

## INSTITUTION OF LEGAL PROCEEDINGS AGAINST CERTAIN ORGANS OF STATE ACT NO. 40 OF 2002

[ASSENTED TO 24 NOVEMBER, 2002]  
[DATE OF COMMENCEMENT: 28 NOVEMBER, 2002]

*(English text signed by the President)*

This Act has been updated to *Government Gazette* 41018 dated 2 August, 2017.

### as amended by

National Ports Act, [No. 12 of 2005](#)  
[with effect from 26 November, 2006]

General Intelligence Laws Amendment Act, [No. 11 of 2013](#)  
[with effect from 29 July, 2013]

Judicial Matters Amendment Act, [No. 8 of 2017](#)  
[with effect from 2 August, 2017, unless otherwise indicated]

### ACT

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

**Preamble.**-RECOGNISING THAT certain provisions of existing laws provide for-

- \* different notice periods for the institution of legal proceedings against certain organs of state in respect of the recovery of debts;
- \* different periods of prescription in respect of such debts;

AND RECOGNISING THAT-

- \* the Prescription Act, 1969 ([Act No. 68 of 1969](#)), being the cornerstone of the laws regulating the extinction of debts by prescription, consolidated and amended the laws relating to prescription;
- \* some of the provisions of existing laws which provide for different periods of prescription in respect of certain debts are inconsistent with the periods of prescription prescribed by the Prescription Act, 1969;

AND BEARING IN MIND THAT-

- \* South Africa has moved from a parliamentary sovereign state to a democratic constitutional sovereign state;
- \* the Bill of Rights is the cornerstone of democracy in South Africa and that the State must respect, protect, promote and fulfil the rights in the Bill of Rights;
- \* [section 34](#) of [the Constitution](#) provides that everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum;
- \* the right of access to courts may be limited to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom as contemplated in [section 36](#) of [the Constitution](#);

AND RECOGNISING the need to harmonise and create uniformity in respect of the provisions of existing laws which provide for-

- \* different notice periods for the institution of legal proceedings against certain organs of state for the recovery of a debt, by substituting those notice periods with a uniform notice period which will apply in respect of the institution of legal proceedings against certain organs of state for the recovery of a debt;
- \* different periods of prescription, by making the provisions of Chapter III of the Prescription Act, 1969, applicable to all debts;

AND RECOGNISING the need to provide for transitional arrangements to ensure a smooth transition between the various existing statutory provisions regulating notice periods for the institution of legal proceedings against

certain organs of state in respect of the recovery of debts and the periods of prescription of such debts, and the provisions of this Act;

AND BEARING IN MIND the limited need, for legal or practical purposes, to retain certain provisions of existing laws which provide for-

- \* notice periods that differ from the envisaged uniform notice period;
- \* periods of prescription that differ from the periods of prescription prescribed by Chapter III of the Prescription Act, 1969,

#### ARRANGEMENT OF SECTIONS

- [1.](#) Definitions
- [2.](#) Prescription of debts, and amendment or repeal of laws and transitional arrangements relating to prescription of debts
- [3.](#) Notice of intended legal proceedings to be given to organ of state
- [4.](#) Service of notice
- [5.](#) Service of process
- [6.](#) Short title
- [Schedule](#) Laws amended or repealed by [section 2 \(1\)](#)

BE IT THEREFORE ENACTED by the Parliament of the Republic of South Africa, as follows:-

### **National Legislation/ Principal Acts and Regulations/ I/ Institution of Legal Proceedings against certain Organs of State Act, No. 40 of 2002/ The Act/ 1. Definitions.-(1) In this Act, unless the context indicates otherwise-**

#### **1. Definitions.-(1)** In this Act, unless the context indicates otherwise-

**"creditor"** means a person who intends to institute legal proceedings against an organ of state for the recovery of a debt or who has instituted such proceedings. and includes such person's tutor or curator if such person is a minor or mentally ill or under curatorship, as the case may be;

**"Constitution"** means [the Constitution](#) of the Republic of South Africa, 1996 ([Act No. 108 of 1996](#));

**"debt"** means any debt arising from any cause of action-

- (a) which arises from delictual, contractual or any other liability, including a cause of action which relates to or arises from any-
  - (i) act performed under or in terms of any law; or
  - (ii) omission to do anything which should have been done under or in terms of any law; and
- (b) for which an organ of state is liable for payment of damages,

whether such debt became due before or after the fixed date;

**"fixed date"** means the date of commencement of this Act;

**"national department"** means-

- (a) a department mentioned in the first column of [Schedule 1](#) to the Public Service Act, 1994 ([Proclamation No. 103 of 1994](#)), but excludes a provincial administration; or
- (b) an organisational component mentioned in the first column of Schedule 3 to that Act;

**"notice"** means a notice contemplated in [section 3 \(1\) \(a\)](#);

**"organ of state"** means-

- (a) any national or provincial department;
- (b) a municipality contemplated in [section 151](#) of [the Constitution](#);
- (c) any functionary or institution exercising a power or performing a function in terms of [the Constitution](#), or a provincial constitution referred to in [section 142](#) of [the Constitution](#);
- (d) the South African Maritime Safety Authority established by [section 2](#) of the South African Maritime Safety Authority Act, 1998 ([Act No. 5 of 1998](#));
- (e) The South African National Roads Agency Limited contemplated in [section 3](#) of The South African National Roads Agency Limited and National Roads Act, 1998 ([Act No. 7 of 1998](#));  
[[Para. \(e\)](#) amended by [s. 88 \(1\)](#) of [Act No. 12 of 2005](#) (English only).]

#### Wording of Sections

- (f) National Ports Authority Limited, contemplated in [section 4](#) of the National Ports Act, 2005, and any entity deemed to be the National Ports Authority in terms of [section 3](#) of that Act; [Para. (f) substituted by [s. 88 \(1\)](#) of [Act No. 12 of 2005](#) (English only).]

#### Wording of Sections

- (g) any person for whose debt an organ of state contemplated in [paragraphs \(a\)](#) to [\(f\)](#) is liable; [Para. (g) added by [s. 88 \(1\)](#) of [Act No. 12 of 2005](#) (English only).]

**"provincial department"** means-

- (a) a provincial administration mentioned in the first column of [Schedule 1](#) to the Public Service Act, 1994 ([Proclamation No. 103 of 1994](#)); or
- (b) a department within a provincial administration and mentioned in the first column of Schedule 2 to that Act.

(2) This Act does not apply to any debt-

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

(3) Any legal proceedings referred to in [subsection \(2\) \(b\)](#) must be continued and concluded as if this Act had not been passed.

(4) For purposes of this Act, legal proceedings are instituted by service of any process, excluding a notice, on an organ of state in which a creditor claims payment of a debt.

#### *Part 1*

**National Legislation/ Principal Acts and Regulations/ I/ Institution of Legal Proceedings against certain Organs of State Act, No. 40 of 2002/ The Act/ 2. Prescription of debts, and amendment or repeal of laws and transitional arrangements relating to prescription of debts.-(1) The laws referred to in the Schedule are, as from the fixed date, amended or repealed to the extent set out in the third column**

**2. Prescription of debts, and amendment or repeal of laws and transitional arrangements relating to prescription of debts.**-(1) The laws referred to in [the Schedule](#) are, as from the fixed date, amended or repealed to the extent set out in the third column of [the Schedule](#).

(2) Subject to [section 3](#) and [subsections \(3\)](#) and [\(4\)](#), a debt which became due-

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

will be extinguished by prescription as contemplated in [Chapter III](#) of the Prescription Act, 1969 ([Act No. 68 of 1969](#)), read with the provisions of that Act relating thereto.

(3) Subject to [subsection \(4\)](#), any period of prescription which was applicable to any debt referred to in [subsection \(2\) \(a\)](#), before the fixed date, will no longer be applicable to such debt after the fixed date.

(4) (a) The expired portion of any period of prescription applicable to a debt referred to in [subsection \(2\) \(a\)](#), must be deducted from the said period of prescription contemplated in Chapter III of the Prescription Act, 1969, read with the provisions of that Act relating thereto, and the balance of the period of prescription so arrived at will constitute the new unexpired portion of prescription for such debt, applicable as from the fixed date.

(b) If the unexpired portion of the period of prescription of a debt referred to in [paragraph \(a\)](#) will be completed within 12 months after the fixed date, that period of prescription must only be regarded as having been completed 12 months after the fixed date.

#### *Part 2*

**National Legislation/ Principal Acts and Regulations/ I/ Institution of Legal Proceedings against certain Organs of State Act, No. 40 of 2002/ The Act/ 3. Notice of intended legal proceedings to be given to organ of state.-(1) No legal proceedings for the recovery of a debt may be instituted against an organ of state unless-**

**3. Notice of intended legal proceedings to be given to organ of state.**-(1) No legal proceedings for the recovery of a debt may be instituted against an organ of state unless-

- (a) the creditor has given the organ of state in question notice in writing of his or her or its intention to institute the legal proceedings in question; or
  - (b) the organ of state in question has consented in writing to the institution of that legal proceedings-
    - (i) without such notice; or
    - (ii) upon receipt of a notice which does not comply with all the requirements set out in [subsection \(2\)](#).
- (2) A notice must-
- (a) within six months from the date on which the debt became due, be served on the organ of state in accordance with section 4 (1); and
  - (b) briefly set out-
    - (i) the facts giving rise to the debt; and
    - (ii) such particulars of such debt as are within the knowledge of the creditor.
- (3) For purposes of [subsection \(2\) \(a\)](#)-
- (a) a debt may not be regarded as being due until the creditor has knowledge of the identity of the organ of state and of the facts giving rise to the debt, but a creditor must be regarded as having acquired such knowledge as soon as he or she or it could have acquired it by exercising reasonable care, unless the organ of state wilfully prevented him or her or it from acquiring such knowledge; and
  - (b) a debt referred to in [section 2 \(2\) \(a\)](#), must be regarded as having become due on the fixed date.
- (4) (a) If an organ of state relies on a creditor's failure to serve a notice in terms of [subsection \(2\) \(a\)](#), the creditor may apply to a court having jurisdiction for condonation of such failure.
- (b) The court may grant an application referred to in [paragraph \(a\)](#) if it is satisfied that-
    - (i) the debt has not been extinguished by prescription;
    - (ii) good cause exists for the failure by the creditor; and
    - (iii) the organ of state was not unreasonably prejudiced by the failure.
  - (c) If an application is granted in terms of [paragraph \(b\)](#), the court may grant leave to institute the legal proceedings in question, on such conditions regarding notice to the organ of state as the court may deem appropriate.

**National Legislation/ Principal Acts and Regulations/ I/ Institution of Legal Proceedings against certain Organs of State Act, No. 40 of 2002/ The Act/ 4. Service of notice.-(1) A notice must be served on an organ of state by delivering it by hand or by sending it by certified mail or, subject to subsection (2), by sending it by electronic mail or by transmitting it by facsimile, in the case where the**

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

- (a) a national or provincial department mentioned in the first column of [Schedule 1, 2 or 3](#) to the Public Service Act, 1994 ([Proclamation No. 103 of 1994](#)), to the officer who is the incumbent of the post bearing the designation mentioned in the second column of the said Schedule 1, 2 or 3 opposite the name of the relevant national or provincial department: Provided that in the case of the Department of Police, the notice must be sent to the National Commissioner and the Provincial Commissioner of the province in which the cause of action arose, as defined in [section 1](#) of the South African Police Service Act, 1995;

[Para. (a) substituted by s. 32 of [Act No. 8 of 2017](#).]

Wording of Sections

- (b) a municipality, to the municipal manager appointed in terms of [section 82](#) of the Local Government: Municipal Structures Act, 1998 ([Act No. 117 of 1998](#));
- (c) a functionary or institution referred to in [paragraph \(c\)](#) of the definition of "organ of state", to the chairperson, head, chief executive officer, or equivalent officer, of that functionary or institution, or where such functionary is a natural person, to that natural person;
- (d) the South African Maritime Safety Authority, to the chief executive officer of that Authority appointed under [section 22](#) of the South African Maritime Safety Authority Act, 1998 ([Act No. 5 of 1998](#));
- (e) The South African National Roads Agency Limited, to the chief executive officer of that Agency appointed under [section 19](#) of The South African National Roads Agency Limited and National Roads Act, 1998 ([Act No. 7 of 1998](#)); or

(f) a person referred to in [paragraph \(f\)](#) of the definition of "organ of state", to that person.

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

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

**National Legislation/ Principal Acts and Regulations/ I/ Institution of Legal Proceedings against certain Organs of State Act, No. 40 of 2002/ The Act/ 5. Service of process.-(1) (a) Any process by which any legal proceedings contemplated in section 3(1) are instituted must be served in accordance with the provisions of section 2 of the State Liability Act, 1957 (Act No. 20 of 1957).**

**5. Service of process.-(1) (a)** Any process by which any legal proceedings contemplated in [section 3\(1\)](#) are instituted must be served in accordance with the provisions of [section 2](#) of the State Liability Act, 1957 ([Act No. 20 of 1957](#)).

(b) Despite [paragraph \(a\)](#), any process by which any legal proceedings contemplated in [section 3 \(1\)](#) are instituted and in which the-

- (i) Minister of State Security is the defendant or respondent, must be served on the Director-General: State Security Agency, at the head office of the department;
- (ii) Minister of Police is the defendant or respondent, must be served on-
  - (aa) the National Commissioner as defined in [section 1](#) of the South African Police Service Act, 1995 ([Act No. 68 of 1995](#)), at the head office of the department; and
  - (bb) the Provincial Commissioner as defined in [section 1](#) of the South African Police Service Act, 1995, of the province in which the cause of action arose;
- (iii) Minister of Correctional Services is the defendant or respondent, must be served on-
  - (aa) the Commissioner of Correctional Services as defined in [section 1](#) of the Correctional Services Act, 1998 ([Act No. 111 of 1998](#)), at the head office of the department; and
  - (bb) the Provincial Commissioner of Correctional Services as defined in [section 1](#) of the Correctional Services Act, 1998 ([Act No. 111 of 1998](#)), of the province in which the cause of action arose.  
[Sub-s. (1) amended by [s. 53](#) of [Act No. 11 of 2013](#) and substituted by [s. 33 \(a\)](#) of [Act No. 8 of 2017](#).]

#### Wording of Sections

(2) No process referred to in [subsection \(1\)](#) may be served as contemplated in that subsection before the expiry of a period of 60 days after the notice, where applicable, has been served on the organ of state in terms of [section 3 \(2\) \(a\)](#): Provided that if the organ of state repudiates in writing liability for the debt before the expiry of the said period, the creditor may at any time after such repudiation serve the process on the organ of state concerned.

[Sub-s. (2) substituted by [s. 33 \(a\)](#) of [Act No. 8 of 2017](#).]

#### Wording of Sections

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

(4) Any process by which legal proceedings contemplated in [section 3 \(1\)](#) are instituted must be issued by the court in whose area of jurisdiction the cause of action arose, unless the organ of state in writing consents to the institution of legal proceedings in a different jurisdiction.

[Sub-s. (4) added by [s. 33 \(b\)](#) of [Act No. 8 of 2017](#).]

**6. Short title.-**This is the Institution of Legal Proceedings against certain Organs of State Act, 2002.

**Schedule**  
LAWS AMENDED OR REPEALED BY [SECTION 2 \(1\)](#)

<i>No. and year of law</i>	<i>Short title</i>	<i>Extent of amendment or repeal</i>
<a href="#">Act No. 38 of 1927</a>	Black Administration Act, 1927	Repeals <a href="#">section 32A</a> .
<a href="#">Act No. 57 of 1951</a>	Merchant Shipping Act, 1951	1. Repeals <a href="#">section 343</a> . 2. Amends <a href="#">section 344</a> by deleting <a href="#">subsection (4)</a> .
<a href="#">Act No. 44 of 1957</a>	Defence Act, 1957	Repeals <a href="#">section 113</a> .
<a href="#">Act No. 94 of 1970</a>	Limitation of Legal Proceedings (Provincial and Local Authorities) Act, 1970	Repeals the whole.
Act No. 18 of 1973	Mental Health Act, 1973	Amends <a href="#">section 68</a> by deleting <a href="#">subsection (4)</a> .
<a href="#">Act No. 90 of 1979</a>	Education and Training Act, 1979	Repeals <a href="#">section 42A</a> .
<a href="#">Act No. 70 of 1988</a>	Education Affairs Act (House of Assembly), 1988	Repeals <a href="#">section 108</a> .
<a href="#">Act No. 122 of 1992</a>	Audit Arrangements Act, 1992	Repeals <a href="#">section 52</a> .
<a href="#">Act No. 38 of 1994</a>	Intelligence Services Act, 1994	Repeals <a href="#">section 26</a> .
<a href="#">Proclamation No. 103 of 1994</a>	Public Service Act, 1994	Repeals <a href="#">section 39</a> .
<a href="#">Act No. 68 of 1995</a>	South African Police Service Act, 1995	1. Repeals <a href="#">section 57</a> . 2. Amends <a href="#">section 641</a> as follows:- :-paragraph (a) substitutes <a href="#">subsection (1)</a> ; and paragraph (b) deletes <a href="#">subsection (2)</a> .
<a href="#">Act No. 7 of 1998</a>	The South African National Roads Agency Limited and National Roads Act, 1998	Amends <a href="#">section 59</a> as follows:-paragraph (a) deletes <a href="#">subsections (1) and (2)</a> ; and paragraph (b) substitutes <a href="#">subsection (3)</a> .
<a href="#">Act No. 111 of 1998</a>	Correctional Services Act, 1998	Repeals <a href="#">section 130</a> .
<a href="#">Act No. 32 of 2000</a>	Local Government: Municipal Systems Act, 2000	Amends <a href="#">section 109</a> by deleting <a href="#">subsection (1)</a> .

**INSTITUTION OF LEGAL PROCEEDINGS AGAINST CERTAIN ORGANS OF STATE ACT  
[NO. 40 OF 2002](#)**

(Prior to amendment by [Act No. 8 of 2017](#))

[Section 4 \(1\) \(a\)](#)

- (a) a national or provincial department mentioned in the first column of Schedule 1, 2 or 3 to the Public Service Act, 1994 ([Proclamation No. 103 of 1994](#)), to the officer who is the incumbent of the post bearing the designation mentioned in the second column of the said Schedule 1, 2 or 3 opposite the name of the relevant national or provincial department;

**National Legislation/ Principal Acts and Regulations/ I/ Institution of Legal Proceedings against certain Organs of State Act, No. 40 of 2002/ Wording of Sections/ (Prior to amendment by Act No. 8 of 2017)/ Section 5 (1)**

**Section 5 (1)**

(1) (a) Any process by which any legal proceedings contemplated in [section 3 \(1\)](#) are instituted must be served in the manner prescribed by the rules of the court in question for the service of process.

(b) Despite [paragraph \(a\)](#), any process by which any legal proceedings contemplated in [section 3 \(1\)](#) are instituted and in which the-

- (i) Minister of State Security is the defendant or respondent, may be served on the Director-General: State Security Agency;
- (ii) Minister for Safety and Security is the defendant or respondent, may be served on-
  - (aa) the National Commissioner of the South African Police Service as defined in [section 1](#) of the South African Police Service Act, 1995 ([Act No. 68 of 1995](#)); or
  - (bb) the Provincial Commissioner of the South African Police Service as defined in [section 1](#) of the South African Police Service Act, 1995, of the province in which the cause of action arose; or
- (iii) Minister of Correctional Services is the defendant or respondent, may be served on-
  - (aa) the Commissioner of Correctional Services as defined in [section 1](#) of the Correctional Services Act, 1998 ([Act No. 111 of 1998](#)); or
  - (bb) the Provincial Commissioner of Correctional Services as defined in [section 1](#) of the Correctional Services Act, 1998, of the province in which the cause of action arose.

**National Legislation/ Principal Acts and Regulations/ I/ Institution of Legal Proceedings against certain Organs of State Act, No. 40 of 2002/ Wording of Sections/ (Prior to amendment by Act No. 8 of 2017)/ Section 5 (2)**

**Section 5 (2)**

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

**National Legislation/ Principal Acts and Regulations/ I/ Institution of Legal Proceedings against certain Organs of State Act, No. 40 of 2002/ Wording of Sections/ (Prior to amendment by Act No. 11 of 2013)**

**(Prior to amendment by [Act No. 11 of 2013](#))**

**Section 5 (1) (b) (i)**

- (i) Minister for Intelligence is the defendant or respondent, may be served on the Director-General: National Intelligence Agency or the Director-General: South African Secret Service, as the case may be;

**National Legislation/ Principal Acts and Regulations/ I/ Institution of Legal Proceedings against certain Organs of State Act, No. 40 of 2002/ Wording of Sections/ (Prior to amendment by Act No. 11 of 2013)/ Section 5 (1) (b) (i)**

**(Prior to amendment by [Act No. 11 of 2013](#))**

**Section 5 (1) (b) (i)**

- 
- (i) Minister for Intelligence is the defendant or respondent, may be served on the Director-General: National Intelligence Agency or the Director-General: South African Secret Service, as the case may be;