1.1 GENERAL CONCEPT OF EXTINCTIVE PRESCRIPTION

Extinctive prescription in general concerns the effects of the passage of time on the rights and duties of the parties to an obligation. The term 'obligation' ('verbintenis') is used to denote the legal bond between parties produced by contract, delict, unjust enrichment, statute or other source. An obligation imports correlative rights and duties, and the term 'debt' ('skuld') describes the duty side of an obligation, that is, the duty of the debtor to do something (pay, deliver or perform a service) or to refrain from doing something. The right of the creditor to such positive or negative performance (vorderingreg) is the asset side of the obligation.¹ Where there are mutual rights and duties, each party to the obligation will obviously be both creditor and debtor.

In terms of the 1943 Prescription Act² a 'right' is 'rendered unenforceable' by the lapse of time,³ whereas the 1969 Prescription Act⁴ provides that a 'debt' is 'extinguished' after the lapse of a prescribed period of time.⁵ The term 'right' is not defined in the 1943 Act, and the wording of the Act in any event casts doubt on whether it is a 'right'⁶ or 'action'⁷ or 'contract'⁸ which is subject to prescription.⁹ However, the term 'right' as used in the Act seems to

¹ Oort en ander NNO v Direkteur van Plaaslike Bestuur en ander 1983 (1) SA 354 (A) at 370A–C; and see also Erasmus v Groenwag en 'n ander 1978 (4) SA 233 (A) at 245D–E; Electricity Supply Commission v Stewart and Lloyds of SA (Pty) Ltd 1981 (5) SA 340 (A) at 344E–F; Joint Liquidators of Glen Anil Development Corporation Ltd (in liquidation) v Hill Samuel (SA) Ltd 1982 (1) SA 103 (A) at 110A–F; De Wet en Year's Kontrakreg en Handelreg 4 ed (1978) by J C de Wet & A H van Wyk (cited below as De Wet & Year's) 2; David M Walker The Law of Prescription and Limitation of Actions in Scotland 3 ed (1981) 45, pointing out that the term 'obligation' is sometimes also used as a synonym for 'duty', in referring to the aspects of the legal relationship which entails that a party is obliged, or bound, or under a duty, to do or pay.
² Act 18 of 1943.
³ Section 3(1).
⁴ Act 68 of 1969.
⁵ Section 10(1) of Act 68 of 1969.
⁶ Section 3(1) of Act 18 of 1943.
⁷ Section 3(2)(b), s 3(2)(c) (vi)–(viii) and s 3(2)(c)(iii) of Act 18 of 1943.
⁸ Section 3(2)(c)(i)–(v), s 3(2)(d) and s 3(2)(e)(i) of Act 18 of 1943.
⁹ See J C de Wet Opuscula Miscellanea (1979) 110–11 (cited below as De Wet Opuscula Miscellanea).
denote the asset side of an obligation, as described above. The term ‘debt’ is also not defined in the 1969 Act, but according to judicial interpretation denotes the duty side of an obligation. However, beyond the difference in terminology regarding the side or aspect of the obligation referred to, the two Acts also purport to embody different concepts of extinctive prescription: initially ‘weak’ prescription in the 1943 Act, affecting merely the possibility of procedurally enforcing a right; and ‘strong’ prescription in the 1969 Act, extinguishing a debt.

Apart from these two different concepts of extinctive prescription, which will be further examined below, there are also a large number of other statutory provisions prescribing time limits for the institution of action against the state, statutory bodies and local government institutions. These limitation or expiry periods (vervaltermyny) have often been described as embodying a distinct form of extinctive prescription, in that they do not affect substantive rights at all, but merely bar a remedy; and as such do not form part of substantive law but of the law of procedure. This distinction between prescription, on the one hand, and limitation or expiry, on the other, is also made in other civil-law jurisdictions, and the basis of the distinction will be further examined below.

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10 The cases dealing with s 3 of the 1943 Act are not concerned with the question whether a particular right is in principle subject to prescription in terms of the Act, but with the category in which the source of the right fits, in order to determine the applicable prescription period: cf Swaapveld v Bloemfontein Town Council 1930 (3) SA 536 (O); De Szabo v Swart NO 1951 (3) SA 378 (T); National Housing and Planning Commission v Van Niekerken 1962 (4) SA 322 (T); Vryburg School Board v Cloete 1955 (3) SA 355 (A); Estate Broot v Pretoria Urban Areas Health Board 1955 (3) SA 534 (T); Glazev v J & another 1956 (2) SA 457 (T); Greeff v Prins 1959 (2) SA 182 (C); Lichtenburg Garages (Pty) Ltd v Vermaak 1962 (1) SA 127 (T); Mohamed v Yssel & others 1963 (1) SA 866 (D); Lombard v Dregola Sugar Milling Co Ltd 1963 (4) SA 119 (D); Montese Township and Investment Corporation (Pty) Ltd & another v Govus NO & another 1965 (4) SA 373 (A).

11 Cf the authorities cited in note 1 above, and cf also Erins v Shield Insurance Co Ltd 1979 (3) SA 1136 (W) at 1141F–G. 'The word “debt” in the Prescription Act must be given a wide and general meaning denoting not only a debt sounding in money which is due, but also, for example, a debt for the vindication of property. While this is so “debt” cannot embrace all rights between two persons. In my view, “debt” in ss 10 and 15(1) of the Prescription Act means an obligation or obligations flowing from a particular right.

12 Section 3(1); De Wet Opzondere Miscellanea 108; De Wet & Years 256.

13 Section 10(1); De Wet & Years 257; and cf in general F C von Savigny System des heutigen römischen Rechts (1941) vol 5 § 248 pp 366–84.

14 For a list of such provisions, see H Lane 'Statutory Limitations — The Enforcement of Civil Claims' 1982 De Rebus 67–8.

15 Cf African Banking Corporation v Owen (1897) 4 Off Rep 253; Curtis v Johannesburg Municipality 1906 TS 208 at 311–12; Langemann v Van Heekelen 1916 TPD 123 at 125; Swaapveld v Van der Wathuesen 1930 TPD 806 at 808; President Insurance Co Ltd v Yu Kwam 1963 (3) SA 766 (A) at 778E–779A; Lubuschagne v Lubuschagne; Lubuschagne v Minister van Justitie 1967 (2) SA 575 (A) at 588D–E; Slabbert v Federal Employers’ Insurance Co Ltd 1979 (3) SA 207 (T) at 209E–H; Mentjes NO v Administratieraad van Sonstraal-Tempsaal 1980 (1) SA 283 (T) at 293C–F; Hartman v Minister van Poste 1981 (2) SA 149 (O) at 152A–D; 1983 (2) SA 499 (A) at 500C–D; Kohne & Nagel AG Zurich v APA Distributors (Pty) Ltd 1981 (3) SA 536 (W) at 537–8; De Wet & Years 275.

16 Cf S van Brakel Leerboek van het Nederlandse Verhoudingsrecht (1934); Evert Theil (1980) 226 W F Lichtenauer De verminderende verjaring en aanzienlijke rechtsgunst, beschouwd naar wezen, begrenzing en onderlinge verhouding (1932) 45–50; Karl Spiero Die Begrenzung
Whatever the form it takes, extincive prescription in general terms negates a creditor’s ability to force a debtor to comply with duties under an obligation, and it must now be examined how and why extincive prescription has this effect.

1.2 THEORIES REGARDING THE NATURE AND EFFECT OF EXTINCITIVE PRESCRIPTION

1.2.1 Introduction

From one point of view, extincive prescription simply concerns questions of fact—whether a particular period of time, prescribed by statute in respect of a particular obligation, has passed, and whether other conditions prescribed by statute for reliance on prescription have been met. If so, and if the debtor chooses to rely on it, prescription takes effect.

In the long-ranging debate on the theoretical nature and effect of extincive prescription the tendency has been to attempt to fit extincive prescription into some established legal niche, in order to explain what it is and why it has the effect it does.

Thus one of the theories likens extincive prescription to a form of waiver or estoppel, by emphasizing the debtor’s reasonable reliance on the apparent abandoning of rights evidenced by the creditor’s failure to enforce his rights within a period of time. Other theories are that extincive prescription creates an irrebuttable legal presumption of compliance; that extincive prescription is a merely procedural denial of action; and that extincive prescription confers upon the debtor a positive substantive right or defence, with a correlative negative effect on the creditor’s right. These theories are interrelated and involve recurrent questions as to the policy and justification of extincive prescription.

privater Rechte durch Verjährungs-, Verwirkungs- und Fetalfristen (1975) Bd I 593–5; H K Köster ‘Naar een betere afbakening tussen vervaltermijnen en termijnen van bevrijdende verjaring’ 91 Weekblad voor Privaatrecht, Notaris-ambt en Registratie 546–5; O Rutz ‘Die Wesensverschiedenheit von Verjährung und gesetzlicher Befristung’ 101 Archiv für die civilistische Praxis 435; C Asser’s Handeling tot de beoefening van het Nederlands Burgerlijk Recht: Verhoudingsrente Deel I 7 ed (1984) by A S Hartkamp 546. The civil-law-based system embodied in the Louisiana Civil Code provides for both liberative prescription and a form of limitation known as peremption; and liberative prescription has often been held to have the effect of merely barring a remedy, whereas peremption has the effect of extinguishing a right not exercised within the period of time fixed by statute for its existence; cf James F Shoey ‘Legal Rights and the Passage of Time’ (1981) 41 Louisiana LR 220 at 224, 229; M S Neufeld ‘Prescription and Peremption—The 1982 Revision of the Louisiana Civil Code’ (1983) 58 Tulane LR 593 at 595–6, 602.

The common-law jurisdictions’ limitations of actions is consistently regarded as a procedural institution having the effect of barring a remedy; cf Walker op cit note 1 at 3; Preston & Newsom on Limitation of Actions 3 ed (1953) by G H Newsom & L Abel-Smith 3,13; W W Chitaley & V B Bakhale The Limitation Act (xxxi of 1963) (India) 5 ed (1976) 47; Halsey’s Laws of England 4 ed (1979) XXVIII paras 646.

Asser–Rutten op cit note 16 at 462–3, where it is stated that reasons for and effects of extincive prescription cannot be regarded as constitutive elements of it, and that the primary meaning of extincive prescription is that of a particular period of time (‘een zeker tijdsoverloop’); cf also Asser–Hartkamp op cit note 16 at 521.

17 Cf De Wet Opuscula Miscellanea 103.
1.2.2 Extinctive prescription as a protection of reasonable reliance

One view of extinctive prescription is that it is founded upon the reasonable reliance by a debtor on what he perceives to be a particular state of affairs, akin to the doctrine of estoppel by representation.\textsuperscript{19} The law gives effect to the debtor’s reliance that the creditor no longer intends to enforce his right. This apparent or probable legal state of affairs then in fact becomes law.\textsuperscript{20}

According to this view, the justification of extinctive prescription lies in the need to protect a debtor reasonably relying on an appearance or probability which the creditor created by voluntary inaction.\textsuperscript{21} Where the inaction of the creditor is the result of some legal or physical disability, it is not justified to prejudice his position, and prescription is suspended.\textsuperscript{22} In this manner, it is argued, the institution of extinctive prescription serves to protect reasonable expectations and accords with practical legal considerations, the need for legal certainty and common consent.\textsuperscript{23}

However, this does not quite satisfactorily explain why a debtor who purposely refrains from paying his debt, or who is unaware of any prescription period, or who does not prejudice his own position by assuming that the creditor will no longer act against him, should be protected; nor why a debtor who has in fact paid, but prefers to rely on prescription rather than proving payment, should be able to do so.

In any event, the precept that a debtor who reasonably expects that the creditor no longer intends to enforce his right should be protected is a statement of legal policy and does not explain in legal technical terms how extinctive prescription negatives the creditor’s ability to enforce his right. In this regard the proponents of the theory of reliance incline towards the view that the debtor acquires a positive right not to be disturbed by further action on the part of the creditor,\textsuperscript{24} or that there is in effect a notional transfer of rights from creditor to debtor.\textsuperscript{25} This construction will be examined below.\textsuperscript{26}

To conclude: the notion that extinctive prescription serves to protect a debtor’s reasonable expectation that the creditor no longer

\textsuperscript{19} Cf in general H. Naendrup ‘Die Verjährung als Rechtsseinswirkung’ (1926) 75 Jahrbücher für die Dogmatik des Bürgerlichen Rechts 237.
\textsuperscript{20} Naendrup op cit note 19 at 246; and cf also G. Kegel ‘Verwirkung, Vertrag und Vertrauen’ Festschrift für Klemens Pleyer (1986) 513 at 526.
\textsuperscript{21} Naendrup op cit note 19 at 272 and 278: ‘Solcher Schutz des Vertrauens auf das Schein zu lasten dessen, der den Schein mit einem Willen hat entstehen lassen, ist ein Axiom der Gerechtigkeit und bedarf darum eigentlich keiner weiteren Erklärung.’
\textsuperscript{22} Naendrup op cit note 19 at 278.
\textsuperscript{23} Naendrup op cit note 19 at 279 (Verkehrserfolg, Verkehrssicherheit, Gemeinwohl).
\textsuperscript{24} Naendrup op cit note 19 at 273 (Nichtbeherrschungsrecht).
\textsuperscript{25} Naendrup note 19 at 273–5; Kegel op cit note 20 at 526: ‘Wie Verjährung und Ersatzung beruht die verwirkung zu einem erheblichen Teil darauf, dass die Rechtsordnung den wahrseinslichen übergang eines Rechts von einer auf den anderen zugunsten des (’vertrauenden’) Erwerbers zu einem sicheren macht: den übergang des Eigentums bei der Ersatzung, den übergang des Anspruchs bei Verjährung (vorbehaltlich Naturalobligation) und Verwirkung.’
\textsuperscript{26} 1.2.4.
intends to enforce his right is not quite satisfactory as a statement of legal policy, and fails to define the technical nature of extinctive prescription and its effect on the obligation concerned.

1.2.3 Extinctive prescription as irrebuttable presumption of law

Extinctive prescription has often been described as the source of an irrebuttable presumption of law. It is said that the right of a creditor at the expiry of the prescription period is irrebuttable presumed to have been abandoned, or to have been extinguished through having been complied with.\(^\text{27}\) This theory clearly implies that the right may in fact not have been abandoned or extinguished; it is merely legally presumed to have been. The opposite obviously also applies; if performance by the debtor has taken place and the obligation has thus been extinguished before the prescription period expired, the presumption would nevertheless apply. Therefore extinctive prescription, according to this theory, does not actually extinguish an obligation, but merely creates an irrebuttable presumption to this effect.\(^\text{28}\)

The operation of such an irrebuttable presumption would necessarily be conditional and subject to provisions regarding the suspension of the prescription period, interruption of the prescription period, and the manner in which the prescription is to be applied by the courts (that is, only if invoked by the debtor).

Apart from the fact that the concept of an irrebuttable presumption of law is a contradiction in terms, a legal fiction, and a contrived way of describing a rule of substantive law,\(^\text{29}\) it is also questionable to what extent this theory of extinctive prescription takes account of the sometimes 'weak' effect of extinctive prescription where the obligation is taken to subsist,\(^\text{30}\) or of the notion that after 'strong' prescription has taken effect the extinguished obligation is still capable of being complied with.\(^\text{31}\)

To be accurate, the content of the irrebuttable presumption in cases of prescription with a 'weak' effect would have to be that a mere right of action is irrebuttable presumed to have been abandoned or extinguished. In cases of prescription with a 'strong' effect, the

\(^{27}\) Cf Von Savigny op cit note 13 at § 248 pp 268–9. Cf Walker op cit note 1 at 1: 'Prescription is a legal presumption of abandonment or of satisfaction, and so extinguishes the debt'; and at 4: 'Non-enforcement by a creditor of a contractual right for the prescriptive period infers an irrebuttable presumption that the right has been abandoned, and therefore that the correlative obligation has been extinguished ...'; Lichtenauer op cit note 16 at 33–6 and in particular the definition at 36: '... het (meestal onweerlegbaar) wettelijk vermoeden van ondergang van het betrokken recht op grond van het niets plaats vinden gedurende een bepaald tijdsverloop van de gebeurtenissen, waarvan het voorkomen in dat tijdsvak als voorwaarde is gesteld voor het aannemen van het langer voortbestaan van dat recht'; and cf also Asser–Rutten op cit note 16 at 462; Naendrup op cit note 19 at 241; Chisale & Bachale op cit note 16 at 47–8.

\(^{28}\) Cf Lichtenauer op cit note 16 at 33–4.


\(^{30}\) See note 11 above.

\(^{31}\) See De Wet Opzuidla Miscellanea 109; De Wet & Yeats 257–8; L E Krause 'The History and Nature of Acquisitive Prescription and of Limitation of Actions in Roman–Dutch Law' (1925) 40 SALJ 26 at 28–9.
notion that a substantive right is irrebuttable presumed to have been completely abandoned or extinguished would have to be qualified by a further presumption that such an abandoned or extinguished right is still irrebuttable presumed to be capable of being complied with. Unless such intricate qualifications are made, the notion of extinctive prescription as an irrebuttable presumption of law is an inaccurate oversimplification.

To conclude: the notion of extinctive prescription as an irrebuttable presumption of law, based on the factual premiss that a creditor who has neglected to enforce his right for a prescribed period of time can fairly be assumed to have abandoned such a right completely, or the premiss that the debtor can be taken to have complied, fails to distinguish between the ‘weak’ and ‘strong’ effects of extinctive prescription, and to accommodate the principle that payment of a debt after it has been ‘extinguished’ by prescription is nevertheless to be regarded as payment of that debt, Section 10(3) of Act 68 of 1969. and therefore does not define the legal nature and effect of extinctive prescription accurately.

1.2.4 Extinctive prescription as a procedural denial of action

A construction of extinctive prescription that coincides with the concept of limitation of actions in common-law jurisdictions ascribes to extinctive prescription the effect of a mere denial of action. Upon expiry of the prescription period a particular obligation is no longer actionable, but the obligation itself still subsists. Thus extinctive prescription has a procedural effect only; it neither establishes nor extinguishes an obligation or cause of action. This is also the nature and effect ascribed to what are known as expiry or limitation periods (vervaltermyne) in South African law.

This construction raises the question of a criterion of distinction between substantive private law and the law of procedure. The consensus in this regard is that there is no absolute divide between the two branches of the law and no clear criterion of distinction or basis of classification. However, broadly defined, substantive private law

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32 Section 10(3) of Act 68 of 1969.
33 Walker op cit note 1 at 3; Asser-Rutten op cit note 16 at 465 (explaining but not supporting this construction); Krause op cit note 31 at 28-9 ('Extinctive Prescription, or Limitation, only deprives the plaintiff of his right of action—he cannot sue to enforce his antecedent or substantive rights which have been infringed. But this substantive right is not destroyed. It remains as a natural right—naturalis obligatio'); Van Brakel op cit note 16 at 249 (explaining but not supporting this view, and stating that if this construction is correct, extinctive prescription is an institution of the law of procedure rather than of substantive private law); Chitaley & Bakhale op cit note 16 at 47 ('The law of limitation is the procedural equivalent of the prescription of rights of property and it, in fact, a kind of imperfect prescription in that it destroys, not the principal substantive right itself, but the accessory right of action only'); Preston & Newsom op cit note 16 at 2–3; Halsbury’s Laws of England op cit note 16 para 646; David Jackson ‘The Legal Effects of the Passing of Time’ (1960–70) 7 Melbourne Law Rev 407 at 425; Shuey op cit note 16 at 228; Neufeld op cit note 16 at 596.
34 Cf note 14 above.
is concerned with the content of rights and duties, whereas the law of procedure is concerned with the means by or manner in which such rights and duties are protected or enforced by legal process. The characterization of extinguitive prescription, whether as part of the substantive law or the law of procedure, is of practical importance regarding questions of conflict of laws, and the retrospective effect of statutes dealing with extinguitive prescription.\textsuperscript{36}

For purposes of characterizing extinguive prescription it is first necessary to examine the question whether the notion of a procedural denial of action without substantive effect is at all compatible with the modern South African law of obligations, which is a system of rights or norms rather than of remedies.\textsuperscript{37} The term ‘action’ merely describes one of the legal processes whereby a substantive right can be enforced.\textsuperscript{38} The term ‘cause of action’ or ‘right of action’ is descriptive not of a procedural right but of a substantive right capable of being protected or enforced by legal process (that is, by action or application).\textsuperscript{39} Conceptually there is no separate ‘right of process’, they must do; they have no choice—their legal rights and duties are defined for them. Much procedural law, however, is provided for people to use if they choose. If, for example, they wish to enforce their rights in a court of law, then and only then must they follow certain prescribed procedures. Implicit in the foregoing general difference between substantive and procedural law is a difference in the substantive law defines legal relations between citizens and between state and citizen. Procedural law specifies the way in which substantive law is to be made, administered and enforced . . . .”; R M Cover & O M Fiss, The Structure of Procedure (1979) 47; John Hart Ely, ‘The Irrepressible Myth of Erie’ (1974) 87 Harvard LR 693 at 724–7 (the writer refers to the ‘fluidity of the line between substance and procedure’ and defines a procedural rule as ‘one designed to make the process of litigation a fair and efficient mechanism for the resolution of disputes’ (at 724) and a substantive rule as ‘a right granted for one or more nonprocedural reasons, for some purpose or purposes not having to do with the fairness or efficiency of the litigation process’ (at 725)).

\textsuperscript{36} Cf Cover & Fiss op cit note 35; Ely op cit note 35; C F Forsyth, ‘Extinctive Prescription and the Lex Fori: A New Direction?’ (1982) 99 SALJ 16; Jackson op cit note 33 at 426–8.

\textsuperscript{37} Cf Van Driel op cit note 16 at 256: ‘En dan is, naar ik meen, duidelijk, dat de scheiding van “recht” en “actie” . . . . met ons tegenwoordig rechtssysteem en de daarmee ten grondslag liggende denkwijze in strijd is . . . . Anders dan in het Rome. Recht wordt tegenwoordig niet een actie, een rechtsoordening, toegerekend, uit welks aard en inhoud dan blijken moet, welke norm eigenlijk haar uitgangspunt was, doch wij handelen juist andersom. Bij ons is het uitspreken van de norm, juist den weegwets taak; door die te vervullen kent hij, zonder het mzwit te spreken, aan het rechtssubject tevens een “actie” toe. Ons procesrecht kan dan ook tot erkenning en handhaven van de meest uiterstloopse, subjektieve rechten dienen, zonder de verschillende rechten waarvan hun “actie” vir te deelen.’ Cf also A Pitlo, Het Nederlands Burgerlijk Wetboek Deel 4: Bewijs en Verzorging 6 ed (1981) by T R Hidma 329, where it is recognized that right and remedy are usually inseparable, but argued that there is an exception in respect of prescription, which causes the remedy to lapse while the right subsists.

\textsuperscript{38} Cf the definition of ‘action’ in the Prescription Act 18 of 1943 as ‘legal proceedings . . . . for the enforcement of a right’; and the definition of ‘action’ in the Rules of Court as ‘a proceeding commenced by summons or by writ . . . .’ (C J M Nathan & M Barnett, Uniform Rules of Court 3 ed (1984) 6).

\textsuperscript{39} Cf Ewino v Shield Insurance Co Ltd 1980 (2) SA 814 (A) at 825F–G, per Trollip JA: ‘I prefer to use the term “right of action” to “cause of action” because, I think, the former is strictly and technically more legally correct in the present context. . . . “Cause of action” is ordinarily used to describe the factual basis, the set of material facts, that begets the plaintiff’s legal right of action and, complementarily, the defendant’s “debit”; the word used in the Prescription Act; and at 838H–89A, per Corbett JA: In the case of an Aquilian action for damages for bodily injury . . . . the basic ingredients of the plaintiff’s cause of action are (a) a wrongful act by the defendant causing bodily injury, (b) accompanied by fault, in the sense of culpa or dolus, on the part of the defendant, and (c) damages. . . . The material facts which must be proved in order to enable the plaintiff to sue (or facta probanda) would relate to these three basic ingredients and upon the concurrence of these facts the cause of action arises’; and cf also McKenzie v Farmer’s Co-operative
divorced from the substantive right which the process is about, and consequently there can be no denial of a ‘right of action’ which leaves the underlying substantive ‘cause of action’ intact. In short, denial of the ability to enforce a substantive right by legal process is essentially a matter of substantive law, because the ability to enforce a substantive right by legal process is an integral part of such a right.

It is further possible to characterize extinctive prescription as part of the substantive law by applying the broadly defined criterion of distinction set out above. Extinctive prescription determines whether a substantive right can effectively be enforced, rather than how it must be enforced, and therefore concerns the content of a right rather than the means or manner of its enforcement. 40 That is not to say that extinctive prescription exclusively concerns matters of substantive law. It can clearly serve procedural purposes as well, for example to prevent actions being brought long after the relevant event, so that cases will not be tried on evidence so stale as to cast a doubt on its trustworthiness. 41 However, this is a procedural policy consideration rather than an illustration of the procedural nature or effect of extinctive prescription. If a statute providing for an extinctive prescription period also requires that formal notice be given before an action is instituted, 42 the notice requirement clearly concerns the means or manner of setting about to enforce a substantive right, rather than the content of the right, and thus introduces a procedural element into the extinctive prescription provision. In some cases procedure and substance may be so interwoven that rational separation is hardly possible. 43 Nevertheless, if classification is a practical necessity, and if an extinctive prescription provision as a whole predominantly concerns competence rather than means of enforcing a substantive right by legal process, its nature and effect is predominantly substantive. 44

Meat Industries Ltd v SA Railways and Harbours 1933 CPD 626 at 637; Coetzee v SA Railways and Harbours 1933 CPD 565 at 570–1; Green v Coetzee 1958 (2) SA 697 (W) at 700B–701D; Nowouitz v Vereeniging Town Council 1966 (3) SA 317 (A) at 330A–E; Schnellen v Randal Assurance Corporation of SA Ltd 1969 (1) SA 517 (W) at 521A–E; Mazibuko v Singer 1979 (3) SA 258 (W) at 265D–G; Kuhne & Nagel AG Zurich v APA Distributors (Pty) Ltd 1981 (3) SA 536 (W) at 538E–F.

40 Cf Ely op cit note 35 at 730–1; and cf Kuhne & Nagel AG Zurich v APA Distributors (Pty) Ltd 1981 (3) SA 536 (W) at 538F–G: ‘The extinction (or creation) of a right by prescription is a matter of substantive law.

41 Cf Ely op cit note 35 at 726.

42 For example s 32 of the Police Act 7 of 1958, and cf Ely op cit note 35 at 731.

43 Cf Ely op cit note 35 at 727.

44 Despite the historically greater emphasis on remedies and procedure in common-law jurisdictions, it is forcefully argued by Jackson op cit note 33 at 423–8 that the limitation process, said to have a merely procedural effect of barring a remedy and thus rendering a right unenforceable, is essentially substantive. An effectively unenforceable right is different in content from an enforceable right. The unconditional ability to enforce is replaced with a conditional ability to retain payment or other performance once acquired from the debtor. The creditor’s right in effect becomes dependent on the debtor’s act of compliance. To say that the right remains unchanged and only the remedy is barred, is to deny the materially different character of the right after prescription. The removal of the active ability to enforce affects the content or value of that right. This means that the effect of such removal is substantive.
To conclude: the notion that extincive prescription merely affects a right of action in the procedural sense cannot be supported, because the right to enforce by legal process is an integral part of a substantive right; and because the effects of extincive prescription are in any event, in terms of necessarily broadly defined criteria, of a substantive rather than a procedural nature.

1.2.5 Extinctive prescription as conferring a substantive right on the debtor

Another widely held view of extincive prescription is that it essentially involves the acquisition of a substantive right or defence by the debtor, which may be enforced with a correlative negative effect on the right of the creditor. Those who support the theory of extincive prescription as the protection of the debtor’s reasonable reliance or expectation also hold that the effect of such protection is to confer a right or defence upon the debtor.45 There is a divergence of views, however, as to the actual effect of such a right or defence on the obligation in question.

One construction is that extincive prescription renders an obligation voidable at the option of the debtor. He acquires the substantive right to avoid the obligation, analogous to the effect produced by misrepresentation or malperformance in respect of a contractual obligation. The obligation is not avoided by operation of law, but may be avoided by the debtor’s exercising his right to rely on prescription.46 The logical difficulty encountered with this construction, however, is that extincive prescription may also be relied upon where an obligation has already been extinguished by proper performance. Instead of proving performance, the erstwhile debtor may simply rely on prescription, and the effect of prescription in such a case cannot be to avoid an obligation that has already been discharged.

Another construction, adhered to in German and Swiss law, is that extincive prescription confers upon the debtor a defence in the form of a substantive right to refuse performance (‘Leistungsverweigerungsrecht’).47 This right can be raised as a defence to an action by the

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45 Cf 1.2.2 above.
46 Cf Asser–Rutten op cit note 16 at 466–7, and in particular at 467: ‘Het tenietgaan van verbonenisse tengevolge van verjasing kan worden vergeleken met de ontbinding van overeenkomsten op grond van wanprestatie en met de vernietiging van rechtshandelingen wegens onbekwaamheid of wijzebreken. In beide gevallen treedt het rechtgevolg (de ontbinding of de nietigheid van de overeenkomst) niet van rechtwege in, maar er moet een beroep op worden gedaan. Aldus treedt ook bij de bevrijdende verjaring het rechtgevolg (het tenietgaan van de verbonenis) niet van rechtwege in, maar eerst nadat door de schuldenaar een beroep op de verjaring is gedaan. In al deze drie gevallen gaat de verbonenis of de overeenkomst niet van rechtwege ten onder, maar is slechts een mogelikheid daartoe aanwezig’; and cf Asser–Hartkamp op cit note 16 at 525.
creditor and is distinguishable from the right to avoid an obligation on a ground such as undue influence, for by invoking it the debtor does not avoid or in any other way affect the obligation itself. The obligation subsists intact, and if performance takes place after the lapse of the prescription period there is no right of recovery. Upon expiry of the prescription period the obligation retains its normal character and can be normally enforced, provided the debtor does not invoke the defence of prescription. Extinctive prescription therefore does not transform the obligation into what is known as a natural obligation.

The effect of expiry of a prescription period according to this theory is to confer upon the debtor the right to refuse performance. It follows that extinctive prescription is an institution of substantive law and not merely a procedural denial of action, since it does not procedurally prevent the creditor from instituting action in the normal manner, and it pertains to the content of the parties' rights and can thus be the subject of an action for a declaration of rights.

As will be noted in the conclusion below, this theory of extinctive prescription provides a logically satisfactory and useful framework for a theory as to the nature and effect of extinctive prescription in South African law.

1.2.6 Conclusion: extinctive prescription in South African law

The theory that extinctive prescription serves to protect a debtor's reasonable reliance on the creditor's inaction is unsatisfactory, both as a statement of legal policy and as a technical definition of the nature and effect of extinctive prescription.

The theory of extinctive prescription as an irrebuttable presumption that the obligation has been extinguished, either as a result of the creditor's having abandoned his right or as a result of the debtor's having complied, fails to distinguish between the 'weak' and the 'strong' effects of extinctive prescription, and to accommodate the principle that an obligation, after it has been affected by extinctive prescription, can still be validly complied with.

The theory that extinctive prescription merely affects a right of action in the procedural sense is in conflict with the concept that the right to enforce by legal process is an integral part of a substantive

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49 Hübner op cit note 47 at 541, but contra Spiro op cit note 16 at 577–8, who describes the obligation after expiry of the prescription period as a natural obligation; at least from the point of view of the debtor, because the creditor cannot enforce performance against the will of the debtor. The initiative is then with the debtor, either to refuse performance by invoking prescription, or to restore to the obligation its normal character by waiving the right to invoke prescription, or by simply rendering the performance required in terms of obligation.
50 Spiro op cit note 16 at 571–2.
51 1.2.6.
right; and the effect of extinctive prescription is in any event of a substantive rather than a procedural nature.

The theory that extinctive prescription confers a substantive right or defence upon the debtor has variations, depending on the actual effect attributed to such a right or defence. The construction that the debtor acquires the right to avoid the obligation does not satisfactorily deal with the position where the obligation has already been extinguished by proper performance. The construction that the debtor acquires the right to refuse performance, which he may invoke as a substantive defence, while the obligation subsists intact and can still be complied with, appears to be logically unassailable and useful for analysis of the positive law position in South Africa.

The 1969 Prescription Act provides that 'a debt shall be extinguished by prescription after the lapse of the period which in terms of the relevant law applies in respect of the prescription of such debt'.

This provision is usually interpreted to mean that the legislature had opted for prescription with a 'strong' effect and that the debt ceases to exist at the expiry of the prescription period. There are apparent qualifications, however, in the provision that 'payment by the debtor of a debt after it has been extinguished by prescription ... shall be regarded as payment of a debt', and the provision that prescription does not take effect by operation of law, but only if invoked by a party to litigation.

These apparent qualifications indicate that the provision 'a debt shall be extinguished by prescription' creates anomalies if taken at face value. It appears that after the prescription period has lapsed the debt in question retains all the characteristics of a subsisting debt, but

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82 Section 10(1) of Act 68 of 1969.
83 De Wet & Yeats 257; De Wet Opuscula Miscellanea 103–4. In Lipshitz v Dechamps Textiles GMBH & another 1978 (4) SA 427 (C) at 430D–G Van Heerden J held that s 10(3) 'does seem to contain an anomaly by regarding payment of a debt after it has been extinguished by prescription as payment of the debt. As far as anomalies are concerned however I find myself in respectful agreement with what Milne JP said on good authority in Manjra v Desai & another 1968 (2) SA 249 (N) at 254.

"where the words of a statute are plain, mere anomalies would not justify a departure from their literal meaning unless they are such as to demonstrate that their literal meaning is not the meaning which the legislature intended them to have."

To my mind the said anomaly does not detract from the clearly expressed wording of s 10(1) that, once the period provided for has lapsed, barring any delays or interruption, the debt is extinguished. When this has occurred, any subsidiary debt which arose from such debt is also extinguished (s 10(2)) and it would appear moreover that, once extinguished, the debtor can no longer by acknowledgement revive such debt (s 14) unless of course it is in the form of an undertaking amounting to a new contract. And at 430H–I:\p: 'The fact that the court may not mero motu take notice of prescription does not alter the position as to whether a debt has become extinguished or not. Section 17(1) seems to be a procedural provision. A court would obviously in the nature of things not be in a position to know whether prescription has in any given case been interrupted or delayed. The provisions of this sub-section accordingly do not show that after prescription has taken place there is any vestige of a debt in existence, they merely ensure that the person who wishes to rely on prescription must do so explicitly.' Cf also Kuhne & Nagel AG Zurich v APA Distributors (Pty) Ltd 1981 (3) SA 536 (W) at 538G.

84 Section 10(3), and cf Kuhne & Nagel AG Zurich v APA Distributors (Pty) Ltd supra note 53 at 538G; Lipshitz v Dechamps Textiles GMBH & another supra note 53 at 430D–G.
85 Section 17(1): 'A court shall not of its own motion take notice of prescription'; and cf the interpretation of this provision in the Lipshitz case, cited in note 53 above.
the debtor acquires a substantive statutory right or defence which, if invoked and proved, will render him exempt from performance. Should the debtor, for whatever reason, not invoke prescription and render performance, it has to be regarded as due performance and cannot be recovered with the conductio indebiti. Should the debtor not invoke prescription and choose to contest the creditor’s action on the merits, this may constitute a waiver of the defence of prescription (explicit, implicit or deemed), but such waiver will not be treated as a novation and the court will adjudicate on the merits of the original debt, and take no notice of prescription. In effect the court will act on the premise that the debt subsists.

Should the debtor, after the relevant prescription period has lapsed, expressly or tacitly acknowledge liability, the question arises whether the running of prescription is to be interrupted in terms of s 14(1) of the Prescription Act. According to the construction that prescription extinguishes a debt, there is clearly no question of interruption after prescription has taken effect. The result is no different, however, if it is accepted that prescription leaves a debt intact, because the wording of s 14(1) makes it clear that the provision deals with the interruption of a period that is still running, and once the period of prescription has run its full course the notion of interruption of prescription is no longer appropriate. A period of prescription that has run its full course can no longer be interrupted or extended by agreement. If it is accepted that the debtor in effect acquires a substantive right to rely on prescription, he may waive his right; but acknowledgement of liability does not in itself constitute such a waiver. Therefore, whatever point of view is adopted as to the effect of prescription on a debt, acknowledgement of liability after expiry of the prescription period cannot constitute interruption of that period.

 Regarding the construction that prescription extinguishes a debt, it is finally necessary to consider the position where a debt has been

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64 De Wet & Yeats 258.
65 Cf De Wet & Yeats 274–5; and Grey v Southern Insurance Association Ltd 1982 (3) SA 688 (E), where it was held that the date on which a debt becomes prescribed is determined by statute, is immutable and is incapable of being extended by agreement; and a debtor who agrees not to invoke prescription waives or renounces ‘the right to rely on prescription as a defence’ (at 692A–B); a view accepted also in Vilikazi v National Employers’ General Insurance Co Ltd 1985 (4) SA 251 (C).
66 De Wet and Yeats 258 and 275 state that a debt, once prescription has taken effect, cannot be novated, for the debt has been extinguished. If the debt is in effect not extinguished, but subsists, novation is obviously also impossible.
68 Cf the Lipschitz case supra note 53 at 430D–G.
69 Cf Bell and Moore v Swart (1899) 16 SC 404 (concerning acknowledgement of liability after expiry of the prescription period in terms of Act 6 of 1963 (Cape)); and Mostert v Mostert 1913 TPD 255 (concerning acknowledgement of liability after expiry of the prescription period in terms of Act 26 of 1908 (Transvaal)).
70 Cf Grey v Southern Insurance Association Ltd and Vilikazi v National Employers’ General Insurance Co Ltd supra note 57.
71 Cf De Wet & Yeats 274n116 and the cases of Bell and Moore and Mostert supra note 61.
extinguished by proper performance prior to expiry of the prescription period. It is difficult to see how such a debt can again be extinguished by prescription, unless s 10(1) of the Act⁶⁴ is to be qualified by the phrase 'unless already otherwise extinguished'.

Should the creditor in such a case deny performance and seek to enforce the debt, the debtor may simply invoke prescription rather than proving performance, thus in effect relying on a statutory right of exemption from performance, which applies regardless of whether the debt still subsists. It is suggested that the anomaly of regarding a debt already extinguished by proper performance as being extinguished by prescription is such as to justify a departure from the literal meaning of s 10 of the 1969 Prescription Act.⁶⁵ Thus s 10 should be regarded as providing for exemption from performance rather than extinction of a debt.

This section would therefore more accurately and logically reflect the effective legal position if it were to read as follows, the words in italics taking the place of or being in addition to the existing words:

'10. (1) Subject to the provisions of this Chapter and of Chapter IV, a debtor shall be exempt from performance under a debt after the lapse of the period which in terms of the relevant law applies in respect of the prescription of such debt.

'(2) By the prescription of a principal debt the debtor under a subsidiary debt which arose from such principal debt shall also be exempt from performance.

'(3) Notwithstanding the provisions of subsections (1) and (2), payment by the debtor of a debt after prescription of such a debt in terms of either of the said subsections, shall be regarded as payment of a debt.'

However, despite obvious anomalies the courts (although not yet the Appellate Division) have consistently taken s 10(1) of the Prescription Act at face value, and a re-examination of the theory and effect of extictive prescription, either by the Appellate Division or the legislature, is called for.

1.3 EXTINCTIVE PRESCRIPTION AND EXPIRY OR LIMITATION PERIODS (VERVALTERMUYNE)

A large number of statutory provisions prescribe time limits for the institution of action (mostly in delict) against the state, statutory bodies and local government institutions. These provisions are often styled as expiry or limitation periods (vervaltermyn) and regarded as embodying a distinct form of extictive prescription, in that they do not affect substantive rights at all, but merely bar a remedy, and as such form part of the law of procedure.⁶⁶ The operation of such a limitation period also differs from that of extictive prescription proper in that there is no suspension or interruption by admission of liability; time simply runs from when the debt arises until expiry of the period, without any account of personal factors or excuses

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⁶⁴ Act 68 of 1969.
⁶⁵ Cf Manjia v Desi & another 1968 (2) SA 249 (N) at 254; and the Lipschitz case supra note 53.
⁶⁶ See the cases cited in note 15.
relevant to the creditor's failure to enforce his rights timeously. 67 The interruption of a limitation period by legal process is also different from that of a prescription period in that mere issue of summons is sufficient, whereas proper service is required for interruption of a prescription period. 68

The distinction between prescription and limitation is also made in other civil-law jurisdictions, 69 but with different implications. In general, limitation periods in these jurisdictions are peremptory and must be applied by a court even if not invoked by the debtor, and there is no possibility of waiver by the debtor. 70 It is accepted that the obligation itself is extinguished completely on termination of the limitation period and that not even a natural obligation remains. 71 There have been various attempts to classify different types of such limitation periods, 72 but in general it appears that a limitation period applies where a right is subject to an inherent time limit imposed by statute, which results in the right ceasing to exist by operation of law at the expiry of such time limit. 73 The limitation period is not subject to any suspension or interruption by admission of liability. 74 It is a matter of construction to determine whether a time limit imposed by statute constitutes a prescription or limitation period. 75 Time limits imposed by contract, as in the case of an option, can be distinguished in that a court is not obliged to enforce the time limit if a party does not invoke it. 76

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67 McIntyre NO v Administraatioen van Sentraal Transvaal 1980 (1) SA 283 (T) at 293C–F; Hartman v Minister van Politie 1983 (2) SA 489 (A) at 500C–D; and earlier, Nicholls NO v South African Railways and Harbours 1917 WLD 95 at 96–7; Stevenson NO v Transvaal Provincial Administration 1934 TPd 80 at 84; President Insurance Co Ltd v Yu Kwam 1963 (3) SA 766 (A) at 778E–779A.

68 Labuschagne v Labuschagne; Labuschagne v Minister van Justitie 1967 (2) SA 575 (A) at 585C–586A. Although this case dealt specifically with the interpretation of s 32 of the Police Act 7 of 1958, policy considerations relative to limitation periods in general were also taken into account.

69 See note 16.

70 See Köster op cit note 16 at 541; Asser–Ruten op cit note 16 at 494; Pitlo–Hidma op cit note 37 at 255; Asser–Hartkamp op cit note 16 at 547, 549.

71 Köster loc cit; Rutz op cit note 16 at 444–5; Asser–Ruten op cit note 16 at 495; Lichtenauer op cit note 16 at 48–50; Palandt–Heinrichs 172; Bruno von Bürn 'Verjährung und Verwirkung in Zivilrecht' 45 Schweizerische Juristen-Zeitung 369 at 370; Graewe op cit note 16 at 24; Pitlo–Hidma op cit note 37 at 254; Neufeld op cit note 16 at 602–3; Asser–Hartkamp op cit note 16 at 548.

72 Rutz op cit note 16 at 435; Graewe op cit note 16 at 22–43.

73 Cf Pitlo–Hidma op cit note 37 at 255: 'Er zijn vorderingen de uit hun aard slechts een beperkte levensduur genieten. Terwijl de gewone wordering tientallen jaren—en theorethisch ook eeuwen—kan voortbestaan, is hun leven beperkt tot een te voren vastgestelde duur. Op de ogenblik dat deze termijn verstreken is, vervallen zij; men spreekt dan van een vervaltermijn, van een fatale termijn en soms bezigt men de term "décéance"'; Asser–Ruten op cit note 16 at 493–4, 498; Neufeld op cit note 16 at 602, citing the definition of 'peremption' in art 3458 of the Louisiana Civil Code: 'a period of time fixed by law for the existence of a right. Unless timely exercised, the right is extinguished upon the expiration of the peremptive period.'

74 Lichtenauer op cit note 16 at 47, 82, 91; Van Brakel op cit note 16 at 257; Asser–Ruten op cit note 16 at 497–8; Pitlo–Hidma op cit note 37 at 255; Neufeld op cit note 16 at 604; Asser–Hartkamp op cit note 16 at 590.

75 Pitlo–Hidma op cit note 37 at 255; Asser–Ruten op cit note 16 at 494; Neufeld op cit note 16 at 603.

76 Asser–Ruten op cit note 16 at 499; Asser–Hartkamp op cit note 16 at 551–2.
It appears therefore that the concept of a limitation period in South African law differs in important respects from that in other civil-law jurisdictions. The courts do not mero motu take notice of such limitation periods; they hold that their effect is that of a procedural denial of action rather than the extinction of a substantive right itself; and they have recognized the possibility of waiver by a defendant.

As argued above (1.2.4), the notion that extinctive prescription or a statutory limitation period merely affects a right of action in the procedural sense is in conflict with the concept that a substantive right in the law of obligations also implies the right to enforce by legal process. There can be no denial of a 'right of action' that leaves the underlying substantive right intact, and a denial of the ability to enforce a substantive right by legal process is essentially a matter of substantive law. A statutory limitation period can also serve procedural purposes, for example by providing that formal notice be given before an action is instituted, but in so far as the provision as a whole concerns competence rather than means of enforcing a substantive right by legal process, its nature and effect is predominantly substantive.

The effect of a particular limitation period will depend on interpretation of the statutory provision in question. A typical provision, and one that has been an abundant source of litigation, is s.32 of the Police Act, providing as follows:

'Any civil action against the State or any person in respect of anything done in pursuance of this Act, shall be commenced within six months after the cause of action has arisen, and notice in writing of any civil action and of the cause thereof shall be given to the defendant one month at least before the commencement thereof.'

It would appear that the effect of this provision largely coincides with that of extinctive prescription under the Prescription Act. Should the state, for whatever reason, not invoke this provision and pay a plaintiff compensation despite non-compliance with the time limits, it will almost certainly be regarded as due performance of a debt and not as a donation. Should the state choose not to invoke this provision and rather to contest the plaintiff's action on the merits, this may constitute an explicit, implicit or deemed waiver of the right to rely on the limitation period; but such a waiver would almost certainly not be regarded as a novation of debt, and the court will

77 See Montsiisi v Minister van Polieie 1984 (1) SA 619 (A) at 637F–638A, where the position in Dutch law is contrasted.
78 See the cases cited in note 15.
79 Labuschagne v Labuschagne; Labuschagne v Minister van Justitie 1967 (2) SA 575 (A) at 586B–587A; Minister van Polieie en 'n ander v Gamble en 'n ander 1979 (4) SA 759 (A) at 770B–C.
80 Act 7 of 1958. Cf similar provisions in s.30 of the Bureau for State Security Act 104 of 1978; s.113 of the Defence Act 44 of 1957; s.90 of the Prisons Act of 1959; and for a list of statutory limitations on civil proceedings, see Lane op cit note 14 at 67–8.
81 Act 68 of 1969.
adjudicate on the merits of the original debt on the premis that it subsists, and take no notice of the limitation period.

It would appear from the above example that, contrary to the position in other civil-law jurisdictions, the expiry of a limitation period in South African law does not extinguish the debt by operation of law, and that the debt still subsists, but that the debtor acquires a substantive statutory right or defence which, if invoked and proved, will render him exempt from performance. The nature and effect of a provision such as the one cited above therefore coincides with that of extinctive prescription under the Prescription Act.82

One important difference is that, as a result of a strict interpretation of the wording of this provision and also on account of the policy consideration that the state is regarded as being in need of special and more stringent protection against stale claims, no suspension or interruption by admission of liability is recognized.83

A further difference between prescription and 'limitation'—that mere issue of summons is sufficient to interrupt what is known as a limitation period, whereas proper service is required for a prescription period84—is difficult to justify in terms of the avowed policy underlying limitation periods. Service rather than mere issue of summons brings the institution of an action to the notice of a defendant and thus enables him to prepare a defence timely. A considerable period of time may elapse between issue and service of a summons,85 and the limitation period may thus in effect be extended. If the policy behind such limitation periods is to provide more stringent protection against stale claims than ordinary prescription does, this difference is at variance with such policy. Possible explanations for this difference are the following: (1) The term ‘commenced’ ('ingestel') as used in s 32 of the Police Act and other similar provisions86 and in the Rules of Court indicates the issue rather than the service of summons;87 and (2) a relevant policy consideration is also that limitation periods in any event almost invariably require prior formal notice of the imminent institution of action,88 thus allowing the defendant to be put on his guard and to prepare his defence timely. The main policy objective is thus

82 Act 68 of 1969.
83 See Hartman v Minister van Polisie 1983 (2) SA 489 (A) at 495A–499H.
84 See note 68.
85 In the magistrates’ courts rule 10 of the Rules of Court provides that a summons not served within twelve months of its date of issue lapses: see Jones and Buckle The Civil Practice of the Magistrates’ Courts in South Africa 2 ed (1976) at 76. There is no similar provision applying to a summons in the Supreme Court, and it is in the discretion of the court whether to allow proceedings on a stale summons to continue: see Herbstien and Van Wissen The Civil Practice of the Superior Courts in South Africa 3 ed (1979) at 200.
86 Cf note 86.
87 See Labuschagne v Labuschagne; Labuschagne v Minister van Justisie 1967 (2) SA 575 (A) at 583H–586A.
88 Cf the statutory provisions referred to in note 80 above.
achieved satisfactorily, and the moment when action is regarded as being formally instituted is of secondary importance.

To conclude: The nature and effect of extinctive prescription and limitation periods in South African law, contrary to the position in other civil-law jurisdictions, appear to coincide in principle. The aim of providing wider protection to certain debtors explains why suspension and interruption by admission of liability have been held to be inapplicable in certain cases. Variations regarding the manner of interruption by legal process are explicable in terms of terminology used in particular statutes and also in terms of the requirement of formal notice which applies in certain cases.

The notion of a limitation period as distinct from a prescription period is not to be found in Roman-Dutch authorities. Although the distinction was acknowledged in a series of cases, culminating in President Insurance Co Ltd v Yu Kwam, the conceptual basis of the distinction was not analysed in that case, nor has such analysis been undertaken subsequently. The courts have merely indicated that limitation periods are of a procedural rather than a substantive nature, and that the wording of such provisions has a peremptory import. The conceptual basis of the distinction has also been questioned by academic writers.

If, as argued above, what are known as limitation periods are fundamentally similar to prescription periods in nature and effect, the conceptual basis of the distinction falls away. The question then arises whether differences in terminology and policy considerations provide sufficient justification for inferring that the legislature in particular cases intended to exclude suspension of prescription, with the inequitable result that time also runs against a creditor who for some reason lacks the capacity to enforce his rights.

Such purported legislative intent to exclude suspension has in any event been held to be subject to an important qualification: that where it is impossible for a plaintiff to comply with the time period in question, for example while he is in detention under circumstances rendering him unable to institute action, the running of the period will in effect be suspended on the basis of the maxim lex non cogit ad

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90 1963 (3) SA 766 (A); and cf Boulle op cit note 89 at 511.

91 See in particular Labuschagne v Labuschagne; Labuschagne v Minister van Justitie 1967 (2) SA 575

92 see President Insurance Co Ltd v Yu Kwam 1963 (3) SA 766 (A) at 780a–781a.

93 1963 (3) SA 766 (A); and cf Boulle op cit note 89 at 511.

94 See in particular Nicholl NO v South African Railways and Harbours 1917 WLD 95 at 97;

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88 Cf De Wet & Years 275; Boulle op cit note 89 at 511–12.
impossibilia. However, this does not apply in the case of a minor, on the basis that a minor usually has someone to represent him and act on his behalf, so that no question of impossibility of instituting legal proceedings arises. Nevertheless, it appears that in the application of what are known as limitation periods the Appellate Division has let in the possibility of suspension by the back door. There will doubtless be situations where it is impossible for a minor, or an insane person, or a juristic person with the debtor as a member of its governing body, or someone acting on behalf of a deceased person, to institute action timeously. Whereas s 13 of the Prescription Act applies as a matter of course in all such cases where ‘normal’ prescription is involved, it will now for the purposes of s 32 of the Police Act and similar provisions be necessary to prove impossibility. The Appellate Division has given no guidance as to whether the impossibility will be determined in absolute terms or in terms of practicability, and has thus created uncertainty.

To conclude: In view of the questionable conceptual basis of the distinction between extinctive prescription and what are known as limitation periods, specific differences regarding suspension and interruption are difficult to justify on grounds of policy alone. In effect suspension does apply in cases of impossibility, but the courts have not provided clear guidelines as to what constitutes impossibility. It is suggested that there should be a uniform approach to all cases of extinctive prescription, and that the courts should incline towards uniform application of the general principles contained in the 1969 Prescription Act, unless the legislature clearly indicates otherwise.

1.4 EXTINCTIVE PRESCRIPTION AND ACQUISITIVE PRESCRIPTION

Extinctive and acquisitive prescription have a common origin in the praeceptio longi temporis of Roman law and a common objective in giving legal effect to an existing factual situation of long standing, and common elements in the notions of suspension and interruption. Despite important differences, such as that good faith is required for acquisitive prescription but not for extinctive prescription, it seems justified to regard prescription as a single institution or concept, manifesting itself in the forms of extinctive and acquisitive prescription.

94 Montis v Minister van Politie supra note 77.
95 See Hartman v Minister van Politie supra note 91.
96 Act 68 of 1969.
97 Act 7 of 1958.
98 See Krause op cit note 31 at 26–7; Lichtenauer op cit note 16 at 10–11.
99 See De Wet & Yeats 77, 158.
100 See De Wet Opuscula Miscellanea 78; Pithie-Hedman op cit note 37 at 193; Lichtenauer op cit note 16 at 5.
101 Cf Lichtenauer op cit note 16 at 13, who refers to ‘één algemeen verjaringsoordeel als eenheid van tegendeelen, de, zonder in alle opzichten elkanders spiegelbeeld te behoeven te zijn (men denke voor ons recht aan de goede trouw als een vereischte voor verkrijgende verjaring, dat voor de vernietigende verjaring niet geld), toch te nauw zijn verwant om gescheiden te worden’.
Extinctive prescription, as argued above, essentially involves the acquisition of a substantive right or defence which can be invoked by a debtor to negative a creditor’s right, thus to gain exemption from performance. Acquisitive prescription essentially involves the acquisition of a substantive right (a real right) which negatives someone else’s existing right.\footnote{Cf Grewen op cit note 16 at 26–7, who points out that the existing right is not so much extinguished by prescription as ousted by the newly acquired right.}

With extinctive prescription the emphasis is on the negative aspect—the effective loss of the ability to enforce a right—while with acquisitive prescription the emphasis is on the positive aspect—the acquisition of a new right. By extinctive prescription the debtor in effect acquires a negative correlative to the creditor’s right; by acquisitive prescription a new positive right similar to the right that is lost is acquired.\footnote{See Jackson op cit note 33 at 411.} According to this analysis, the loss of servitude rights by non-use\footnote{Section 7 of Act 68 of 1969; and cf Symeon Symeonides ‘One Hundred Footnotes to the New Law of Possession and Acquisitive Prescription’ (1983) 44 Louisiana LR 69 at 130n95.} lies somewhere in the middle. The emphasis is on the negative loss of the servitude right, but there is nevertheless also a positive acquisition by the owner, who acquires the full use of the property formerly burdened by the servitude. The principles governing such loss of a servitude right, however, are those applying to acquisitive prescription.\footnote{Section 8(2) of Act 68 of 1969.}

Both extinctive and acquisitive prescription serve private and public interests in protecting not only the parties to an existing factual relationship but also outsiders who may assume that a long-standing factual relationship reflects the legal position. However, with extinctive prescription the emphasis is on the private interests of the parties to an obligation, whereas with acquisitive prescription there is an additional emphasis on public interest, because real rights of lengthy duration are involved and the chances of outsiders relying and acting upon the apparent legal position are much greater.\footnote{See De Wet Opstelidae Miscellanea 78.}

1.5 EXTINCTIVE PRESCRIPTION AND POLICY CONSIDERATIONS

The main object of extinctive prescription is to create legal certainty and finality in the relationship between parties after the lapse of a period of time, and the emphasis is on protection of the debtor against a stale claim that has existed for such a long time that it becomes unfair to require the debtor to defend himself against it.\footnote{Cf in general De Wet & Years 255; Lichtenauer op cit note 16 at 15, 18; Spiro op cit note 16 at 7; Pitha–Hidma op cit note 37 at 192; Asser–Hartkamp op cit note 16 at 519; Van Brakel op cit note 16 at 251; Jackson op cit note 33 at 410.
This policy has been justified in glowing terms by Story.\textsuperscript{108}

'\textit{Laws, thus limiting suits, are founded in the noblest policy. They are statutes of repose, to quiet titles, to suppress frauds, and to supply the deficiency of proofs arising from the ambiguity and obscurity or the antiquity of transactions. They proceed upon the presumption that claims are extinguished, or ought to be held extinguished, whenever they are not litigated in the proper forum within the prescribed period. They take away all solid grounds of complaint, because they rest on the negligence or neglect of the party himself. They quicken diligence by making it, in some measure, equivalent to right. They discourage litigation by bringing in one common receptacle all the accumulations of past times which are unexplained, and have now, from lapse of time, become inapplicable. It has been said by John Voet with singular felicity that controversies are limited to a fixed period of time lest they should be immortal—Ne autem lites immortales essent, dum litigantes mortales sunt.}'

The emphasis is on the protection of the debtor, as the creditor is responsible for enforcing his right timeously and must suffer the consequences of failure in this regard. However, the purpose is not to punish the creditor, and extinctive prescription should not simply be a blunt instrument for achieving finality in the relationship between parties to an obligation.\textsuperscript{109} Thus personal factors relevant to the creditor's failure to enforce his right timeously are taken into account for the purposes of suspension of the running of the prescription period.\textsuperscript{110}

The protection of the debtor by extinctive prescription is obviously justified where the debtor has already rendered due performance and may rely on prescription rather than proving performance. The problems of proving performance or other relevant events after a considerable period of time, when records may be lost or destroyed and witnesses unavailable, justifies reliance on prescription by the debtor.\textsuperscript{111} However, a debtor who has not duly performed may also rely on prescription, illustrating that the object of legal certainty will inevitably sometimes prevail over due enforcement of an obligation.

Essentially extinctive prescription embodies a desire for finality and serves the common good by creating legal certainty in individual cases. There comes a time as between creditors and debtors when the books should be closed.

\textsuperscript{108} See Chitale & Bakhale op cit note 16 at 48–9.
\textsuperscript{110} Cf the distinction made in this regard between prescription and limitation periods in \textit{Meintjes NO v Administratieraad van Senegal-Transvaal} 1980 (1) SA 283 (T) at 293C–F; and \textit{Hartman v Ministre van Polisie} 1983 (2) SA 489 (A) at 500C–D.
\textsuperscript{111} Cf Preston & Newsom op cit note 17 at 2; Lichtenauer op cit note 16 at 19; Jackson op cit note 33 at 409; Asser–Hartkamp op cit note 16 at 523; Van Brakel op cit note 16 at 251; Naendrup op cit note 19 at 239; Spiro op cit note 16 at 8; Zimmermann op cit note 47 at 410.

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