not raised by the consumer and he made payment on the prescribed debt or made an acknowledgment of debt regarding a debt arising from a credit agreement governed by the NCA, prior to 13 March 2015, such payment and/or acknowledgment would validly have revived the prescribed debt. However, prescribed debt under a credit agreement entered into after the coming into effect of section 126B cannot be collected or revived where, as part of legal proceedings or otherwise (in other words, at any stage), in response to a demand the consumer raises the defence of prescription, or the consumer fails to raise the defence but would reasonably have raised the defence of prescription had he been aware of such a defence.

The Legislature aims to go one step further in its aim to prohibit the selling, collecting and reactivating of prescribed debt by criminalising these activities. The *National Credit Amendment 7* of 2019 (the NCAA) has been signed into law but not in operation yet. Under this Act the NCA will be amended to provide that a contravention of section 126B(1)(a) (that is, the selling of prescribed debt) and (b) (that is, the collection or re-activation of prescribed debt) of the NCA would constitute offences punishable with a fine or imprisonment not exceeding 10 years or both a fine and such imprisonment, depending on the nature of the convicted person (for example, a natural person vs a juristic person). Section 25 of the NCAA introduces various new offences under sections 157A-D. Section 157B(2) states that any person who intentionally sells a prescribed debt under a credit agreement to which the NCA applies as contemplated in section 126B(1)(a) is guilty of an offence. The prohibition on the selling of NCA debts extinguished by prescription is therefore absolute and will constitute an offence under section 157B(2). Section 157B(3) provides that any person who intentionally continues the collection of or attempts to reactivate a debt under the NCA under the circumstances contemplated in section 126B(1)(b) commits an offence. The offence will therefore be limited to the specific circumstances contemplated – and section 157B(3) therefore does not affect the nature of the prohibition in section 126B(1)(b). The collection or reactivation of prescribed debt may therefore still in certain circumstances

---

<sup>129</sup> See *Kaknis* para 21, where the court refers to *Kubyana v Standard Bank of SA Ltd* 2014 3 SA 56 (CC) para 20.



not constitute an offence (see, above, the discussion of the specific qualified circumstances in section 126B(1)(b)). Under the amended section 161 of the NCA a contravention of section 157B is liable to a fine or imprisonment not exceeding ten years or both, or if the convicted person is not a natural person, to a fine not exceeding ten per cent of the annual turnover or R1 million, whichever amount is the greatest. A contravening credit provider would also run the risk that it could lose its registration as a credit provider with the National Credit Regulator. The criminalisation of selling prescribed debt under the NCA or the collection or attempted re-activation of prescribed debt under the NCA under the circumstances contemplated in section 126B(1)(b) is to be welcomed from the perspective of consumer protection. One concern, however, is that a consumer in certain instances may abuse the defence of prescription simply to delay proceedings: will a credit provider, for example, still be able to enforce debt after a court finds that a debt has not prescribed and that section 126B has not been transgressed?

## 5 Section 86A of the NCAA and prescription

The NCAA aims to introduce by way of section 86A a special "debt intervention" mechanism applicable to certain consumers under certain circumstances.<sup>130</sup> One of the consequences of debt intervention is that a credit agreement may be suspended for a fixed period of time. To deal with the running of prescription regarding a debt arising from such a credit agreement during the time of its suspension, the NCAA aims to introduce section 87A(4)(b) in the NCA to interrupt/delay prescription.<sup>131</sup> The proposed section 87A(4)(b) provides that:

... if the period of prescription in respect of a suspended credit agreement would be completed before or on, or within one year after the day on which the suspension ended, the period of prescription shall not be completed before a year has elapsed after the day on which the suspension ended.

## 6 Proposed changes to the prescription of debt by the South African Law Reform Commission made in their draft *Prescription Bill*

The South African Law Reform Commission (hereafter the Law Commission) embarked on a project to harmonise the existing laws providing for different prescription periods and to overhaul the current *Prescription Act* and the *Institution of Legal Proceedings against Certain Organs of State Act*.<sup>132</sup> As part of the Law Reform Commission's project it

<sup>130</sup> For criticism of debt intervention and the resulting suspension of a credit agreement, see Sonnekus 2018 *TSAR* 407-427.

<sup>131</sup> See s 15 of the Amendment Act.

<sup>132</sup> See SALRC *Harmonisation of Existing Laws*.

published a draft *Prescription Bill* (hereafter draft *Prescription Bill*) and a draft *Institution of Legal Proceedings against Certain Organs of State Amendment Bill*. The Law Reform Commission accepted public comments on their draft Bills until 31 August 2018, and it remains to be seen if their work will develop into new legislation.

We will focus on only a selection of the proposed changes to the *Prescription Act* made by the Law Commission in their draft *Prescription Bill* which is likely to affect the consumer-credit industry. The time periods after which the different types of debts prescribe remain largely the same in the draft *Prescription Bill*, except for the increased prescription period for unsecured credit from three to four years.<sup>133</sup>

Clause 14 of the draft *Prescription Bill* provides that the voluntary payment by a consumer of a prescribed debt does not revive prescribed debt under any circumstances. To protect the autonomy of a party who wants to clear his good name, clause 14 recognises the payment of prescribed debt as payment, but only if it was made voluntarily by the consumer without his being induced by the credit provider to do so. However, despite this, the clause stipulates that the payment will still not constitute the revival of the prescribed debt. The clause also allows the consumer to recover any payments made in the aforementioned circumstances and where it is established that the consumer was not indebted to the credit provider. This is contrary to the current situation, discussed above, where the *Prescription Act* allows for the revival of prescribed debt generally by a consumer's payment of such a debt and the consumer is prohibited from reclaiming the payment made on the prescribed debt.<sup>134</sup> Although section 126B of the NCA prohibits credit providers from reactivating or collecting prescribed debt arising from a credit agreement governed by the NCA, the voluntary activation of consumers is still permitted that would reactivate the prescribed debt, provided, of course, that the consumer was aware of the defence of prescription and chose not to invoke the defence.<sup>135</sup>

In alignment with the objective of section 126B of the NCA, clause 13(2) of the draft *Prescription Bill* provides that a person may not cede, transfer or recover a prescribed debt.

At present, prescription generally needs to be raised in pleadings as a defence,<sup>136</sup> except where the debt is regulated by section 126B of the NCA, where a slightly different situation prevails, as contemplated in section

---

<sup>133</sup> Clause 15(1)(d) of the draft *Prescription Bill*.

<sup>134</sup> Section 10(3) read with s 14(1) of the *Prescription Act*.

<sup>135</sup> See the discussion above in para 4 and the view of the minority in *Kaknis* expressed in paras 19 and 20 regarding the application of s 126B of the NCA.

<sup>136</sup> Section 17 of the *Prescription Act*.

126B(b)(ii) – when a consumer *would reasonably have raised the defence of prescription had the consumer been aware of such a defence*, in response to a demand, whether as part of legal proceedings or otherwise.<sup>137</sup> It seems as if a presiding officer has a discretion to consider prescription as a defence without its being specifically raised if "the consumer would reasonably have raised the defence of prescription had the consumer been aware of such a defence" (own emphasis added). The meaning of the aforementioned phrase is still uncertain and it remains to be seen what impact it is going to have on section 17 of the *Prescription Act*. The draft *Prescription Bill* will, however, clear up any uncertainty. The draft *Prescription Bill* apparently aims to change the need to specifically raise the defence of prescription and provides in clause 13(4) for a court during judicial proceedings to consider if a debt has prescribed. Clause 20(1) goes a step further and states that a court "must consider the question of prescription". A court therefore has to consider the question of prescription without a party's specifically raising it.

Clause 13(4) provides for specific additional orders a court may make where the debt has prescribed. It makes provision for the court to order:

- (a) the repayment of amounts recovered on prescribed debt;<sup>138</sup>
- (b) the payment of compensation for any loss or damage suffered pursuant to the recovery, including any loss or damage incurred:<sup>139</sup>
  - (i) through the use of force, intimidation, the making of fraudulent or misleading representations or the spreading of false information relating to the creditworthiness of an affected person;
  - (ii) through other conduct amounting to a contravention of a code of conduct that a person is obliged to comply with in terms of any law; or
  - (iii) because of any other impropriety or unlawful conduct.

Clause 13(4) together with clause 20 seems to imply that a court would have to take prescription into consideration when dealing with a debt governed by the draft *Prescription Bill*, irrespective of whether it was raised as a defence by the consumer. There would be a similar situation, for instance, where the court seemingly decides on its own during any court proceedings concerning a credit agreement falling within the scope of the NCA whether

---

<sup>137</sup> Also see the discussion in para 4 above on the uncertainty about the meaning of s 126B(1)(b)(ii) of the NCA.

<sup>138</sup> Clause 13(4)(a) of the draft *Prescription Bill*.

<sup>139</sup> Clause 13(4)(b) of the draft *Prescription Bill*.

the credit involved was granted recklessly<sup>140</sup> (or whether the statutory *in duplum* rule applies to the debt).<sup>141</sup>

The consumer bears the onus of proving that a debt that a credit provider is trying to recover has prescribed,<sup>142</sup> while the credit provider will bear the burden of proving that the prescription was interrupted (for example, by way of an acknowledgment of liability) or that the consumer waived or renounced his right of relying on prescription.<sup>143</sup> The draft *Prescription Bill* suggests an entire shift of this general burden of proof on a consumer. In terms of the draft *Prescription Bill* a consumer does not have to allege and prove prescription. In clause 20(1) it provides that a credit provider trying to recover a debt through legal proceedings bears the onus of proving that the debt has not prescribed and the credit provider must also deal with the question of prescription in his relevant document filed of record in the proceedings.

The draft *Prescription Bill* in clause 13(5) also makes it possible for a consumer affected by prescription to report the matter (for instance, the collection of prescribed debt) to the Regulatory Authority (for example, the National Credit Regulator) in terms of certain pieces of legislation such as the NCA. This clause merely correlates with the proposed sections in the pending *National Credit Amendment Act 7* of 2019, which provides that any contravention of section 126B would constitute an offence.<sup>144</sup>

At present either an express or tacit acknowledgment of debt (liability) interrupts the running of prescription.<sup>145</sup> This entails that the acknowledgment of debt does not have to be in writing. In this regard, a proposal has been made by way of clause 18 in the draft *Prescription Bill* which provides that interruption by the acknowledgment of debt must be unequivocal and in writing. This is in stark contrast to the current position, where allowance is made for acknowledgments also to be made orally or tacitly. Of course the challenge with an oral acknowledgment lies in its evidentiary proof.

## 7 A few observations and conclusions

The Law Reform Commission in their *Harmonisation of Existing Law* acknowledges that although prescription is rooted in a pre-constitutional era and its rules inherently limit other rights, it remains a rational and legitimate

---

<sup>140</sup> Section 83(1) of the NCA.

<sup>141</sup> Section 103(5) of the NCA; also see Kelly-Louw "Debt Relief and Insolvency" 162.

<sup>142</sup> Section 17(2) of the *Prescription Act*.

<sup>143</sup> Also see Saner *Prescription in South African Law* para 3.3.16.

<sup>144</sup> See the discussion in para 4 above.

<sup>145</sup> Section 14(1) of the *Prescription Act*.

instrument of legal engineering aimed at regulating the periods within which rights must be enforced in order to balance the interests of debtors, the public and creditors.<sup>146</sup> It has been indicated above that the prescription of debt that arises from a credit agreement governed by the NCA is jointly governed by the NCA and the *Prescription Act*. The NCA has recently been amended and a draft *Prescription Bill* has been published.

Section 126B of the NCA was introduced to curb the abusive practice that existed at the time, where credit providers and/or debt collectors were continuously selling or collecting prescribed debt and tricked consumers, who were unaware of the law regarding prescription, into making payments on their prescribed debts in order to reactivate these debts. Section 126B(1)(b) at first sight seems to make it impossible to collect or reactivate a prescribed debt that falls under the NCA. However, there are two qualifications to the prohibition in section 126B(1)(b): a person may not collect or reactivate a debt if the debt has prescribed in terms of the *Prescription Act*; and where the consumer in fact raises the defence of prescription or would reasonably have raised the defence had he been aware of the defence, in response to a demand or as part of legal proceedings. Section 126B(1)(b) therefore does not contain an absolute prohibition: it does not prohibit the acceptance of payment by the credit provider of a prescribed debt under section 10(3) of the *Prescription Act*, and if a consumer is aware of the defence of prescription but deliberately fails to invoke it under section 17 of the *Prescription Act*.

Currently prescription generally needs to be raised in pleadings as a defence,<sup>147</sup> except where the debt is regulated by section 126B of the NCA, where a slightly different situation prevails as contemplated in section 126B(b)(ii) – when a consumer *would reasonably have raised the defence of prescription had the consumer been aware of such a defence*, in response to a demand, whether as part of legal proceedings or otherwise.<sup>148</sup> In terms of section 126B(b)(ii) a presiding officer has a discretion to consider prescription as a defence without its being specifically raised if "the consumer would reasonably *have raised the defence of prescription had the consumer been aware of such a defence*" (own emphasis added). The meaning of the aforementioned phrase is still uncertain, so it remains to be seen what impact it is going to have on section 17 of the *Prescription Act*. The draft *Prescription Bill* will, however, clear up any uncertainty. The draft *Prescription Bill* aims to change the need to specifically raise the defence of prescription and provides in clause 13(4) for a court during judicial

---

<sup>146</sup> SALRC *Harmonisation of Existing Laws* xiii.

<sup>147</sup> Section 17 of the *Prescription Act*.

<sup>148</sup> Also see the discussion in para 4 above on the uncertainty about the meaning of s 126B(1)(b)(ii) of the NCA.

proceedings to consider if a debt has prescribed. Clause 20(1) goes a step further and states that a court "must consider the question of prescription". A court therefore has to consider the question of prescription without a party's specifically raising it.

In *Kaknis v Absa Bank Limited; Kaknis v Man Financial Services SA (Pty) Ltd* the Supreme Court of Appeal considered whether section 126B of the NCA applied retrospectively. The majority concluded that the section did not operate retrospectively, while the minority held that the principle against the retrospective operation of law was not absolute, particularly where the consequences of holding that an act was non-retrospective would lead to an "absurdity or practical injustice". The majority in *Kaknis* leaves the consumer-credit industry with two categories of contracts to which the NCA applies and different rules for each category in respect of its enforceability once the debt has prescribed: credit agreements concluded prior to section 126B's coming into operation would offer less protection to consumers than those entered into after section 126B. This therefore creates a difference between categories of consumers. Although the majority judgment regarding the retrospectivity of legislation may be correct, it is undesirable to have different rules for the same situation.

The protection offered by section 126B is to be welcomed. Regulation of the practices of the selling of prescribed debt and its collection or reactivation has been long overdue. Section 126B also offers much-needed protection to consumers, especially those being unaware of the prescription defence, and allows them to raise the defence at any time. This is in contrast to the *Prescription Act* that requires the consumer to be aware of prescription and to specifically raise it as a defence when faced with a demand for payment in order to gain the benefits of it. It may at this stage create uncertainty for credit providers where a consumer has already made a payment on a prescribed debt. However, more certainty will be brought about with the coming into operation of the draft *Prescription Bill*, which provides that a court should always consider prescription irrespective of whether or not it was raised as a defence by the consumer.

The criminalisation of the selling of prescribed debt under the NCA or the collection or attempted re-activation of prescribed debt under the NCA under the circumstances contemplated in section 126B(1) by the NCA is to be welcomed from the perspective of consumer protection. The draft *Prescription Bill* correlates with the criminalisation of contraventions of section 126B. Clause 13(5) of the draft *Prescription Bill* also makes it possible for a consumer affected by prescription to report the matter (for instance, the collection of prescribed debt) to the Regulatory Authority (for

example, the National Credit Regulator) in terms of certain pieces of legislation such as the NCA.

It is therefore clear from the above that while the NCA continues to regulate or prohibit certain behaviour in relation to prescribed debts, the *Prescription Act* still regulates prescription periods and prescription in general. An overlap of these pieces of legislation is likely to occur. The pending amendment of the NCA and the *Prescription Act* are at this stage well aligned, specifically on the criminalisation of certain behaviour. However, it remains to be seen what the impact of section 126B will be, and more specifically what the impact on the credit industry will be of the criminalisation of contraventions of section 126B.

## Bibliography

### Literature

Bradfield *Christie's Law of Contract*

Bradfield GB *Christie's Law of Contract in South Africa* 7<sup>th</sup> ed (LexisNexis Durban 2016)

Christie and Bradfield *Christie's Law of Contract*

Christie RH and GB Bradfield *Christie's The Law of Contract in South Africa* 6<sup>th</sup> ed (LexisNexis Durban 2011)

De Wet *Regseleerde Lesings*

De Wet JC *Opuscula Miscellanea: Regseleerde Lesings en Adviese van JC de Wet* (Butterworth Durban 1979)

Harms *Procedural Timetables*

Harms DR *Procedural Timetables and Prescription Periods* (LexisNexis Durban 2017)

Kelly-Louw "Debt Relief and Insolvency"

Kelly-Louw M "Debt Relief and Insolvency: Better Consumer Protection under the Statutory 'In Duplum' Rule" in Kelly-Louw M, Nehf J and Rott P (eds) *The Future of Consumer Credit Regulation: Creative Approaches to Emerging Problems* (Ashgate Aldershot 2008) 155-164

Koekemoer and Pretorius 2014 *Ann Surv SA L*

Koekemoer MM and Pretorius JT "Miscellaneous Contracts" 2014 *Ann Surv SA L* 1027-1079

Loubser *Extinctive Prescription*

Loubser MM *Extinctive Prescription* (Juta Claremont 1996)

Loubser "JC de Wet and the Theory of Extinctive Prescription"

Loubser MM "JC de Wet and the Theory of Extinctive Prescription" in Du Plessis J and Lubbe G (eds) *A Man of Principle – The Life and Legacy of JC de Wet / 'n Man van Beginsel – Die Lewe en Nalatenskap van JC de Wet* (Juta Claremont 2013) 397-428

Loubser 1988 *SALJ*

Loubser MM "Towards a Theory of Extinctive Prescription" 1988 *South African Law Journal* 34-53

Loubser 2016 *Stell LR*

Loubser MM "The Prescription Period Applicable to a Debt Secured by Notarial Bond" 2016 *Stell LR* 374-392

Otto 2015 *TSAR*

Otto JM "National Credit Act. Vanwaar Gehási? *Quo Vadit Lex?* And Some Reflections on the National Credit Amendment Act 2014 (Part 2)" 2015 *Tydskrif vir die Suid-Afrikaanse Reg* 756-773

SALRC *Harmonisation of Existing Laws*

South African Law Reform Commission *Revised Discussion Paper 147, Project 125: Harmonisation of Existing Laws Providing for Different Prescription Periods* (SALRC Pretoria 2017)

Saner "Prescription"

Saner JS "Prescription" in Joubert WA (ed) *The Law of South Africa* (Service Issue 28) (LexisNexis Durban 2019) vol 21

Saner *Prescription in South African Law*

Saner J *Prescription in South African Law* (Butterworths Durban 1996-) (loose-leaf)

Sonnekus 2017 *TSAR*

Sonnekus JC "Verjaring, Verjaringstermyne en Verbande – Hoogste Hof van Appèl Saai Verwarring" 2017 *Tydskrif vir die Suid-Afrikaanse Reg* 597-609

Sonnekus 2018 *TSAR*

Sonnekus JC "Respyte: Verknog aan die Persoon van die Primêre Skuldenaar of tóg met Deurwerking? Enkele Gedagtes oor die Voorgestelde Wysiging van die Nasionale Kredietwet en Skuldkwytskelding" 2018 *TSAR* 407-427



Van Heerden "Enforcement of Credit Agreements" (2016)  
Van Heerden CM "Enforcement of Credit Agreements" in Scholtz JW (ed) *Guide to the National Credit Act Service Issue 8* (Juta Claremont 2016) ch 12

Van Heerden "Enforcement of Credit Agreements" (2018)  
Van Heerden CM "Enforcement of Credit Agreements" in Scholtz JW (ed) *Guide to the National Credit Act Service Issue 10* (Juta Claremont 2018) ch 12

Van Heerden and Boraine 2015 *THRHR*  
Van Heerden CM and Boraine A "The Impact of Section 129(1)(a) of the National Credit Act on the Prescription of Credit Agreement Debt" 2015 *THRHR* 457-475

### **Case law**

*Agnew v Union and South West Africa Insurance Co Ltd* 1977 1 SA 617 (A)

*Arendsnes Sweefspoor CC v Botha* 2013 5 SA 399 (SCA)

*Balkind v Absa Bank Ltd* 2013 2 SA 486 (ECG)

*Benson v Walters* 1984 1 SA 73 (A)

*BKB Limited v Bezuidenhout* 2019 ZAECGHC 18 (5 March 2019)

*Factaprops 1052 CC v The Land and Agricultural Development Bank of South Africa* 2017 4 SA 495 (SCA)

*Food and Allied Workers' Union obo Gaoshubelwe v Pieman's Pantry (Pty) Limited* 2018 5 BCLR 527 (CC)

*Investec Bank Ltd v Ramurunzi* 2014 4 SA 394 (SCA)

*Jans v Nedcor Bank Ltd* 2003 6 SA 646 (SCA)

*Kaknis v Absa Bank Limited; Kaknis v Man Financial Services SA (Pty) Ltd* 2017 4 SA 17 (SCA)

*KLD Residential CC v Empire Earth Investments 17 (Pty) Ltd* 2017 3 All SA 739 (SCA)

*Kubyana v Standard Bank of SA Ltd* 2014 3 SA 56 (CC)

*Kuhne & Nagel AG Zurich v APA Distributors (Pty) Ltd* 1981 3 SA 536 (W)

*Minister of Police v Yekiso* 2019 2 SA 281 (WCC)

*Motokonya v Minister of Police* 2018 5 SA 22 (CC)

*Murray & Roberts Construction (Cape) (Pty) Ltd v Upington Municipality* 1984 1 SA 571 (A)

*Nkata v FirstRand Bank Limited* 2016 4 SA 257 (CC)

*Road Accident Fund v Mdeyide* 2011 2 SA 26 (CC)

*Robertson v Firstrand Bank t/a Wesbank* 2015 ZAECGHC 7 (24 February 2015)

*Sebola v Standard Bank of South Africa Ltd* 2012 5 SA 142 (CC)

*Sentrachem Limited v Terreblanche* 2017 ZASCA 16 (22 March 2017)

*Silhouette Investments Ltd v Virgin Hotels Group Ltd* 2009 4 SA 617 (SCA)

*Standard Bank of SA Ltd v Oneanate Investments (Pty) Ltd* 1995 4 SA 510 (C)

*Standard Bank of South Africa Ltd v Miracle Mile Investments 67 (Pty) Ltd* 2017 1 SA 185 (SCA)

## **Legislation**

*Constitution of the Republic of South Africa*, 1996

*Institution of Legal Proceedings against Certain Organs of State Act* 40 of 2002

*Magistrates' Court Act* 32 of 1944

*National Credit Act* 34 of 2005

*National Credit Amendment Act* 19 of 2014

*National Credit Amendment Act* 7 of 2019

*Prescription Act* 18 of 1943

*Prescription Act* 68 of 1969

*Security by Means of Movable Property Act* 57 of 1993

## Government publications

Proc R10 in GG 38557 of 13 March 2015

## Internet sources

Bracher 2017 <https://www.financialinstitutionslegalsnapshot.com/2017/02/section-126b1b-of-the-national-credit-act-is-not-retrospective>

Bracher P 2017 *Section 126B(1)(b) of the National Credit Act is not Retrospective*

<https://www.financialinstitutionslegalsnapshot.com/2017/02/section-126b1b-of-the-national-credit-act-is-not-retrospective> accessed 24 June 2019

Jansen van Rensburg 2015 <https://www.schoemanlaw.co.za/wp-content/uploads/2015/02/prescription-on-template.pdf>

Jansen van Rensburg A 2015 *Short Notes on: Prescription of Debt* <https://www.schoemanlaw.co.za/wp-content/uploads/2015/02/prescription-on-template.pdf> accessed 24 June 2019

Knowler 2018 <https://www.businesslive.co.za/bt/money/2018-02-24-prescribed-debt-a-confusing-and-contentious-issue/>

Knowler W 2018 "Prescribed Debt: A Confusing and Contentious Issue" *BusinessLive* (25 February 2018) <https://www.businesslive.co.za/bt/money/2018-02-24-prescribed-debt-a-confusing-and-contentious-issue/> accessed 24 June 2019

Muswere 2016 <https://www.fin24.com/Debt/News/everything-you-need-to-know-about-prescribed-debt-20160619>

Muswere M 2016 "Everything You Need to Know about Prescribed Debt" *Fin24* (19 June 2016) <https://www.fin24.com/Debt/News/everything-you-need-to-know-about-prescribed-debt-20160619> accessed 24 June 2019

## List of Abbreviations

Ann Surv SAL	Annual Survey of South African Law
NCAA	National Credit Amendment Act 7 of 2019
NCA	National Credit Act 34 of 2005
SALJ	South African Law Journal
SALRC	South African Law Reform Commission
Stell LR	Stellenbosch Law Review
THRHR	Tydskrif vir Hedendaagse Romeins-Hollandse Reg
TSAR	Tydskrif vir die Suid-Afrikaanse Reg