

Hurter Spies Incorporated
Reg. no. 2008/009761/21
Attorneys/Notaries/Conveyancers

Pretoria-offices:

Second Floor, Block A, Loftus Park
416 Kirkness street, Arcadia
Pretoria, 0007

Centurion-offices:

54 Union Avenue (c/o Union Avenue & Kort street)
Kloofsig, Centurion, 0158

Acting as caretaker of the practice of:

LT Pretorius Attorneys
829 Codonia Avenue, Waverley, Pretoria, 0186
Telephone: 012 332 1770

P O Box 14505

0140 Lyttelton

Tel : 012 941 9239

Fax : 012 644 1997

e-mail : admin@hurterspies.co.za

Internet : www.hurterspies.co.za

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Mr Rob Hutchinson

DearSA

By email: rob.hutchinson@dearsouthafrica.co.za

LEGAL OPINION

1. INTRODUCTION

- 1.1. We confirm that our firm has been approached by our client, DearSA NPC with an enquiry relating to the prescription in Civil and Criminal Matters (sexual offences) amendment bill.
- 1.2. We have therefore taken the liberty of briefly summarising the purpose of the amendment bill.

2. BACKGROUND

- 2.1. The Constitutional Court, in *Levenstein and Others v Estate of the Late Sidney Lewis Frankel and Others 2018 ZACC 16* (“the Levenstein matter”), declared on 14 June 2018 that section 18 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), is inconsistent with the Constitution to the extent that it bars, in all circumstances, the right

to institute a prosecution for all sexual offences, other than those listed in section 18(f), (h) and (i) of the said Act, after the lapse of a period of 20 years from the time when the offence was committed. The Constitutional Court afforded Parliament 24 months to enact remedial legislation, that is before 14 June 2020.

- 2.2. The Criminal Procedure Amendment Bill, 2018, was introduced in Parliament on 30 May 2018, before the Constitutional Court delivered its judgment. The Department of Justice and Constitutional Development briefed the Portfolio Committee of Justice and Correctional Services on that Bill, but the Portfolio Committee did not invite interested parties to comment on the Bill.
- 2.3. On 16 January 2019, the Minister informed the Speaker that the applicants in the Levenstein matter have decided to challenge the constitutional validity of section 12(4) of the Prescription Act, 1969.
- 2.4. The Speaker was informed that the Criminal Procedure Amendment Bill, 2018, will be withdrawn and that a single Amendment Bill will be prepared to deal with proposed amendments to section 18 of the Criminal Procedure Act, 1977, and section 12 of the Prescription Act, 1969.

3. PURPOSE OF THE AMENDMENT BILL

- 3.1. To amend the Prescription Act 1969 so as to extend the list of sexual offences in respect of which prescription does not commence to run under certain circumstances regarding a debt that is based on the alleged commission of any of those sexual offences.
- 3.2. To amend the Criminal Procedure Act 1977 so as to the extend the list of sexual offences in respect of which a prosecution may be instituted after a period of 20 years has lapsed since the date of the alleged commission of the sexual offence.
- 3.3. To provide for matters connected herewith.
- 3.4. Section 12 of the Prescription Act, 1969 (Act No. 68 of 1969), regulates when prescription in civil matters begins to run. Section 12(4) provides that prescription does not commence to run in respect of a debt based on the commission of, among others, certain sexual offences during the time in which the creditor is unable to institute proceedings because of his or her mental or psychological condition.
- 3.4. Clause 1 of the Bill aims to amend section 12(4) of the Prescription Act, 1969, in order to ensure that all sexual offences, regardless of whether they have been committed under common or statutory law and is hence included in that section.

- 3.5.** Section 13 of the Prescription Act, 1969, deals with the delay of the completion of prescription in certain circumstances, for example where the creditor is a minor, is “insane” or is a person under curatorship.
- 3.6.** Clause 2 of the Bill aims to amend section 13 of the Prescription Act, 1969, to make provision for those cases where victims of sexual offences are in a position to institute proceedings, but then suffer relapses which prevent them from instituting proceedings for a period. Clause 2 aims to replace the term “insane” with the phrase “mental or intellectual disability, disorder or incapacity”.
- 3.7.** Section 18 of the Criminal Procedure Act, 1977, regulates the prescription of the right to institute prosecutions after a period of 20 years has lapsed after alleged commission of certain offences. A prosecution may, in terms of section 18, only be instituted after a period of 20 years has lapsed after the alleged commission, among others, of—
- (i) rape or compelled rape as contemplated in section 3 or 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (Act No 32 of 2007), respectively; and
 - (ii) using a child or person who is mentally disabled for pornographic purposes as contemplated in sections 20(1) and 26(1) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007.
- 3.8.** Clause 3 of the Bill, among others, aims to give effect to the judgment of the Constitutional Court. Clause 3 aims to amend section 18 of the Criminal Procedure Act, 1977, to include reference to the offence of corruption. The clause also aims to ensure that all sexual offences, whether they have been committed under common or statutory law, are included in section 18 of the said Act.

4. PROPOSED CHANGES

- 4.1.** Amendment of section 12 of Act 68 of 1969, as amended by section 1 of Act 11 of 1984, section 68 of Act 32 of 2007 and section 48 of Act 7 of 2013

Section 12 of the Prescription Act, 1969, is hereby amended by the substitution for subsection (4) of the following subsection:

“(4) Prescription shall not commence to run in respect of a debt that is based on the alleged commission of—

- (a)** [an alleged sexual offence as contemplated in sections 3, 4, 17, 18(2), 20(1), 23, 24(2) and 26(1) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007,] any sexual offence in terms of the common law or a statute; and

- (b) [an alleged offence] offences as provided for in sections 4, 5, 6, [and] 7 and 8(1) and involvement in these offences as provided for in section 10 of the Prevention and Combating of Trafficking in Persons Act, 2013,

during the time in which the creditor is unable to institute proceedings because of his or her mental or [psychological condition] intellectual disability, disorder, or incapacity, or because of any other factor that the court deems appropriate.

4.2. Amendment of section 13 of Act 68 of 1969, as amended by section 11 of Act 139 of 1992

Section 13 of the Prescription Act, 1969, is hereby amended by the substitution in subsection (1) for paragraph (a) of the following paragraph:

- (a) the creditor is a minor or is [insane] a person with a mental or intellectual disability, disorder or incapacity, or is affected by any other factor that the court deems appropriate with regard to any offence referred to in section 12(4), or is a person under curatorship or is prevented by superior force including any law or any order of court from interrupting the running of prescription as contemplated in section 15(1); or”.

4.3. Substitution of section 18 of Act 51 of 1977, as substituted by section 68 of Act 32 of 2007 and amended by section 48 of Act 7 of 2013 and section 8 of Act 8 of 2017

The following section is hereby substituted for section 18 of the Criminal Procedure Act, 1977:

“Prescription of right to institute prosecution

18. (1) The right to institute a prosecution for any offence, other than [the offences of]—

- (a) murder;
- (b) treason committed when the Republic is in a state of war;
- (c) robbery, if aggravating circumstances were present;
- (d) kidnapping;
- (e) child-stealing;
- (eA) the—
 - (i) common law offence of bribery;
 - (ii) the offence referred to in section 1 of the Corruption Act, 1994 (Act No. 92 of 1994); or
 - (iii) offences referred to in Parts 1 to 4, or section 17, 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004 (Act No. 12 of 2004);
- (f) **[rape or compelled rape as contemplated in section 3 or 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act,**

2007, respectively] any sexual offence in terms of the common law or statute;

(g) genocide, crimes against humanity and war crimes, as contemplated in section 4 of the Implementation of the Rome Statute of the International Criminal Court Act, 2002; any contravention of section 4, 5 or 7 and involvement in these offences as provided for in section 10 of the Prevention and Combating of Trafficking in Persons Act, 2013 (Act No. 7 of 2013);

[(hA) trafficking in persons for sexual purposes by a person as contemplated in section 71(1) or (2) of the Criminal Law Sexual Offences and Related Matters) Amendment Act, 2007;

(i) using a child or person who is mentally disabled for pornographic purposes as contemplated in sections 20(1) and 26(1) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007;] or

(j) torture as contemplated in section 4(1) and (2) of the Prevention and Combating of Torture of Persons Act, 2013 (Act No. 13 of 2013), shall, unless some other period is expressly provided for by law, lapse after the expiration of a period of 20 years from the time when the offence was committed.

(2) The right to institute a prosecution that, in respect of any offence referred to in subsection (1)(eA) and (f), has lapsed before the commencement of the Prescription in Civil and Criminal Matters (Sexual Offences) Amendment Act, 2019, is hereby revived.”.

5. EFFECTIVENESS OF CHANGES TO ACHIEVE GOALS

5.1. Cabinet described the bill in its statement as rectifying “Section 18 of the Criminal Procedure Act, 1977 (Act 51 of 1977) that was declared unconstitutional by the Constitutional Court. The Bill provides for the prosecution of people who have committed sexual offences, irrespective of when these offences were committed”.

Cabinet added that the “proposed amendments will provide the National Prosecution Authority with a wider discretion to institute the prosecution of sexual offences cases that were committed even 20 years earlier”.

5.2. The Sexual Offences Bill seeks to empower survivors, who often suffer in silence and either never disclose the offences at all - with the perpetrator escaping all consequence - or they only disclose over varying periods of time.

According to the 2018/19 Statistics South Africa Victims of Crime Report, the percentage of victims of sexual offences, who reported at least one incident, is 88%.

“The Ministry of Justice and Correctional Services believes that amendments such as these will encourage survivors of sexual offences to report these matters, even if the incidents took place many years ago, so that perpetrators of sexual offences are not met with impunity.

“It means that these crimes can be prosecuted, irrespective of when the crime took place,” said the Justice Department.

- 5.3.** It is important to note that an amendment to the statutory provisions relating to the prescription of civil claims and criminal prosecutions arising out of sexual offences does not cure the disease of violence against women and children but rather treats its symptoms by ensuring that survivors have the opportunity to be appropriately compensated and that offenders can still be prosecuted despite lengthy lapses in time. It provides protection to children who have been victims of any sexual offence by allowing them to come forward many years after the offence took place. This Bill is a step in the right direction but is unfortunately reactive in nature. The time has come for South Africa to come up with proactive solutions and legislative frameworks which deal with the root cause of violence against women and children.

6. IN CONCLUSION

- 6.1.** Our advice is that the progressive steps taken by the National Assembly to pass the amendment bills to remedy laws which has had a massive effect on our society. We are also cognizant of the fact that our criminal justice system still has to undergo more substantive reforms in order to systemically address any secondary victimization experienced by survivors in the criminal justice system.
- 6.2.** Moreover, it is evident that the proposed amendments will undoubtedly pass constitutional muster as it is a direct response to a declaration of unconstitutionality by the Constitutional Court.
- 6.3.** Please feel free to contact our firm should you have any further enquiries in this regard.
- 6.4.** We advise accordingly.

Yours truly,



HURTER SPIES INC

Daniël Eloff

Assisted by Belinda Pieterse