# ANOTHER PERSPECTIVE IN DEBT-COLLECTION LITIGATION: EFFECTS OF EXTINCTIVE PRESCRIPTION ON ORDINARY DEBTS AND HOW CESSION OF CREDITORS' RIGHTS CAN CUSHION THESE EFFECTS.

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**Declaration**

I**, CHAMUNORWA RAMANGWANAREVANAVEDU CHINGWE-GANGATA**, (**R160097L),** declare that the work presented in this dissertation is my own and it has never been submitted for a degree at any other university. Where information has been obtained from other sources, I verify this has been revealed and acknowledged through complete references.

……

Signature of Student

This dissertation has been submitted for examination with my approval as University Supervisor.

**SUPERVISOR**

I approve that I worked with……. as his Supervisor and support the submission of this dissertation.

……

Signature of Supervisor

**Dedication**

This research is dedicated to all creditors who have lost their monies/fruits; investments, personal savings, because of extinctive prescription. Of course there are several reasons at/in play, and most of these reasons are legal, as has been argued, but losing money can never be justified, unless at the instance of the creditor. Clearly, there are no other permissible words to include in this dedication other than words of protest, beseech; imploring the Legislature to consider an approach that incorporates principles of equity.

**Acknowledgement**

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**Abstract**

*This research assesses the effects of extinctive prescription on ordinary debts in terms of the Prescription Act [Chapter 8:11] of the Republic of Zimbabwe. The focus of this study is to generate a conceptualised conclusion, as guided under conceptual research, over whether internal mechanisms entrenched in the Prescription Act are sufficient to deal with the effects of prescription, which are both legal and factual. The effectiveness of these mechanisms is assessed in view of determining other alternative mechanisms that can be used to protect debts from extinctive prescription. This study establishes that debt security is paramount and the need to secure debt is the drive behind debt-collection litigation; as such mechanisms of protection should be able to secure the debt first and at least counter prescription. This research also tests the rationale of different time periods of extinctive prescription, in particular, the three years prescription period imposed on any other debt vis-á-vis long prescription periods imposed on debts owed to entities such as the State and banks, which have wider means of recovering debts. The assumption is that prescription is prejudicial to creditors, who for several justifiable reasons fail to claim debts within the stipulated period, and because prescription is in existence, debtors are manipulating prescription to their benefit. Hence, there ought to be other means of protection, that is if prescription cannot be abrogated in the least of it, and cession ought to be considered, but only if utilised strategically, together with other alternative mechanisms.*

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## CHAPTER ONE

### 1. Introduction

Debt collection litigation is one of the areas of litigation in modern litigation. This area of litigation focuses on settlement of debts between creditors and debtors.[1] In context, the lending or borrowing of money or fruits, which begets these debts, is a time immemorial engagement influenced by so many reasons, not limited to trust, friendship, business partnerships, and contractual agreements or privileges.[2] In fact, borrowing or lending of money happens at any given time. However, there is a growing concern over losses incurred by creditors that is lenders or those from whom money is borrowed. These losses occur through many causes, and amongst these causes include; 'extinctive' prescription. Extinctive prescription invalidates a claim to a debt; it extinguishes the claim because of effluxion of time.[3] Extinctive prescription creates a procedural loophole which benefits debtors because debtors can use it as a special plea to bar a claim for the debt, thus absolving the debtor from paying the debt.[4] This clearly is a disadvantage to the creditor, who for so many other reasons not limited to trust, failure to claim a debt on time, ignorance of the effects of prescription, would have failed to claim the debt. These factors create a plethora of legal questions, such as; whether prescription is necessary, or the justification of time period of prescription and how effects of prescription can be cushioned. Clearly, there ought to be means and ways of protecting rights of creditors and the effectiveness of these means, if any, ought to be assessed. Ordinarily, legislation guiding the concept of prescription provides means and ways of countering and intercepting the effect of prescription,[5] however, the question

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[1] 'Chasing personal debts', *The Newsday*, 18 March 2017 < newsday.co.zw/2017/03/chasing-personal-debts-2/amp/> visited on 23 June 2021. See also; 'Debt collection- How an acknowledgement of debt can save a creditor time and money', <honeyb.co.zw/debt-collection-how-an-acknowledgement-of-debt-can-save-a-creditor-time-and-money/> visited on 23 June 2021.

[2] See; R. Ranyard, et al, 'The psychology of borrowing and over-indebtedness', 1:5 Economic Psychology (2017). T. Parker, 'When are personal loans a good idea?' 12 March 2021, <investopedia.com/articles/personal-finance/111715/when-are-personal-loans-a-good-idea/> visited on 1 July 2021. See also; V. Ways of financing economic activities', <fao.org/3/t1675e05.htm> visited on 30 June 2021. See also; Congressional Research Service Report For Congress, 'Economic Factors Affecting Small Business Lending and Loan Guarantees', 7 (2013).

[3] See; *Food and Allied Workers' Union obo Gaoshubelwe v Pieman's Pantry (Pty) Limited* 2018 5 BCLR 527 (CC) paras. [50], [143]-[148]. See also; "Rules on extinctive prescription. Do not wait until it is too late', 01 June 2018, <cluvermarkotter.law/2018/06/01/too-late/> visited on 10 June 2021. See also; 'Prescription Revisited-A brief overview of the latest case law developments in terms of the Prescription Act 68 of 1969' <lexology.com/library/detail/> visited on 12 June 2021.

[4] *Santam Ltd v Ethwar* [1998] ZASCA 102. See also; *Road Accident Fund & Anor v Mdeje* 2011 (2) SA 26 CC. See also; As per Gubbay CJ in *Ashanria v Patel & Others* 1991 (2) ZLR 276 (S).

[5] See the Prescription Act [Chapter 8:11] for a detailed outline of these means.

remains; whether these means can be considered enough and effective.[6] The reality is that a creditor should recover his, her or its debt and rights of the creditor should be protected. This is without doubt a reasonable principle of equity appropriate and apposite. Therefore, this research unpacks the effects of extinctive prescription on ordinary debts in view of whether internal mechanisms of protection contained in the Prescription Act [hereinafter the Act] are sufficient, and if not; whether cession can be used in the alternative either directly or indirectly together with any other alternative means to protect and secure interests and rights of creditors from prescription. This research also evaluates the rationale of different time periods of extinctive prescription contained in the Act with a view of assessing their legal impact on creditors.

### 1.2. Background to the study/Literature overview

The foundational appreciation of prescription adopted in this research is the fact that prescription is a statutory legal technicality or rather it is a codified common law defence usable by a defendant to bar a claim for a debt because it would be out of time.[7] It is in two main traditional forms, which are; acquisitive prescription and extinctive prescription. In a general sense, acquisitive prescription, also known as positive prescription, captures the right to acquire property due to the running of time. [8] Acquisitive prescription is the acquisition of a right by lapse of time; while extinctive prescription is the extinction of a right by lapse of time. Extinctive prescription is not a mode of acquiring ownership, while acquisitive prescription is. Extinctive prescription is but a mode of extinguishing an obligation or right in person, and is based on the principle of the limitation of actions. In effect, one can acquire property because he or she was in continuous and uninterrupted possession of the property for a period of thirty (30) years. On the other hand, extinctive prescription, also known as negative prescription, is a form of prescription

[6] For a detailed discussion of interruption of prescription see; *Barrel Engineering & Founders (Pvt) Ltd v Bitumen Construction Services (Pvt) Ltd HH 715-1*. See also; *Asharia v Patel & Ors 1991 (2) ZLR 276 (S): See also; Nyandoro & Anor v Nyandoro & Ors 2008 (2) ZLR 219 (H).* See also; G.F. Lubbe & C.M. Farlam & Hathaway Contract, *Cases, Material and Contemporary* (3rd Ed.) (Juta & Co Ltd, Cape Town, 1998). See also; I. Maja, *The Law of Contract in Zimbabwe* (Maja Foundation, Harare, 2015).

[7] I. Maja, *The Law of Contract in Zimbabwe* (Maja Foundation, Harare, 2015) p. 146. See also; *Peebles v Dairiboard Zimbabwe (Pvt) Ltd* 1999 (1) ZLR 41 (H).

[8] Section 4 of the Prescription Act [Chapter 8:11]. See also; C.P. Sherman, 'Acquisitive Prescription: Its Existing World-Wide Uniformity', *Yale Law Journal* (1911) pp. 147-149.

that destroys a right to a claim because of the lapse of time.[9] In other words, one is barred from claiming a debt because he, she or it would have failed to do so within stipulated time fame.[10]

This research focuses on extinctive prescription, which, in terms of the Act, has the effect of extinguishing a claim to a debt. Accordingly, a debt, as outlined in the Act, is anything that is lawfully owed or claimed by another person to and from another.[11] A debt includes services and goods, which means it is not limited to money and it also includes anything that can be claimed by reason of an obligation arising from statute, contract, delict, inter *alia*.[12] What is important to make note of is that a debt creates a form of relationship between parties involved in the debt. This relationship comes with obligations. The person to whom the debt is owed is legally referred to as a creditor and the one who owes the creditor is legally referred to as a debtor. The debtor has an obligation to repay what he, she, or it owes, while the creditor has an obligation, in a sense, to claim what is owed.[13] However, prescription has provided legal avenues for debtors to abscond settling debts.[14] This is so because, the Act, establishes that a creditor should claim a debt within a specific time frame once the debt becomes due.[15] Therefore, once the stipulated timeframe has lapsed, a debtor is legally justified for refusing to pay the debt.[16] Clearly, this shortchanges creditors.

Interestingly, the Act provides different prescription periods for different debts, and as such the focus of this research is on ordinary debts which prescribe after three years. [17] This means that a

[9] *Cassim v Kadir* 1962(2) 473 (NPD). See also; *Yusaf v Bailey and Others* 1964(4) SA 117. See also; M. M. Loubser, *Extinctive Prescription,* (Kenwyn, Juta & Co., 1996) pp. 1-239.
[10] M. M. Loubser, *Extinctive Prescription,* (Kenwyn, Juta & Co., 1996) pp. 1-239. See also; S. W. Van der Merwe, L.F. Van Huyssteen, *et al,* Contract*: General Principles,* (3rd Ed.) (Juta, South Africa, 2007) pp. 1-587.
[11] For a concise definition of a debt, see; section 2 of the Prescription Act [Chapter 8:11}. See also; *Makate v Vodacom (Pty) Ltd* [2016] ZACC 13. See also; *Electricity Supply Commission v Stewarts and Lloyds of SA (Pty) Ltd* 1981 (3) SA 340 (A)).
[12] *Ibid,* s 2 of the Prescription Act [Chapter 8:11].
[13] A. Bergman, 'The International and Comparative Law Quarterly' 11:3 *The International and Comparative Law Quarterly Cambridge University Press* (1962) pp. 742-781. See also; M. M. Loubser, 'Towards a theory of extinctive prescription', 105:34 *African Law Journal* (1988) p.34.
[14] This is inferred to be the influence behind why debtors would prefer to use the defence of prescription instead of paying their debt.
[15] Extractable from prescription periods explained from section 15 of the Prescription Act [Chapter 8:11]. See also; Absa Bank Limited v *Keet* [2015] 4 All SA 1 (SCA) at p 2.
[16] For justification of extinctive Prescription, see; M. M. Loubser, *Extinctive Prescription,* (Kenwyn, Juta & Co., 1996) pp. 1-239.
[17] Section 15(d) of the Prescription Act [Chapter 8:11]: *"except where any enactment provides otherwise, three years, in the case of any other debt."*

creditor should be able to claim his, her or its debts within three years from the time the debt becomes due.[18] Clearly, this strict timeframe is ignorant of the different circumstances of how debts are created. This research holds that most of these debts are created through trust. Such debts created between businesses, individuals and businesses, individuals and individuals, families and families are facilitated by the existence of trust and interests. They are created by persons, who are not aware of the Act; who do not know the means and ways of intercepting prescription, and who would be overshadowed by trust and who do not have effective means of enforcing and recovering debts. What remains interesting is the fact that the Act creates different time periods for prescription of debts, of which debts owed to entities such as the State, and other well-equipped institutions such as banks, have longer prescription time periods other than those ordinary debts owed to a common creditor.[19] As such, this creates the need to examine the effectiveness of available means of countering prescription and to test any legitimate and alternative means for the purpose of countering the effects of extinctive prescription and securing ordinary debts, together with making policy propositions on what the Legislature should consider adopting in order to cushion the effects of prescription projected thereof.

Putting it in context, this research assumes that cession is an alternative method to secure ordinary debts, and that it has a positive counterintuitive impact, although it is indirect, on the extinction of debts. Cession, in its legal form, is a bilateral juristic act which constitutes a type of agreement; contractual in precise terms.[20] In this arrangement the transferor or cedent, transfers a right to a transferee or cessionary. No formalities are required for the obligationary agreement or the act of cession itself, although the parties may agree on formalities with which the cession must comply.[21] The cession may be express or tacit or may be inferred from the parties conduct.[22] Whilst the cession need not be reduced to writing, the parties may agree that it should

[18] *Brooker v Mudhanda & Another* SC 5/18. *See also; Nyika & Anor v Minister of Home Affairs & Ors* HH-181-16.
[19] Section 15 of the Prescription Act [Chapter 8:11]; 'periods of prescription of debts'.
[20] See; *Syfrets Merchant Bank v Jardine & Ors* 1999 (1) ZLR 124 – 127. The judge therein made it clear that a cession is a juristic act which transfers the right from the estate of the creditor to that of another (cessionary) who thereby becomes creditor in his stead. See also; *Brayton Carlswald (Pty) Ltd and Another v Brews* (245/2016) [2017] ZASCA 68.
[21] Mwayera J aptly explained that no formalities are required in a cession in *Larry Makahamadze & Marmak (Pvt) Limited v Jacinth & Associates* HH 658-14 at p. 2.
[22] C. D. Hofmeyr, 'The nature of cession in security', *Finance and Banking Alert* 20, (2017) pp. 3. See also; *Kilburn v Kilburn 1931 AD 501.* See also; *Grobler v Oosthuizen* (299/2008) [2009] ZASCA 51. See also; *Shill v Milner* 1937 AD 101. See also; *Coopers & Lybrandt v Bryant* [1995] ZASCA 64; 1995 (3) SA 761 (A).

be in writing, in which event it will only be valid if reduced to writing.[23] This principle allows the holder of a right, a creditor, to transfer or cede his or her claim in order to secure a debt he or she owes[d]. Its effect is to substitute creditors.[24]

The transfer of a debt to another creditor is suggested as an alternative to securing a debt, on the basis of the security it brings and the means that new creditor would possess in order to enforce debt collection. Cession ought to be looked at as a strategic alternative that offers security to a debt through involvement of a third party which is able to enforce debt collection without compromise. In as much as, it can be argued whether cession directly counters prescription or not, this research presupposes it to be legally useful in as far as security of debt recovery is concerned, and as such its many forms that apply in the context of ordinary debts will be tested in this research. However, the effect of extinctive prescription remains, since clearly cession does not counter the running of prescription, other than mechanisms contained in the Act. Hence, there is a need to thoroughly test internal mechanisms contained in the Act and to make informed propositions on any other means of which can effectively curtail the effects of extinctive prescription. In addition, the relevance of prescription on its own ought to be tested in the process, in order to ascertain its legitimate existence in modern day Zimbabwe. This test is projected on a contextualised historical appreciation of how other doctrines such as the doctrine of *versari in re illicita* have been abrogated because of their incompatibleness in modern criminal law.[25]

### 1.3. Research Assumptions

- The abuse of extinctive prescription prejudices creditors owed ordinary debts

1. Debtors escape liability over debts through prescription;

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[23] *Ibid,* p.3.

[24] S. Scott, *The Law of Cession* (2nd Ed. Juta, 1991) pp. 200-250. See also; *Anglo-African Shipping Co (Rhodesia) (Pvt) Ltd v Baddeley & Another* 1977 (1) RLR 259. See also; *Grobler v Oosthuizen* (299/2008) [2009] ZASCA 51.

[25] G. Feltoe, *A Guide to the Criminal Law Of Zimbabwe,* (2005) p. 20; "*Under the versari doctrine a person could be convicted of a serious crime for which he did not have the required mental state simply because he had been committing some other unlawful act… **but this doctrine has been discredited in and discarded from our law. It may not be used in our law as a basis for liability.** The reason why this doctrine was ejected from our law is that it is grossly unfair and it violates the basic principle that a person can only be convicted of a crime if the essential physical and mental requirements for the crime with which X is charged are present..."*

2. Creditors are not aware of mechanisms of securing debts;
3. Three years of extinctive prescription worsens the prejudicial effect of prescription;

### 1.4. Research Questions

1. What is debt-collection litigation?
2. What is prescription?
3. What is cession?
4. What is the impact of prescription or how is prescription prejudicial?
5. How can cession be used to quell the effects of prescription?
6. Are creditors aware of the existence of prescription in its actual sense?
7. How are debtors abusing prescription at the expense of creditors?
8. Does prescription serve the interest of the society?
9. Should prescription laws be changed or done away with?
10. What is the rationale for different periods of prescription?
11. What should the law governing debts contain?

### 1.5. Research Objectives

1. To understand debt-collection litigation in Zimbabwe and other jurisdictions;
2. To conceptualise prescription and cession;
3. To examine the impact of prescription on ordinary debts;
4. To assess the relevance of extinctive prescription in modern legal systems;
5. To evaluate the rationale behind different prescription periods;
6. To establish legal solutions to the prejudicial effects of prescription;

### 1.6. Statement of the Problem

In *Howson v Cameron*,[26] the defendant only paid USD 40 000, leaving the balance of US$200 000 outstanding. The balance had to be paid in five equal installments within a period of five years.[27] But the defendant did not pay the balance, nonetheless the defendant got away with it. In his defence, the defendant invoked the principle of prescription. Surprisingly, according to

[26] *Howson v Cameron* HH141/18.
[27] *Ibid.*

Bradfield, the aim of prescription; "*is to promote certainty in the ordinary affairs of people*".[28] Yet, the prejudicial effect of prescription is beyond repair, and because it has continuously been used by debtors to avoid performing their obligations (honouring their debts) it suffices to be assessed and qualified. Thus, raising legal questions of both fact and law as to whether its existence should be maintained and if so whether there are legal mechanisms either direct or indirect that can be used to protect the rights of creditors in order to cushion the prejudicial effect of prescription.

### 1.7. Justification of the Study/Significance of the study

As extractable from numerous decided cases in Zimbabwe, the Act in particular sections 14 and 15 have been weaponised by debtors to avoid the payment of debts. Prescription creates a legal impossibility for claiming an 'overdue' debt, thus promoting defaulting of debt-payments. As such this study will create a bridging analysis of the relevance of prescription in the modern legal system *vis-á-vis* its prejudicial effects. The study will also establish alternative safeguards to extinctive prescription of debts, as well as enhancing the need for entrenching debt-collection which is one of the key functions of legal practitioners. Thus, this study seeks to create and simplify the knowledge around prescription and to capture the legitimate application of cession as well as influencing law makers to make necessary changes to laws guiding prescription, with particularity to the time-period differences of extinctive prescription.

### 1.8. Methodology

This research utilises a conceptual research methodology. Conceptual research is philosophical and focuses on developing new concepts or re-interpreting them.[29] As such this will be mainly done through literature search from library resources, tracing various writings, case law, and international instruments.[30] The conceptual thrust is to reshape phenomenological existence through the application of logic against experience or realities necessitated by time, prevalent

[28] R. H. Christie and G. Bradfield, *Christie's Law of Contract in South Africa* (6th Ed. LexisNexis, Durban, 2011) pp. 200-480.
[29] For an in depth discussions see; W. Kluwe, *Legal Research Explained* (Aspen Publishers, 2007). See also; T. R. 'Methodology in Legal Research', 13:3 *Utrecht Law Review* (2017). See also; P. Langbroek, *et al.,* (eds.) 'Methodology of Legal Research: Challenges and Opportunities', 13: 3 *Utrecht Law Review* (2017) p. 1-8.
[30] P. Langbroek, *et al.,* (eds.) 'Methodology of Legal Research: Challenges and Opportunities', 13: 3 *Utrecht Law Review* (2017) p. 7.

moral and political realities, public policy, the conscious and the unconscious guidelines applied by judges and the ultimate relationship between parties.

### 1.9. Limitations of the Study

The study's limitation is that there is not so much time to construct an understanding of whether individuals or ordinary people appreciate the existence of prescription and the mechanisms of debt collection and debt security. Considering that debt collection has grown to be an important form of litigation, much information should be generated around it.

### 1.10. Chapter Synopsis

CHAPTER 1

This Chapter gives an introduction and background to the study. The Chapter further contains the statement of the problem, research questions, an outline of the research aims and objectives, the research methodology, significance of the study, literature review and gives a synopsis of all the chapters contained.

CHAPTER 2

This Chapter focuses on conceptualisation of prescription –extinctive prescription, cession, debt enforcement or collection and other debt security mechanisms. This chapter tests the first and second objectives of this study. It explains what debt collection is about and it gives the historical existence of extinctive prescription in terms of the Prescription Act, and debt security.

CHAPTER 3

This Chapter analyses the legal rationale for extinctive prescription as provided for in the Prescription Act and the different time periods of extinctive prescription. The Chapter therefore exposes the effect or impact of extinctive prescription on ordinary debts and why there is need for alternative means for securing debts. Further, internal mechanisms of cushioning or controlling prescription are also analysed *vis-á-vis* cession.

CHAPTER 4

This Chapter traces whether citizens understand prescription and cession and whether prescription serves a purpose in society. In other words it assesses the relevance of extinctive prescription in modern legal systems. It establishes legal solutions to the prejudicial effects of prescription. It also further makes an empirical assessment of whether prescription should be abrogated, if not; whether reservations should be added to it.

CHAPTER 5

This Chapter gives a summary of research findings and the conclusion drawn from the research findings. It further proffers specific and ordinary recommendations on the mechanisms for debt security in Zimbabwe. Finally, the Chapter concludes the study

## CHAPTER TWO: CONCEPTUALISATION OF PRESCRIPTION, DEBT-COLLECTION AND DEBT SECURITY MECHANISMS

### 2.1. Introduction

This chapter evaluates at length the existing literature on the effects of extinctive prescription on ordinary debts. It conceptualises extinctive prescription in effect and how the interplay of mechanisms of debt security have managed to counter the effects of extinctive prescription and ensure debt recovery outside the question of whether a debtor is able to repay the debt. It is clear that lending and borrowing is a core component in society and as such the concept of debt-collection, in however way it can be enforced, commands great attention in as far as security of ordinary debts is concerned. However, the modest focus of this research remains that of suggesting a conceptually intelligible modification to the approach of prescription as a concept by testing its function and rationale in modern day Zimbabwe and also to test the effectiveness of various mechanisms of countering the running of prescription. Thus, in fulfilling this task and in coming up with intelligible and convincing legal alternatives, as has been undertaken in other researches;[31] an intellectual plunge into the deep and murky pool of conceptual justifications, controversies, and criticisms of extinctive prescription will be made. The purpose thereof, is to unpack the daunting effect of prescription and how any alternative mechanism, as mechanically suggested in this research can be effectively adopted.

### 2.2. The definition of an ordinary debt

The concept of an 'ordinary debt' is principal to this research, as it is the core variable which in praxis is destroyed by extinctive prescription, thus its meaning and definition ought to be appreciated in fact and in law. Debt refers to anything that can be lawfully owed or claimed by one person to and from another. It is not limited to money but may also include goods and services. A debtor is any person who owes another, the creditor a certain sum of money or owes performance or service arising from some legal basis. A debt, which is the prerequisite link between the two, is defined in Section 2 of the Act as including anything that may be sued for or

[31] W. S. Johnson, 'Extinctive Prescription-Conflict of Laws-Sources of Quebec Rules', 4:1 *The University of Toronto Law Journal* (1941) pp. 109-130.

claimed by reason of an obligation arising from statute, contract, delict or otherwise. This legal existence or legal phenomenon exists between two or more parties. These parties are known through technical terms, either as creditor and debtor. A debtor is any person, natural or juristic, who owes another party known as a creditor.[32] This therefore simply means that a creditor is any person to whom a debt is owed, and to whom payment of the debt if it is in the form of cash or if it is in the form of performance of a service should be performed directly or through other means.[33]

The above definition of a debt is all encompassing of all types of debts. These types of debts as extractable from section 15 of the Act, include; a debt secured by a mortgage bond, a judgement debt, a debt in respect of taxation under any enactment, a debt owed to the state, a debt arising from a bill of exchange, and any other debt.[34] Nonetheless, the focus of this research is on 'ordinary debts'. Clearly, the expression ordinary debt is not contained in the Act, but by reading of the law, an ordinary debt is any other debt. Therefore, the meaning and explanation of 'any other debt' shall be read as the definition of an 'ordinary debt'. This clearly makes an ordinary debt any other debt which is not specific to the conditions or qualifications outlined other than from section 15(d) of the Act.[35]

This research adopts the definition and meaning of a debt as outlined in statutes and judicial decisions, but with a streamlined focus on ordinary debts as contextually defined above. It is these debts (ordinary debts), together with other debts, which are central to debt-collection litigation and debt-collection in its ordinary sense, and also it is these debts (ordinary debts), in particular, which are affected by extinctive prescription).

[32] See; M. J. Trebilock, B. J. Reiter & J. B. Laskin, *Debtor and Creditor: Cases, Notes and Materials* (University of Toronto Press, 1979) pp. 1-920.
[33] For a comprehensive discussion of the difference between debtor and creditor, see; S. W. Van der Merwe, L.F. Van Huyssteen, *et al, Contract: General Principles*, (3rd Ed.) (Juta, South Africa, 2007) p. 393. See also; M. J. Trebilock, B. J. Reiter & J. B. Laskin, *Debtor and Creditor: Cases, Notes and Materials* (University of Toronto Press, 1979) pp. 1-920.
[34] Section 15 of the Prescription Act [Chapter 8:11].
[35] Section 15(d) of the Prescription Act [Chapter 8:11]; "…(d) *except where any enactment provides otherwise, three years, in the case of any other debt."*

### 2.3. The concept of debt-collection

This research acknowledges that debt collection is an important phenomenon in the day to day interaction of parties involved in a debt. Debt collection is a matter close to many people's hearts at the moment. Whether you are on the creditor or the debtor is side of the line, it is essential to understand the process to be able to make appropriate decisions. Essentially debt collection is a specific type of litigation.[36] Therefore, it is equally important, to have an appreciation of debt-collection as a concept and in its practical sense. Without doubt, debt collection is close to many people, either what it is about and on how debts are collected. Debt-collection is a process of redeeming or collecting what is owed by a debtor for a creditor.[37] This can be done in numerous ways that is through agencies, in person and through initiating court processes.[38] For that matter, debt-collection has become a specific form of litigation. Once litigated, a party would initiate a claim for recovery of a debt due to a failure by the debtor to pay for a service rendered, a loan or any goods sold.[39] This of course would require the interplay of other processes in order to secure a debt. The creditor renders an account and if the debtor fails to pay according to the terms agreed between the creditor and debtor, the creditor can issue a final demand for payment.[40]

This segment of the research, confirms the functionality of debt-collection in the society and how it is part of the broad spectrum of the day to day coexistence of persons. Of course, it is marred with its own inherent challenges,[41] but these challenges can be looked at in a more evaluative standpoint in so far as person[s] involved in outsourcing the involvement of debt-collectors would make an assessment of the arrangement guiding these collectors before they can use their services. In the context of Zimbabwe, due to lack of information, it can be assumed that the field

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[36] Trebilock, Reiter & Laskin, *supra,* note 33.

[37] See; E. Hermes, 'Collection Profile: South Africa', 20117. See also; L. Schmidt & K. Chetty, 'Debt Collection for beginners', *GoLegal* 27 October 2020, <golegal.co.za/debt-collection-mechanisms/> visited on 11 July 2021.

[38] See; 'Lawyers in debt collection loophole', *Mail & Guardian,* 06 August 2015, <mg.co.za/article/2015-08-06-lawyers-in-debt-collection-loophole/> visited on 10 July 2021. The use of emolument attachment order through the courts.

[39] Schmidt & K. Chetty, 'Debt Collection for beginners', *GoLegal* 27 October 2020, <golegal.co.za/debt-collection-mechanisms/> visited on 11 July 2021. See also; Our attorneys explain the debt collection procedure in South Africa' 30 August 2019, <baileyhaynes.co.za/News/entryid/109/our-attorneys-expalain-the-debt-collection-procedure-in-south-africa> visited on 11 July 2021.

[40] See; Our attorneys explain the debt collection procedure in South Africa' 30 August 2019, <baileyhaynes.co.za/News/entryid/109/our-attorneys-expalain-the-debt-collection-procedure-in-south-africa> visited on 11 July 2021. See also; *Kessel v Davis 1905 TS 73*1, at 733.

[41] 'Advantages and disadvantages of using debt collection agency', <nibusinessinfo.co.uk/content/advantages-and-disadvantages-of-using-debt-collection-agency> visited on 10 June 2021.

of debt-collection is yet to gain traction of numerous players, as such, it would be easier to know the work these players have done, even though it lessens available options.

### 2.4. Prescription and the effect of extinctive prescription on ordinary debts

#### 2.4.1. The context of prescription

Prescription is embodied by the interplay of time; on the one hand being transient and finite on the other hand.[42] The reach of prescription is universal and spans virtually to all branches of law, and it has had a use in different jurisdictions.[43] Legally speaking, 'prescription' denotes the role that time plays in the making or termination of certain legal rights, whereas 'to prescribe' is the declaration that a certain right is no longer legally claimable due to the expiration of time. The right will be said to have prescribed due to effluxion of time. Studies have claimed that prescription is an indispensable feature in modern societies which serves a purpose of creating a balance of interests of a debtor, and a creditor, together with the general public.[44] Prescription, as a concept, is applicable in both civil law and criminal law.[45] However, the focus of this research is on prescription under civil law as guided by the Prescription Act. Interestingly, the Act does not expressly define what prescription is; rather it only captures forms of prescription. As such, this research will attempt to capture the definition of prescription through its historical existence or application and through what the judiciary have constructed it to be.

The history of prescription spans back to the Roman Empire.[46] In fact, prescription is considered a Roman law legacy.[47] Scholars identify two main forms of prescription, apart from other types

[42] See; M. P. Opala, 'Praescriptio Temporis and its Relation to Prescriptive Easements in the Anglo-American Law' 7:2 *Tulsa Law Review* (1971) pp. 1-21. See also; South African Law Reform Commission, Discussion Paper 147 (Revised); Project 125; Harmonisation Of Existing Laws Providing For Different Prescription Periods, (2017). See also; C.P. Sherman, 'Acquisitive Prescription: Its Existing World-Wide Uniformity', *Yale Law Journal* (1911) pp. 147-149.

[43] Prescription is universally applied world over *mutatis mutandis*.

[44] E. H. Hondius, 'Extinctive Prescription: On the limitation of actions: Reports to the XIVth Congress International Academy of Comparative Law (German Report by Reinhard Zimmerman 171). See also; England Law Commission Limitation of Actions Consultation Paper No. 151 (1998) p. 16. See also; F. Du Bois and G. Bradfield, *Wille's Principles of South African Law* (9th Ed. Juta, 2007) p. 851.

[45] See; Part IV of the Criminal Procedure and Evidence Act [Chapter 9: 07]. See also; Criminal Procedure Act of the Republic of South Africa 51 of 1977.

[46] The origin of the term "prescription" is interesting. It arose from the way of pleading in a Roman lawsuit the acquisition or extinction of a right by lapse of time: it was what was alleged written first (*praescriptio*)-in the very beginning of the commission to the trial referee and before the statement of the plaintiff's claim. It thus indicated to

such as immemorial prescription[48] and many others. These include; acquisitive prescription and extinctive prescription.[49] Acquisitive prescription on one hand is self-explanatory. It entails the acquisition of things or rights through the effluxion of time.[50] Acquisitive prescription makes it possible for a person to claim ownership of immovable property after expiration of thirty (30) years. This is only possible if that person was in continuous or uninterrupted possession of the property freely and openly as if he or she were the owner of the property.[51] If the owner tries to vindicate possession after the expiration of thirty (30) years, the new occupier can safely resist it. Acquisition of property through acquisitive prescription is achievable only to property that can be subjected to private ownership.[52] Stolen property and property taken by violence (*mala fide*) cannot be acquired through acquisitive prescription.[53] Also, for one to acquire property, he or she, must have been in possession of the thing in good faith.[54] On the other hand, extinctive prescription, which is the main focus of this study, is self-explanatory and shall be highlighted in depth in succeeding paragraphs, but in a general sense it entails extinction or destruction of a claim due to the lapse of time.[55]

### 2.4.2. Extinctive Prescription

Extinctive or liberative prescription is the extinction of a right by lapse of time. [56] It is a way of extinguishing the right to pursue an action due to no action by the titular of the claim. Commentators differ if the extinctive prescription produces both the extinction of the right and

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the referee that he was to try the preliminary allegation before he proceeded to the main issue. There were many such *praescriptiones* pleadable by either the plaintiff or the defendant: one of the most important was the *praescriptio* setting forth acquisition or extinction, of a right by lapse of time. Subsequently, by metonymy, this term of pleading served to denote the substantive right itself, which was then likewise called "*praescriptio*",-whence the modern legal term "prescription". Aptly discussed in, C.P. Sherman, 'Acquisitive Prescription: Its Existing World-Wide Uniformity', *Yale Law Journal* (1911) pp. 147-149.

[47] M. P. Opala, 'Praescriptio Temporis and its Relation to Prescriptive Easements in the Anglo-American Law' 7:2 *Tulsa Law Review* (1971) pp. 1-21. See also; Villagran, 'Extinctive Prescription, characteristics', 29 March 2019, <villagranlara.com/extinctiveprescription/> visited on 10 March 2021.

[48] Zimmerman and Visser (eds.), *Southern Cross: Civil law and common law in South Africa* (1996).

[49] C.P. Sherman, 'Acquisitive Prescription: Its Existing World-Wide Uniformity', *Yale Law Journal* (1911) pp. 147-149.

[50] 'When debt becomes rotten fruit', *The Independent* 14 December 2018, <theindependent.co.zw/2018/12/14/when-debt-becomes-rotten-fruit/> visited on 12 February 2021.

[51] Section 4 of the Prescription Act [Chapter 8:11].

[52] Sherman, *supra*, note 50.

[53] *Ibid.*

[54] Borokowski and Du Plessis, *Textbook on Roman Law* (2005). See also; C.P. Sherman, 'Acquisitive Prescription: Its Existing World-Wide Uniformity', *Yale Law Journal* (1911) pp. 152.

[55] L. Villagran, 'Extinctive Prescription, characteristics', 29 March 2019, <villagranlara.com/extinctiveprescription/> visited on 10 March 2021.

[56] *Ibid.* See also; M. M. Loubser, *Extinctive Prescription*, (Kenwyn, Juta & Co., 1996) pp. 1-239.

the action, but the most accepted interpretation is that the right remains but the action to claim that right expires. [57] Traditional doctrine considers two fundamental factors, the inertia of the creditor and the passing of time taking in consideration the existence of a right that can be exercised

Prescription in its form as extinctive prescription has been used as a special plea that is in defence of the party alleging that due to the lapse of time, a particular claim in a right has extinguished.[58] However, prescription as a form of defence creates an interesting twist to debt-collection. If a debtor is successful in raising this defence, it means the creditor, be it in person or through agencies, cannot claim for a debt.[59] It should be borne in mind that if a debtor fails to raise this defence the court cannot on its own *mero mutu* raise prescription.[60] This means, the court, even if it is clear before it that a claim has prescribed, it can only determine a matter based on the pleadings and evidence before it. Clearly, this legal process creates a strong message to creditors to consider protecting their rights in a debt because loss lies heavily upon the creditor.

Another key component bordering the operation of extinctive prescription is the aspect of when and how extinctive prescription starts to operate. This concept is intertwined with the question of when a debt becomes due. It is important to understand that prescription only begins to run from the date on which the debt is due and payable. In addition, a debt can only be due, if it does exist. This concept is aptly illustrated in the Act. Accordingly, prescription begins to run once a debt becomes due and the creditor should be aware of the identity of the debtor and the facts surrounding the debt.[61] This concept is directly linked to the concept of *"actio nodum natae non*

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[57] See; *Pellerin Savitz LLP v Guindon* 2017 SCC 29 [a Canadian case]. See also; *Doelcam (Pvt) Ltd v Pichanick & Others* 1999 (1) ZLR 390 (H).

[58] It was outlined in *Links v Member of the Executive Council, Department of Health, Northern Cape Province* [2016] ZACC 10 that; *"…the onus rests on the party raising a defence of prescription to show that the claimant "had knowledge of all the material facts from which the debt arose or which he needed to know in order to institute action"; and that in dealing with the question of what facts the creditor is required to know, in the context of a medical malpractice claim, held that "in a claim for delictual liability based on the Aquilian action, negligence and causation are essential elements", which have both factual and legal elements."* See also; *First National Bank v Scenematic One (Pty) Ltd* [2016] ZASCA 60 where the court considered deemed knowledge to suffice in the determination of the running of prescription. See also; *Macleod v Kweyiya* [2013] ZASCA 28.

[59] The various forms of special pleas and the rationale underlying the procedure were set out by Gillespie J in *Doelcam (Pvt) Ltd v Pichanick & Others* 1999 (1) ZLR 390 (H), at 396B-F: *"Special pleas are three in kind. The plea in bar … the dilatory plea… the plea in abatement…"*

[60] Section 20 of the Prescription Act [Chapter 8:11].

[61] *Nyandoro & Another v Nyandoro and Others* (HC 746/07) [2008] ZWHHC 89.

*praescribitur"* which entails that if the action to sue does not exist, there is no way for prescription,[62] thus operating as an exception to prescription. Another exception to the running of prescription was influenced from the Roman law principle of *"contra non valentem agere non currit praescriptio"*. This principle discards the running of prescription against someone who is unable to act,[63] for instance; on minors or an insane person.[64] Therefore, it is clear that once all these factors are satisfied, the running of prescription begins, and its effects are maintained.

### 2.4.3. Time periods of Prescription

The Act creates different prescription time frames with regards to debts. Section 15 of the Act, bearing the heading; 'periods of prescription of debts' illustrates these different periods.[65] Nonetheless, the question that arises from this, which is central to this research, is the rationale behind these different time periods, considering the fact that the state or other entities enjoying longer prescription time periods are better equipped to recover debts as compared to ordinary creditors owed 'any other debt' as the Act purports.

#### 2.4.3.1. The global perspective

The concept of extinctive prescription carries different meanings in different jurisdictions.[66] The difference has largely been whether it is used as a procedural rule or as a substantive rule.[67] In other jurisdictions it has been used as a mechanism to extinguish a right of action while in some jurisdictions it has simply been used as a remedy to bar. Even though it is a common law legal term, there clearly cannot be a common meaning for it. For instance, England; which generally uses limitation periods against the remedy, extinctive prescription is not a substantive feature of its laws, but it is a defence of limitation and it provides no bar to a claim unless pleaded.[68]

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[62] Melich cited in L. Villagran, 'Extinctive Prescription, characteristics', 29 March 2019, <villagranlara.com/extinctiveprescription/> visited on 10 March 2021. See also; the Napoleonic Civil Code which outlined that "time of prescription cannot begin to be counted but only from the day the creditor is able to file lawsuit".

[63] Villagran, *supra,* note 56.

[64] Marin cited in L. Villagran, 'Extinctive Prescription, characteristics', 29 March 2019, <villagranlara.com/extinctiveprescription/> visited on 10 March 2021.

[65] See section 15 of the Prescription Act [Chapter 8:11] for a detailed appreciation of these different time periods.

[66] H. Pullum, 'The meaning of Extinctive Prescription in Guernsey', (2016) p. 174.

[67] *Ibid.*

[68] This was confirmed by the House of Lords in *Ketteman v Hansel Properties Ltd* [1987] AC 189, at 219E, per Lord Griffiths.

However, there are also other legal considerations of prescription periods recognised under international conventions which England recognises and allows to create cause of actions and to as well extinguish those cause of actions.[69]

Zimbabwe's prescription laws have notable similarities with those of its neighbour, South Africa.[70] South Africa's Prescription Act of 1969 aptly enshrines prescription periods which guide all debts in South Africa, unless otherwise stated in any other legislation. In particular, section 11(d) of the South African Prescription Act creates a three year extinctive prescription period for any other debt, not specified under the same section or any other law in South Africa.[71] Without doubt, this Act influenced drafters of the Prescription Act of Zimbabwe, in so many ways. However, the question that remains lingering in all this is whether the three year period of extinctive (negative) prescription for ordinary debts is appropriate and legally apposite for the people in Zimbabwe that is if Prescription in its totality is to remain.

### 2.4.4. The effects of extinctive prescription on ordinary debts and parties involved

As outlined above, without any dispute, extinctive prescription is a defence, raised by a defendant in a suit in the form of a special plea.[72] This defence is raised in the relevant documents filed of record in the proceedings. It is also known as a special plea in bar. As such, its effect is to destroy a claim to a right because such right would have been extinguished by the lapse of time,[73] and in terms of the focus of this research, such a right would have been extinguished due to the lapse of three years. Of course, for this plea to succeed, the onus is with

[69] See; Convention relating to the Carriage of Passengers and their Luggage by Se*a Higham v Stena Sealink Ltd* [1996] 3 All ER 660.

[70] Zimbabwe's Prescription Act clearly was copied from the South African Prescription Act. Differences are only noticeable on the arrangement of sections, but the content is almost the same except that it was constructed to apply in Zimbabwe.

[71] Section 11(d) of the Prescription Act of 1969 of the Republic of South Africa. See also; *Brummer v Minister of Social Development Western Cape High Court* Case No: 10013/07 16 March 2009 (Reportable).

[72] See; *Yusaf v Bailey and Others* 1964(4) SA 117. See also; I. Gilead, B. Askeland, (eds.), *Principles of European Tort Law; prescription in tort law* (1st Ed. 2020). See also; Loubser, *supra,* note 10.

[73] *John Conrad Trust v Federation of Kushanda Pre-Schools Trust and Ors* HH 503-15. See also; *Cape Town Municipality v Allie N.O* 1981 (2) SA at p. 5: "*…it cannot be denied that society is intolerant to stale claims. The consequence is that a creditor is required to be vigilant in enforcing his rights. If he fails to enforce them timeously he may not enforce them at all."*

the party alleging it to prove that indeed the claim has prescribed.[74] It cannot be denied that society is intolerant to stale claims. The consequence is that a creditor is required to be vigilant in enforcing his rights. If he fails to enforce them timeously he may not enforce them at all. But above it all, a successful claim of prescription destroys the right to claim a debt in its entirety.[75] As seamlessly short and precise as this effect or impact of prescription seems to be, its impact is clearly a heavy deathblow to a creditor. Creditors lose their property in any form. It reduces creditors into beggars, because, once prescription is successfully raised, it will only be at the behest of the debtor and its mercy, so to content, would a creditor recover its money. Clearly, this cannot be considered to be appropriate. In as much as law is law regardless of what it ought to be,[76] but its negative impact ought to be proportionate. As such, this study propels an alternative standpoint to extinctive prescription; something that is conversant with the factual reality of people's experiences.

## 2.5. Mechanism of security against extinctive prescription

### 2.5.1. Internal mechanisms (traditional mechanisms) of security against extinctive prescription

There are a number of ways which are enshrined in the Prescription Act, which can be used to secure a debt from extinctive prescription. These means delay the running of prescription,[77] and these are beyond dispute because they are internal means which are lawfully recognisable. Accordingly, since prescription begins to run when a debt becomes due,[78] the creditor can utilise judicial interruption mechanisms as outlined under section 19 of the Act.[79] What has to be noted in this process is the fact that this form of interruption becomes effective upon serving the other party.[80] The effect of this process is that it interrupts prescription, thus causing prescription to run afresh. It does not, however, destroy prescription, but only delays its running.

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[74] See; (1) *Jennifer Nan Brooker v Richard Mudhanda and The Registrar Of Deeds (2) Adrienne Staley Pierce v Richard Mudhanda and The Registrar Of Deeds* (SC 457 & 458/15) SC 5/18. See also; S. W. Van der Merwe, L.F. Van Huyssteen, *et al*, Contract*: General Principles*, (3rd Ed.) (Juta, South Africa, 2007) pp. 1-587.
[75] *Cape Town Municipality v Allie N.O* 1981 (2) SA.
[76] H. L. A. Hart, 'Are there any Natural Rights?' 64:2 *The Philosophical Review*, (1955) pp. 175-191.
[77] For an in depth appreciation of this characteristic, see the Prescription Act [Chapter 8:11]. See also; *Du Bruyn v Joubert* 1982 (4) SA 691 (W), which captures the dilatory nature of such mechanisms.
[78] *Deloitte Haskins & Sells Consultants (Pty) Ltd v Bowthorpe Hellerman Deutsch (Pty) Ltd* 1991 (1) SA 525 (A)).
[79] Section 19 of the Prescription Act [Chapter 8:11]; *"Judicial interruption of prescription".*
[80] Ibid.

In addition, prescription is interrupted by an acknowledgement of a debt by the debtor.[81] The Act does not explain how a debtor would acknowledge a debt, but clearly, by application of reason, a creditor can through other means, for instance; writing a letter requiring the debtor to acknowledge the debt or rather the debtor can choose to acknowledge the debt through communicating the time frame with which he or she would commit to pay.[82] What is important, however, is that once a debtor acknowledges a debt, that act alone interrupts the running of prescription.[83] This means a creditor can utilise this method in order to delay the running of prescription and ensure that, somehow, the debtor would pay the debt. Similarly, it does not destroy prescription, but only delays its running.

There are other factors which have been explained to delay the running of prescription. These factors are largely coincidental than they can be considered to be of a direct impact to intercepting prescription, nonetheless, these will be mentioned for the purposes of comprehensiveness of this research. Accordingly, prescription can be delayed from running if the creditor is a minor, or for some other reasons is under curatorship.[84] Other factors include if the debtor is outside the country, if the creditor and the debtor marry each other, if the executor of a deceased estate is yet to be appointed and if the debtor is a member of the creditor, who might be a government.[85] These means do not destroy prescription, but rather delay its running.

The Act sort of creates another mechanisms for securing a debt, even though this mechanism is a cooption of a debtor and highly imaginative. Accordingly, the law permits parties to make a payment of a debt or to agree to make a payment of a debt even after the debt has prescribed.[86] However, this option happens after the fact and cannot be considered as a means of countering prescription, and since it is dependent on whether the debtor is willing to pay, common reasoning

[81] Section 18 of the Prescription Act [Chapter 8:11].
[82] *KLD Residential CC v Empire Earth Investments 17 (Pty) Ltd* [2016] ZAWCHC 83:
[83] Section 18(1) of the Prescription Act [Chapter 18:11]; *"The running of prescription shall be interrupted by an express or tacit acknowledgment of liability by the debtor."*
[84] Section 17 of the Prescription Act [Chapter 8:11].
[85] 'Prescription', 10 May 2020, <legalwise.co.za/help-yourself/quicklaw-guides/prescription> visited on 26 July 2021.
[86] This is explained in terms of section 14(3) of the Prescription Act [Chapter 8:11].

does not capture any such possibility, because it is against why parties have preferred to use the defence of prescription in order to destroy claims for a debt.

What is important to remember is that mechanisms outlined above are internal means of countering the effect of prescription by delaying it. It should be emphasised that these mechanisms do not in any way change the ability of a debtor to pay a debt, but in their practical form they delay the running of prescription. But clearly, the important question that remains is whether or not this creates security over a debt. Thus, creating the need to assess the effectiveness of these mechanisms, and above all, to test alternative means suggested in this research.

### 2.6. Conclusion

This chapter illustrates a contextualised approach to factors anchoring this study. It captures the legal position of an ordinary debt, the concept of debt collection and the effects of extinctive prescription. However, it is clear that internal mechanisms of countering the extinctive prescription are only but useful for delaying prescription, which they are, but there is a great need for identification or establishment of other mechanisms be it direct or indirect which upon being tested can be effectively utilised not only to delay the running of prescription but to bring security over a debt. Another important factor to consider in all this is whether creditors are aware of these means of delaying prescription. It cannot be ascertained that they are not, but clearly, by assumption, considering that creditors have been losing their right to a claim,[87] it is sufficient to establish the assumption that creditors are not effectively aware of these. Even if they can be aware of them, these mechanisms do not destroy prescription and do not guarantee security of a debt or recovery of a debt, thus, still the bone of contention remains. Therefore, alternative means ought to be identified and their effectiveness ought to be tested. Clearly, there have not been any extensive discussions of alternative means of securing debts from the effects of prescription except for arguments for and/or against prescription. The ultimate aim of this research is to generate conclusions on alternative means of securing debts from extinctive prescription and a test for the relevance of prescription in modern day Zimbabwe.

[87] The assumption is that if a creditor is aware of prescription and its effects, he, she or it should act within the stipulated time, failure to do so, clearly suggest that creditors are not, in fact; they only become aware after the fact.

# CHAPTER THREE: THE LEGAL RATIONALE OF EXTINCTIVE PRESCRIPTION AND THE ADEQUACY OF INTERNAL MECHANISMS OF COUNTERING PRESCRIPTION

## 3.1. Introduction

Zimbabwe's Prescription Act was enacted in 1976,[88] and to date prescription laws have been operational, of course with subsequent modifications. Without any doubt, the operation of prescription laws predates the enactment of the Prescription Act.[89] Clearly, the assumption from this is that prescription laws are functional and necessary in society because they have been in existence for the longest of time. However, this chapter tests the practicability of this assumption. It examines the rationale of extinctive prescription on ordinary debts and the adequacy of mechanisms contained in the Act, which have been used and determined by the courts. The purpose behind the test for rationality is to establish deficiencies, if any, and to construct the basis for alternative means of debt security.

## 3.2. The rationale and relevance of extinctive prescription in modern societies

The preceding chapter outlined the effects of extinctive prescription, which in simpler terms is to extinguish the right to claim a debt, thus; destroying the debt unless any other arrangement is made after the fact.[90] However, several scholars have seen this to be appropriate and necessary. Extinctive prescription is considered to be necessary in modern legal systems because it brings legal certainty and finality to claims between debtors and creditors.[91] It creates protection, in particular to the debtor, against unfairness of having to defend the same claim time and time again.[92] The idealised rationale of extinctive prescription is that it promotes timeous exercise of rights.[93] This clearly leaves one wondering as to whether rights should have an expiry debt. What has been maintained is that rules of prescription are not meant to operate punitively and

[88] See; the long title of the Prescription Act [Chapter 8:11]: "[Date of commencement: 1st January, 1976.]"
[89] Prescription laws were developed during the reign of the Roman Empire.
[90] Unless parties can agree to a settlement of the debt despite the fact that it has prescribed. This exception after the fact is available in terms of section 14(3) of the Prescription Act [Chapter 8:11].
[91] Maja, *supra*, note 7, p. 129, introduces prescription as follows: "*It would be unfair for one person to be sued for a debt many years after taking that debt. Memory might have faded, witnesses might no longer be available, and records might have been lost or destroyed."*
[92] *Brooker v Mudhanda & Another* SC 5/18. *See also; Nyika & Anor v Minister of Home Affairs & Ors* HH-181-16.
[93] Loubser, *supra*, note 10.

mechanically but they are meant to improve and quicken the diligence of a creditor and to ensure that the creditor acts timeously.[94] The benefit of this is the improvement of judicial effectiveness in the administration of justice.[95]

In addition, the effluxion of time and the effect of prescription positions parties in such a way that they can exercise or enforce their rights while they are still fresh in mind.[96] This creates an economic approach to the exercise of rights. Parties are best served by the courts if disputes are adjudicated and concluded promptly while evidence which can be adduced is available and fresh in the minds of witnesses. This resonates with section 68 of the Constitution which creates a perspective for prompt administration of justice from all angles.[97]

Clearly, there seem to be an overwhelming legal justification for extinctive prescription. But what is surprising is that these justifications neglect the impact of extinctive prescription on creditors considering that if successfully pleaded, extinctive prescription completely destroys the right to a thing or property. This justification to loss of property cannot be claimed to be a reasonable limitation to property rights under section 71 of the Constitution of Zimbabwe,[98] as is contemplated by the limitation clause in the same Constitution.[99] Of course the first argument in favour of extinctive prescription is that a debt does not become due as and when it is concluded,[100] hence, there is time before prescription begins to run, which means a creditor has more time to claim for a debt because a debt is 'due' when it is claimable by the creditor and is payable by the debtor. It has furthermore been held that a debt is only due when the creditor's cause of action is complete. Another argument is that a creditor has numerous other ways of countering the running of prescription which are contained in the Act.[101] Also, because a creditor entered into an arrangement to lend money with an appreciation of the consequences hence he, she or it should have been sure of whether the debtor would be able to meet his, her or its obligation on time. However, such a conclusion is devoid of the real facts on the ground. There are

[94] Loubser, *supra,* note 10. See also; Christie and Bradfield, *supra,* note 29.
[95] M. Kelly-Louw and P. Stoop, 'Prescription of Debt in the Consumer-Credit Industry', 22 *PER / PELJ* (2019) p. 3.
[96] Loubser, *supra,* note 10.
[97] Section 68 of the Constitution of Zimbabwe Amendment (No.20) Act, 2013.
[98] Section 71 of the Constitution of Zimbabwe Amendment (No.20) Act, 2013.
[99] Section 86 of the Constitution of Zimbabwe Amendment (No.20) Act, 2013.
[100] *Deloitte Haskins & Sells Consultants (Pty) Ltd v Bowthorpe Hellerman Deutsch (Pty) Ltd* 1991 (1) SA 525 (A).
[101] See; the Prescription Act [Chapter 8:11].

opportunistic debtors; sinister, fraudulent and uncouth, who borrow with a view to abuse prescription to their benefit. Credit arrangements; in particular 'ordinary debts' are influenced by various reasons, and chief among these reasons include; trust, friendship, care, and contractual partnerships. Some creditors are not even aware of prescription, of course ignorance of the law is not defence,[102] but such technical concepts such as extinctive prescription cannot be expected to be easily understood by an ordinary man entrusting his savings to a fellow friend who would have pleaded for assistance and pledging to pay back the amount or thing borrowed. The saddening truth is that creditors are losing immeasurable amounts of money, an equivalent of life's savings, because of extinctive prescription. Clearly, there ought to be an improvement in laws governing prescription.

### 3.3. The rationale of different periods of prescription in terms of the Act[103]

It is clear from this research that the different periods of prescription preferred by the Act are prejudicial to creditors. Clearly, the rationale for these differences remains a matter of social construction or rather a copied conclusion from other jurisdictions such as South Africa,[104] France, Australia and India, which have different periods of prescription. In context, the obvious justification for the periods of prescription can be assumed to be a question of what the Parliamentarian said when he moved the motion to have the Bill adopted and enacted to be a law, as it is now.[105] It can also be claimed that since 'ordinary debts' or 'any other debts', involve the most of trivial cases, such as debts arising from claims for damages, as such for these to be claimed decades after the occurrence of the event affects the quality of evidence that can be used to justify the claim. However, the question of interest goes to the justification behind different time frames for claiming debts that is if, indeed, prescription is meant to bring finality to claims. This area of prescription is yet to be thoroughly deliberated over, which is why it is a central

[102] See; *Taylor-Freemen v The Senior Magistrate, Chinhoyi & Anor* 2014 (2) ZLR 498 (CC), wherein the general framework was laid out together with acceptable exceptions to the general rule. See also; G. Feltoe, 'Should Ignorance or mistake of law be a defence in Zimbabwe?' *The Zimbabwe Law Journal.*

[103] Section 15 of the Prescription Act [Chapter 8:11].

[104] For comparison, see; the South African Prescription Act of 1969.

[105] Unfortunately the Hansard could not be accessed in order to have an appreciation of what the Legislator claimed to be the basis of the differences in the time-periods of extinctive prescription, but the interpretation followed by courts in Zimbabwe is straightforward. The generic explanation followed by judges shows that they are satisfied with the view that society is intolerant to stale claims. See remarks by *Mathonsi* J in *John Conrad Trust v Federation of Kushanda Pre-Schools Trust and Ors* HH 503-15.

thrust of this research, as it remains a source of perpetual prejudice for creditors because not all claims can be trivial and after all the triviality of any claim remains a subjective construction.

### 3.4. Adequacy of internal mechanisms of countering prescription

The question of adequacy of internal mechanisms is integral to the conclusions derivable from this research. Internal mechanisms as enshrined in the Act delay the running of extinctive prescription. Once prescription is successfully interrupted, it runs afresh.[106] But what is clear is that the debt remains and extinctive prescription would still run from the day it would have been interrupted. Section 19 of the Act, clearly outlines this predicament.[107] This leaves a lot to desire, considering that these means do not destroy prescription once initiated and do not secure the payment of the debt, but rather delay its running. There are too many legal cavities created by the Act, which ought to be filled. As such, this creates the need to look elsewhere for effective alternative means, of course upon testing their application.

### 3.5. Conclusion

It is evident from the discussion that the rationale of extinctive prescription as projected from studies is somewhat relevant and prudent in its abstract construction but contestable in its practical application considering the fact that it is overly ignorant, so to speak, to the factual damage of prescription on creditors. At face value, the argument of economic and efficient administration of justice is appropriate and in sync with what can be theoretically deduced from section 68 of the Constitution of Zimbabwe. Nonetheless, an excursive consideration of the damage extinctive prescription as is extractable in *Howson v Cameron*,[108] wherein the defendant avoided paying a balance of USD 200 000 because the claim had been extinguished by the lapse of time. In the case, the parties, who were siblings, had on June 30, 2008 entered into an agreement in terms of which the plaintiff sold her shares to the defendant for the price of US$240 000 in a company they jointly owned. The defendant only paid US$40 000, leaving the balance of US$200 000 outstanding. That balance was to be paid in five equal instalments within a period of five years. Clearly, such a right cannot be considered to be a stale claim, whatever the case could have been. The value of USD 200 000 is sufficient to save many lives and it can

[106] See section 18 and 19 of the Prescription Act [Chapter 8:11].
[107] Section 19(3), (4), (5) and (6) of the Prescription Act [Chapter 8:11].
[108] *Howson vs Cameron, supra, note* 33.

sustain a livelihood for a couple of years. In fact it can change lives beyond the imagination of many. As such, to watch all this investment plunging into a legal impossibility because it has prescribed and because there is need to bring finality and an ending to litigation or to claims for debt is clearly impractical. To expire a right, worse of it a property right, cannot be considered rationale, given the period attached to it. What is interesting is the fact that debts owed to the State, which has 'unrestricted' and multiple capabilities of recovering or ensuring that a debt owed to it is recovered, is in the least six (6) years and at most thirty (30) years. Yet an ordinary debt, owed to an ordinary creditor; who probably survives on it or rather which forms party of his, her or its livelihood, prescribes in three (3) years. The rationale of bringing finality to claims is clearly misplaced, for its unchecked effect.

There are several reasons as to why persons cannot claim debts within the shortest of time possible. Equally there are numerous reasons why debtors cannot honour up to their obligation to repay a debt. Some of these reasons on the part of the creditor may include; trust, confidence, degree of relationship and respect, lack of knowledge of prescription and its effects, lack of resources to effectively claim for repayment, *inter alia*. While on the part of the debtor it could be genuine lack of resources, opportunism, fraud, *inter alia.* Therefore, to claim relevance of prescription against internal mechanisms available in terms of the Act and to expect a creditor to utilise such mechanisms is a premature justification of prescription. It could have been justifiable if these internal mechanisms were adequate in such a way that they would create guarantee that one way or the other, a creditor would secure his, her or its debt. However, the best recourse these mechanisms offer is just dilatory. They are devoid of finality claimed to be achievable from the flip side of prescription.

Clearly, this creates an undeniable salience for consideration of alternative mechanisms to prescription, be it in an indirect form. This also creates an assessment for the practicality of the three (3) years period of extinctive prescription on ordinary debts, considering its devastating effect on the ordinary person.

## CHAPTER FOUR: LEGAL SOLUTIONS TO THE EFFECT OF PRESCRIPTION

### 4.1. Introduction

Extinctive prescription poses both a legal effect and a factual effect. The legal effect of extinctive prescription is that of extinction or rather extinguishing a legal right to a claim or to a thing.[109] It justifies loss of property because of effluxion or lapse of time.[110] The factual effect on the other hand is that which deals with the practical impact caused by prescription once a right to a claim is extinguished. A creditor loses property. A creditor will not be able to recover its investment unless otherwise the debtor is remorseful and considerate to agree to pay the debt. The debate has been that prescription brings finality and certainty in claims.[111] It saves a debtor from what has been considered unfair subjection to stale claims,[112] whilst a creditor loses a right to a claim for a debt.

It is without doubt that the law serves a purpose in society.[113] The debate however has remained that of whether the law should be considered or required to be just or unjust.[114] However, other schools of thought, in particular natural theorists consider that laws should be just and should function in such a way to protect the moral thread threading societies.[115] It cannot be assumed that the law is maintaining the natural when it justifies dispossession and disenfranchisement of a right to a claim because it has expired because the ideal thing is to bring finality to a claim, yet the other party would have benefited at the expense of the other. Even though the law is not only for the prudent, but it cannot be the agent of unjust enrichment. As argumentative as this might

[109] See; Villagran, supra, note 58. See also; M. M. Loubser, Extinctive Prescription, (Kenwyn, Juta & Co., 1996) pp. 1-239.
[110] C. Todica and I. O. Urs, 'The Extinctive Prescription Or Lack Of Prescription Of The Grounded Action For Recovery According To The Private Property Right', *Research Gate* (2011) pp. 54-60. See also; E. H. Hondius, 'Extinctive Prescription: On the limitation of actions: Reports to the XIVth Congress International Academy of Comparative Law (German Report by Reinhard Zimmerman 171).
[111] Loubser, *supra*, note 10. See also; *Cape Town Municipality v Allie N.O* 1981 (2) SA at p. 5.
[112] Loubser, *supra*, note 10. See also; *John Conrad Trust v Federation of Kushanda Pre-Schools Trust and Ors* HH 503-15.
[113] Humbly, *et al*, *Introduction to Law and Legal Skills in South Africa: Jurisprudence* (Oxford University Press Southern Africa (Pty) Ltd, Cape Town, 2012). See also; K. Van Dijkhorst, Courts: In LAWSA (2nd Ed., Vol 5(2), 2004).
[114] L. L. Fuller, *The Morality of Law* (2nd Ed., 1969) p. 39. See also; H. L. A. Hart, 'Are there any Natural Rights?' 64:2 *The Philosophical Review*, (1955) pp. 175-191.
[115] M. S. Moore, "Law as a Functional Kind" in Robert P. George, ed., Natural Law Theory: Contemporary Essays (Oxford: Oxford University Press, 1992) p. 188. See also; J. Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980) p. 273.

sound, there ought to be solutions to this quagmire, which this research purports to find. As such, this chapter will test alternative solutions to debt security and the appropriateness of the different time frames of extinctive prescription.

## 4.2. Alternative ways of securing ordinary debts from the effects of prescription

### 4.2.1. Cession

This research purports that cession is a legal solution for securing ordinary debts and improving debt recovery. Before, delving into the functionality or usefulness of cession, it is appropriate to unpack cession as a concept. A cession is a legal act or agreement, whereby a personal right transfers from a creditor to another person, who then becomes the creditor. Put differently, cession entails the transfer of personal rights from one person to another. It is a legal agreement in which a personal right against a debtor is transferred to the cessionary. It does not transfer real rights to the cessionary. The cessionary can enforce the claim or accept an amount in settlement or abandon the claim against the debtor. It involves the transference of personal rights[116] from one party who is the original creditor also known as a cedent to another party to whom the right is transferred known as the cessionary.[117] A cession is accomplished by means of an agreement of transfer between the cedent and the cessionary arising out of a *justa causa* from which the intention of the cedent to transfer the right to claim to the cessionary (*animus transferendi*) and the intention of the A cessionary to become the holder of the right to claim (*animus acquirendi*) appears or can be inferred. The agreement of transfer can coincide with or be preceded by, a *justa causa* which can be an obligatory agreement such as a contract of sale, a contract of exchange, a contract of donation, an agreement of settlement or even a *solutio* (payment). The person who transfers or cedes his or her right(s) is the cedent and the person who obtains the ceded right is the cessionary.[118] This right can be by inference.[119] When concluding a cession; a

[116] See the judgement in *Zimbabwe Banking Corporation and Others v Shiku Distributors (Pvt) Ltd and Others* 2000 (2) ZLR 11 (H), wherein the Court established that: *"... (a) contract of cession is one in which a personal right against a debtor is transferred to the cessionary. It does not transfer real rights to the cessionary. The cessionary can enforce the claim or accept an amount in settlement or abandon the claim against the debtor."*
[117] R. H. Christie, *Business Law in Zimbabwe* (Juta, 1998) pp. 1-525.
[118] Christie, *supra,* note 118. See also; *Larry Makahamadze & Marmak (Pvt) Limited v Jacinth & Associates* HH 658-14 at p. 2.
[119] Christie, *supra,* note 118. See also; Syfrets Merchant Bank v Jardine & Ors 1999 (1) ZLR 124 – 127.

cedent is prohibited from transferring a debt that has been extinguished by prescription, [120] a cedent can only cede that which belongs to him, her or it, and the cession must be lawful and operational.[121]

Cession is a type of substitution, together with other types of substitution which are delegation and assignment.[122] The preferred choice of cession in this research is because of the nature and characteristics of cession. Clearly, cession stands as a better alternative that can offer security to a creditor without having to go through the trouble of seeking consent of a debtor[123] that is if, it can be determined as useful in this research.

The effects of a cession are different depending with whether it is absolute or *securitatem debiti* (by way of security). Absolute cession divests the cedent with all the rights ceded that is their extent and nature so that thereafter the cessionary, not the cedent, is vested with all these rights and entitled to sue for their enforcement.[124] However, this type of cession, seem not to be favourable in the circumstances raised in this research. Therefore, a turn to the second type or form of cession is appropriate at this stage.

The second type of cession is cession in *securitatem debiti* (in security). With this form of cession, cession of rights is meant as security for a debt.[125] This is when the cession of a right is used as a form of security. The legal effect of such cessions is a matter of debate in South Africa. One school of thought holds that the legal effect of this cession is that the cedent retains ownership or dominium of the right that was ceded as security and the cessionary only gets a security of interest. This is called pledge construction. Another school of thought holds that this

[120] *Woodnutt NO v The Master* 1966 (3) SA 436 (R). See also; G.F. Lubbe & C.M. Farlam & Hathaway Contract, *Cases, Material and Contemporary* (3rd Ed.) (Juta & Co Ltd, Cape Town, 1998). See also; *Hippo Quarries (TV1) Pty Ltd* 1992 (1) SA 867.
[121] *Larry Makahamadze & Marmak (Pvt) Limited v Jacinth & Associates* HH 658-14. See also; C. D. Hofmeyr, 'The nature of cession in security', *Finance and Banking Alert* 20, (2017) pp. 1-4.
[122] Christie, *supra,* note 118. See also; *Treasure General v Van Vuren* 1905 TS 582. See also; *Roman Catholic Church v Southern Life Assurance Ass* 1992(2) SA 807.
[123] This is interpreted from the fact that in a cession agreement, it is not necessary to seek for consent from a debtor. See; *Larry Makahamadze & Marmak (Pvt) Limited v Jacinth & Associates* HH 658-14. See also; *Anglo-African Shipping Co (Rhodesia) (Pvt) Ltd v Baddeley & Anor* 1977 (1) RLR 259.
[124] *Syfrets Merchant Bank v Jardine & Ors* 1999 (1) ZLR 124 – 127. See also; *Johnson v Incorporated General Insurance Ltd* 1983 (1) SA 318 (A).
[125] Hofmeyr, *supra,* note 22. See also; S. Scott, *The Law of Cession* (2nd Ed. Juta, 1991) pp. 200-250.

cession is akin to an out-and-out cession with an additional fiduciary agreement that the cessionary will cede back the right once the principal debt has been satisfied. If the cessionary exercises the right contrary to the security agreement, he or she can be sued in terms of this fiduciary pact. However, the South African Supreme Court appears to favour the pledge construction,[126] but for Zimbabwe, there is yet to be clarity as to the form of legal effect[127] of cession in *securitatem debiti.* What is however important in this segment is the fact that a creditor can strategically cede his or her right to claim a debt to a cessionary, who in turn would be charged with the obligation of securing the debt. This process should of course be concluded before the lapse of the prescription timeframe as prescribed in the Act. Since, a cession is flexible with what parties agree about, it means, the creditor would have to convince the cessionary to come up with a flexible arrangement. However, what remains questionable, is whether, the creditor would recover all his, her or its due, and also the question of who should be the cessionary.

### 4.2.2. Other considerable alternative mechanisms to extinctive prescription

This research constructs that, the extension of the prescription time-frame for ordinary debts is necessary in order to cushion the effects of prescription. The question obviously becomes how this alternative option will bring security to a debt. The answer to this is hinged against the fact that there are numerous reasons causing people to fail to repay debts and/or claim debts. These reasons as outlined in preceding chapters may be from the creditor's side or the debtor's side. Therefore, extension of time creates more time for both parties, depending on the cause of the impediment. This is however more beneficial to the creditor who would have more time to claim his, her or its debt.

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[126] See; Scott, *supra,* note 24. See also; D. Hofmeyr, 'Cession in security: Casting the net too widely', *Finance & Banking Alert* (2020) pp. 1-12.

[127] The debate of the legal effect, which is interesting to make note of was considered in *Zimbabwe Banking Corporation and Others v Shiku Distributors (Pvt) Ltd and Others* 2000 (2) ZLR 11 (H), where the court held that: *"...Adhere the cession takes place before legal action begins, the cedent divests himself of the right to claim and cannot institute an action against the defendant and he cannot even act as agent for the cessionary as an undisclosed principal…. Prescription affects a cause of action and not the parties or the right of action…A purported transfer after litis contestatio is ineffective against the cessionary unless the cessionary is substituted, at the discretion of the court, as plaintiff. The transfer is perfected only when the court gives its approval by granting substitution."*

Secondly, parties to a debt should always exercise the culture of reducing every debt arrangement into writing. This means every term should be captured. This should be coupled with creating collateral based contractual arrangements, such that if a party fails to repay the debt, a creditor can take something of similar value in place without having to approach the courts. These alternative means might not stop the running of prescription but offer a better chance of securing a debt, which is the ultimate goal, all in all.

### 4.3. Conclusion

It is interesting to make note of the nature of the law and how in most circumstances disputes are settled basing on the interpretation of a particular provision. In as much as this research identifies the legal and factual effect of prescription, it is clear that prescription laws are older than Zimbabwe itself and its influence and impact is existent in various fields or areas of law. The impact of prescription is not different from the death sentence, which, fortunately has been abrogated in several jurisdictions. Clearly, this chapter attempted to test the effectiveness of alternative means of prescription, but what is undeniable is that these alternative means have an indirect effect on prescription. In particular, cession would be depended on whether the cessionary succeed in recovering a debt on behalf of the cedent to whom the principal debt is owed. This research does not claim that the cessionary should be a debt-collection agent considering that 'ordinary debts' are in different packages and debt-collection agents do not come cheap. As such, a cession can be done with a debt-collection agent or an individual. What should be maintained is that a cession should be done only for strategic purposes. Therefore, the cessionary should be in a position to recover a debt. In this sense, without focusing much on the running of prescription, it can be assumed that cession does create a form of security on debt recovery. The assumption is that the person to whom rights are ceded should have the knowledge of prescription and should be in a position to counter the running of prescription considering that cession does not directly counter the running of prescription. Another important conclusion extractable from this chapter is the consideration for increasing the prescriptive period for extinctive prescription on 'ordinary debts'. Its effect is perpetually prejudicial to creditors, thus, increasing the time is necessary.

## CHAPTER FIVE: CONCLUSION

### 5.1. Introduction

This research establishes that debt security is integral in society because lending and/or borrowing is a factual existence in the community. The reality is that people (persons) borrow money or fruits from others. There are several reasons that cause people (person) to borrow from another person and vice versa.[128] The reality of losing property through non-compliance or non-performance of an obligation is central to debt-collection litigation, wherewith; the injured party would be seeking to recover what he, she or it is owed by the debtor.[129] Interestingly, it is possible, and more often than not, that the creditor would lose the right to recover its debt. This is so because of extinctive prescription. As extensively documented in this research, extinctive prescription is a technical defence; or rather a special plea used by a defendant or respondent in any matter, in this case a debtor, to bar a creditor from successfully recovering his, her or its debt because it would have been extinguished by the effluxion of time.[130] Since the focus of this research is on 'ordinary debts' it means the defendant would successfully argue that the creditor failed to claim the debt within the stipulated three (3) years prescription period.[131] Indeed, this technical argument is an evil, but one which is necessary as has been claimed by several scholars and maintained by the courts.[132] Eventually, a creditor would lose a claim to a *bona fide* debt because it prescribed, and there is nothing amiss with this because prescription is a legitimate defence codified in the statutes.

Prescription commands an undisputable global application across jurisdictions. The only noticeable differences are on the periods of prescription.[133] What it then means is that prescription is a universally accepted legal principle. The major justification around this is that prescription brings finality to claims and saves a debtor from having to defend stale claims.[134]

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[128] For a glimpse of some of the reasons, see discussions in the preceding chapters of this research.
[129] See chapter 2 of this research.
[130] Refer to chapter 3 and 4 of this research for an in depth discussion of the effects of prescription.
[131] This prescription period is outlined under section 15(d) of the Prescription Act [Chapter 8:11].
[132] See different justifications of extinctive prescription as discussed in chapter 3 and chapter 4 of this research.
[133] For a thorough appreciation of this conclusive standpoint, compare prescription statutes guiding prescription laws in Zimbabwe, South Africa, Scotland, England and France, among many other countries.
[134] See the justifications laid out in; M. M. Loubser, Extinctive Prescription, (Kenwyn, Juta & Co., 1996) pp. 1-239. See also; C.P. Sherman, 'Acquisitive Prescription: Its Existing World-Wide Uniformity', Yale Law Journal (1911) pp. 147-149. See also; L. Villagran, 'Extinctive Prescription, characteristics', 29 March 2019, <villagranlara.com/extinctiveprescription/> visited on 10 March 2021.

Prescription also encourages the creditor to follow up on his, her or its debt on time whilst it is still fresh in mind, in case, it ends up in court; the creditor would be able to adduce favourable and competent evidence helpful because the matter will still be fresh.[135] These justifications are appropriate and necessary. However, they are not alive to the devastating effect of extinctive prescription on creditors.[136] This research agrees to the reasoning that prescription brings finality to claims, but it establishes the factual reality of the devastating effects of prescription on creditors. Prescription destroys the right to a claim, which means a creditor would not be legally able to claim his, her or its debt. Once this legal reality is established, the factual reality is that a creditor would suffer. The creditor suffers because of the importance of the money it would lose and the value of the thing he or she would lose. What is clear is that, a debtor benefits twice at the expense of the creditor. Again, there are several reasons that cause parties to agree to lend each other money. But once a legitimate expectation is created and a right for that matter; that one should recover money or fruits, he, she or it ought to recover the money. Unfortunately, such factual reasoning cannot alter the direction of the sands of prescription which is a legal reality.

Clearly, one would expect that those who coined prescription laws would not have left it one sided that is only benefiting debtors at the expense of creditors, and of course this is not the case. This research appreciates the entrenchment of internal mechanisms in the Act to counter the effects of extinctive prescription. However, this research questions the effectiveness of these mechanisms *vis-á-vis* the ultimate impact of extinctive prescription on creditors. This test for effectiveness; sets out the framework for testing the use of alternative mechanisms of debt security which can meet tore to tore with the impact of extinctive prescription. The point of departure in this research is that internal mechanisms couched in the Act are insufficient; hence, there is a need to look elsewhere.

### 5.2. Effectiveness of internal mechanisms of countering extinctive prescription

The effectiveness of internal mechanisms entrenched in the Act, is set on a tenor of their ability to counter prescription and at the same time securing the debt from the effects of extinctive

[135] These justifications are extractable from numerous court decisions. For instance, see; *Howson v Cameron* HH141/18. See also; *John Conrad Trust v Federation of Kushanda Pre-Schools Trust and Ors* HH 503-15. See also; *Cape Town Municipality v Allie N.O* 1981 (2) SA at p. 5.
[136] This is the position advanced through this research.

prescription. Accordingly, the running of extinctive prescription is commenced once a debt becomes due and claimable. A debt only becomes due when a creditor becomes aware of the identity of the debtor and the facts from which the debt arises from. This means the clock of prescription begins to tick. In order to counter this, a creditor may go by way of involving the court, however way, in respect of the debt, in order to recover it as outlined in the Act.[137] This forms part of judicial interruption. What is critical about this mechanism is that the plaintiff or applicant (who is the creditor) must serve the other party. However, this does not destroy prescription, but it only interrupts the running of prescription. In other words it delays prescription. The ultimate effect is that it causes prescription to start running afresh.[138] This is clearly short of effectively securing the debt. Of course, it buys more time for the creditor, but what remains critical is making sure that the debt is secured, thus, creating a legal craving for an effective solution. This reality, is the same with all other internal mechanisms entrenched in the Act, which are acknowledgement of debt by the debtor,[139] and other indirect internal means which delays the running of prescription such as the legal status of the creditor that is if the creditor is a minor[140] and if the debtor is in a foreign country.[141] Clearly, the first and foremost solution is that which guarantees that the creditor would be able to secure his, her or its debt, despite the question of whether the debtor has capacity to repay the debt. What it then means is that, for any mechanism to be effective it must allow recovery of the debt or rather it must be a step towards the recovery of the debt.

### 5.3. Alternative means of debt security

It is clear that mechanisms entrenched in the Act are not sufficient to bring security and/or protect a debt from the impact of prescription. This research, with particularity, tested cession as an alternative of securing debts from the impact of extinctive prescription, and also makes note of other alternative solutions in particular the solution to the aspect of the time period of extinctive prescription of 'ordinary debts'. Cession of creditor's rights is suggested in this research as an effective solution to debt security. Cession as explained in this research is a form

[137] This is clearly outlined in terms of section 19(2) and (3) of the Prescription Act [Chapter 8:11].
[138] See section 19(4) of the Prescription Act [Chapter 8:11].
[139] Section 18 of the Prescription Act [Chapter 8:11].
[140] These special conditions are outlined under section 17 of the Prescription Act [Chapter 8:11].
[141] *Ibid*, section 17(1) (c).

of substitution which involves the transfer of rights to a principal debt from one creditor who is the cedent (holder of the right) to a cessionary (the recipient of the rights).[142] This process transfers rights to a debt, and allows the other party to recover the debt on behalf of the other party. However, it is clear from this research that for cession to be effective it must be strategic. This means that the party to whom the rights are ceded must be strategically positioned and must be able to recover the debt on behalf of the other. As such, a creditor can consider ceding its rights to a debt collector. Although, it does not necessarily have to be a debt collector, it can also be anyone else, but that person should be able to recover the debt and should be aware of prescription. It is however, important, to make note of the fact that cession does not counter prescription, in fact, a cession will be considered invalid if a cedent cedes rights that would have prescribed.[143] But the assumption from this research is that if cession is strategically done, the creditor would have a better chance of securing his, her or its debt, considering that the cessionary would do what it takes to recover the debt and should be better placed, for strategic reasons, to recover debts.

It is also submitted that there are other alternative means which can be effectively used by debtors, which are not as complex as cession. Firstly, parties should always reduce their agreements into writing. This helps especially to counter the possibility of disputes over the existence of the debt. Secondly, creditors should also consider entering into collateral based written contracts. Of course, such contracts must be legal, but their impact is beyond measure. Such contracts should inculcate a timeframe within which a creditor would recover his, her or its debt by taking something of equal value belonging to the debtor.

In addition, it is far and beyond and well established that the time-period for extinctive prescription of 'ordinary debts' is the major variable leading to perpetuation of prejudice against creditors. There is no satisfying justification over the different time frames allocated per each type of debt in terms of the Act. Clearly, if prescription can be countered and prolonged, anyhow, simply put; the argument that prescription brings finality to claims becomes questionable. As such, the time frame for extinctive prescription on 'ordinary debts' ought to be

[142] For in depth appreciation of this relationship refer to chapter 4 of this research.
[143] For a wider appreciation of limitations of cession, see; S. Scott, *The Law of Cession* (2nd Ed. Juta, 1991) pp. 247. See also; R. H. Christie and G. Bradfield, *Christie's Law of Contract in South Africa* (6th Ed. LexisNexis, Durban, 2011) p. 487. *Nhlapo v Nhlapo* [2013] ZAFSHC 59 (unreported) (South Africa).

increased at least six years, in order to afford a creditor enough time to react and enforce its right. This would obviously be of benefit to genuine debtors without sufficient resources through affording them ample time to gather resources.

### 5.4. Recommendations

A. It is clear that over and above, extinctive prescription is prejudicial to creditors. In as much as it is reasonable to claim that it brings finality and improves the quality of administration of justice, but its impact is inordinately disadvantageous to creditors. It is also agreed in this research that prescription still serves a purpose in modern day Zimbabwe. However, it is recommended that the Prescription Act should be reviewed with a view of increasing the time period of prescription on ordinary debts.

B. It is also recommended that the legislature should consider entrenching a counter-argument to the defence of prescription which allows the plaintiff (creditor) to raise dishonesty and deceit on the party of a debtor who would have manipulated prescription to its advantage. Of course the onus remains with the party alleging dishonesty. The purpose of this is to discourage opportunism and the use of the law to perpetuate evil.

C. This research brushed through the field of debt-collection litigation in Zimbabwe. However, it is clear that there is not much research information around the area. As such, there is need to fill in the gap through research around the area of debt-collection litigation.

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