# Annexure: H

# Consideration of the prescription of unauthorised, irregular, fruitless and wasteful expenditure where there has been an extreme delay in processing of unauthorised, irregular, fruitless and wasteful expenditure

## 1. Background

This annexure guides the practical application of the prescription to unauthorised, irregular, fruitless and wasteful expenditure ('UIFWE') matters processed in terms of section 32 of the MFMA. It aims to promote consistent, lawful, and defensible decisions on recoverability and liability.

In municipal administration, there are often delays in processing UIFWE due to unresolved matters that persist for long periods. Delays are often caused by waiting for MPAC investigations, council resolutions, or delays in recording UIFWE in UIFWE registers. On a practical level, prescription in UIFWE matters determines how long a municipality has to recover losses from a person who caused the UIFWE. Prescription is therefore a time-based limit on recovery, not a judgment on whether the expenditure was wrong or not.

For further guidance, clarity and application of prescription of UIFWE debt, municipalities and municipal entities should consult the Prescription Act 68 of 1969 ('Prescription Act').

## 2. Prescription of UIFWE

The UIFWE process unfolds through several administrative, reporting, oversight, and decision-making stages. Section 32 of the MFMA requires a municipality to deal with UIFWE and to determine whether such expenditure is recoverable from a liable person. Where there have been extreme delays in processing UIFWE, municipalities should also consider the Prescription Act. Prescription limits the period within which a municipality may lawfully recover a debt, inclusive of UIFWE debt. If the prescription is not properly considered, recovery actions may be unlawful or unenforceable or expose the organisation to audit findings and litigation risk.

In terms of section 11(d) of the Prescription Act, **a debt generally prescribes after three years unless another Act provides otherwise**. Section 12 of the Prescription Act provides that prescription begins to run when the debt becomes due. A debt becomes due when the creditor has knowledge, or is deemed to have knowledge, of the identity of the debtor and the material facts from which the debt arises.

Case law confirms that prescription starts when the creditor has the minimum facts necessary to institute recovery proceedings, i.e. does not wait for legal certainty, the completion of investigations, disciplinary processes, Municipal Public Accounts Committee ('MPAC') deliberations, or council resolutions). A municipality cannot delay the running of a prescription through inaction or by relying on internal governance processes.

## 3. Brief Description of the Process-Based Application of Prescription

The UIFWE process unfolds through several administrative, reporting, oversight, and decision-making stages. Prescription does not commence at the point where expenditure is merely suspected to be non-compliant, the UIFWE is incurred when an incident report is first compiled. At this stage, the municipality lacks confirmed facts on causation and does not yet know the identity of a liable person.

Similarly, the recording of UIFWE in the UIFWE register and the statutory reporting of UIFWE to the mayor, the MECs, and the Auditor-General are compliance and disclosure steps. These steps create institutional awareness but, on their own, do not establish a debt that is due. Prescription, therefore, does not begin merely because UIFWE has been recorded or reported.

Prescription begins when the municipality has sufficient factual knowledge to institute recovery proceedings. **This occurs when a specific person is identified as responsible for the UIFWE and when the material facts support a recoverable claim.** In practice, this point is usually reached when the Accounting Officer determines that recovery proceedings should be instituted, or when a report under section 32(4) of the MFMA **identifies the person responsible for the UIFWE.** Once this threshold is reached, the municipality is deemed to have the minimum knowledge required to act, and prescription starts to run.

Referral of the matter to MPAC does not suspend or interrupt prescription, as MPAC performs an oversight role based on information that should already be available to the municipality. MPAC processes confirm, test, or evaluate responsibility, but they do not delay the commencement of prescription. **Where a UIFWE report submitted to MPAC does not identify the person responsible or the material facts giving rise to liability, prescription will not commence until those facts become known or are reasonably knowable.** However, once responsibility and causation are established, prescription runs regardless of ongoing MPAC or council processes.

A council resolution approving recovery does not interrupt prescription. Such a resolution confirms an existing legal position and does not create new factual knowledge. Municipalities must therefore actively monitor prescription from the point at which the minimum recoverable facts are known. Internal delays, oversight structures, or governance processes do not stop the running of prescription. This process-based approach ensures that section 32 of the MFMA is applied consistently with the Prescription Act and established case law.

## 4. Situations where the running of prescription may be delayed, suspended, or interrupted

The Prescription Act recognizes limited situations where the running of prescription may be delayed, suspended, or interrupted. These situations apply equally to UIFWE recovery where the facts meet the statutory tests. They are narrow and must be applied carefully, as prescription is not lightly postponed.

### *4.1 Delay of prescription*

In UIFWE matters, this occurs when the municipality does not yet know, and could not reasonably have known, the identity of the person responsible or the material facts giving rise to liability. If the facts required to institute recovery are genuinely unknown, prescription does not commence until those facts become known or reasonably knowable. This delay applies only where the lack of knowledge is reasonable and not the result of inaction.

Prescription is also delayed **where the debtor willfully prevents the municipality from becoming aware of the debt**. In UIFWE cases, this may arise where an official conceals information, falsifies records, or deliberately withholds material facts to hide responsibility for the expenditure. In such circumstances, the **prescription does not begin to run until the municipality becomes aware of the debt and the responsible person.** This protection applies only where there is intentional concealment and not where information could have been uncovered through reasonable care.

### *4.2 Suspension of prescription*

Prescription may be suspended in limited statutory circumstances. The Prescription Act provides for suspension where, for example, the creditor is legally prevented from enforcing the debt.

In UIFWE matters, suspension will be rare, as internal municipal processes, oversight structures, or governance delays do not amount to a legal bar to recovery. Waiting for MPAC processes, disciplinary hearings, forensic investigations, or council resolutions does not suspend prescription.

### *4.3 Interruption of prescription*

Prescription is interrupted when the debtor acknowledges liability. In UIFWE matters, this may occur where the responsible person admits responsibility for the expenditure or agrees in writing to repay the amount. An express or tacit acknowledgement of a debt interrupts prescription and restarts it from the date of the acknowledgement. The acknowledgement must relate to liability for the UIFWE debt and not merely to the existence of an investigation.

*Prescription is also interrupted when the municipality institutes legal proceedings to recover UIFWE.* The service of summons or equivalent legal process interrupts prescription. Once interrupted, prescription begins to run anew after the interruption. Internal steps, resolutions, or correspondence that do not constitute legal action do not interrupt prescription.

In summary, delays, suspensions, and interruptions of prescriptions in UIFWE matters are strictly regulated by the Prescription Act. They do not arise from administrative delay or internal governance processes. Municipalities must therefore assume that prescription runs once responsibility and material facts are known, unless a clear statutory ground exists to delay, suspend, or interrupt it.

## 5. Accountability for the failure to prevent the prescription of UIFWE

A municipality may hold a person responsible where UIFWE has prescribed, but the basis of responsibility must be clearly understood. The municipality cannot recover the prescribed UIFWE debt from the original debtor, but it may hold another person accountable for allowing the claim to prescribe.

Where UIFWE prescribes because recovery action was not taken timeously, this may constitute a separate act of financial misconduct. If an Accounting Officer, senior manager, or official knew, or reasonably ought to have known, that recovery had to be instituted and failed to act, that failure may amount to negligence or dereliction of duty. The loss suffered by the municipality in such a case is not the original UIFWE, but the loss of the right to recover it.

In practical terms, the municipality may investigate whether the prescription occurred because of an unreasonable delay, failure to monitor prescription periods, or failure to institute recovery proceedings. If such failure is established, the municipality may pursue disciplinary action in terms of the MFMA and the Municipal Regulations on Financial Misconduct Procedures and Criminal Proceedings. This accountability process is separate from the original UIFWE recovery.

The municipality may also consider civil recovery against the person whose conduct caused the UIFWE claim to prescribe. In such a case, the municipality must show that the person had a legal duty to act, failed to do so, and that this failure caused the municipality to lose a recoverable claim. The prescribed UIFWE amount may then form the measure of the loss suffered by the municipality.

Holding a person accountable for prescription does not revive the original UIFWE debt. Once UIFWE has prescribed, recovery from the original debtor remains legally impossible. However, accountability for the failure to act remains available and must be assessed on its own facts. It is possible that more than one official can be held responsible for the prescription of UIFWE. In this case, it will be possible to hold various officials collectively responsible for the prescribed UIFWE debt amount.

**It is also possible that the actions or inactions of the MPAC or the municipal council could lead to the prescription of the UIFWE. As in the case of officials being held responsible for prescribing UIFWE debt, so can councillors be held responsible for prescribing the UIFWE debt. Councillors may also, in terms of the processes and protocols, be subject to the Local Government: Municipal Structures Act 117 of 1998, where their actions or inaction led to the prescription of UIFWE debt.**

The recovery of UIFWE debt that has prescribed from officials or councillors responsible for its prescription must be processed through normal common law civil claim processes. A municipality may not use section 32 of the MFMA to recover prescribed UIFWE from an official or councillor. Section 32 of the MFMA applies only where a valid and enforceable UIFWE recovery claim still exists. Once prescription has run, section 32 recovery is no longer lawful.

In summary, prescription does not end accountability. It shifts the focus from recovery of UIFWE to responsibility for the loss caused by allowing the claim to prescribe.

## 6. UIFWE steps in the context of prescription

The guidance tables below set out a practical, step-by-step approach to determining when prescription commences, continues, or does not run during the UIFWE process under section 32 of the MFMA. They are intended to assist municipalities in aligning UIFWE reporting, oversight, and recovery actions with the requirements of the Prescription Act, 1969.

The guidance explains how factual knowledge, deemed or constructive knowledge, and institutional actions at each stage of the UIFWE process affect the prescription of recovery claims. The notes also explain how MPAC processes, council resolutions, recovery actions, and disciplinary proceedings interact with prescription. The purpose of this guidance is to promote consistent UIFWE recoverability and to prevent avoidable losses arising from prescribed recovery claims.

See the tables below for guidance on the possible prescription of UIFWE debt:

| **UIFWE process step:** | **Factual position at the stage:** | **Knowledge assessment:** | **Prescription impact:** |
|---|---|---|---|
| **Step 1:** UIFWE is incurred, and an incident report is compiled | The municipality is aware that the expenditure may be non-compliant, but liability and causation have not yet been established. | The municipality does not yet know the identity of the debtor or the material facts required to institute recovery. | • ***Prescription does not commence*** because the minimum facts to institute legal proceedings are not yet known. |
| **Step 2:** UIFWE report is forwarded to the Accounting Officer and recorded in the UIFWE register | UIFWE is formally recorded for compliance and reporting purposes. | Accounting or compliance recognition does not amount to actual knowledge of liability or debtor identity. | • ***Prescription does not commence*** because administrative recording is not legal or factual knowledge. |
| **Step 3:** UIFWE is reported to the Mayor, MECs, and AGSA in terms of section 32(4) of the MFMA | The municipality has institutional awareness and has complied with statutory disclosure duties. | Statutory reporting identifies possible governance failures but does not create enforceable civil liability. | • **Prescription does not commence** because disclosure does not establish the facts for the debt to be due. |
| **Step 4:** UIFWE report is referred to MPAC for investigation with identity of person(s) responsible for | Oversight structures assess responsibility based on information already available. | The municipality is deemed to know the debtor's identity and the material facts at this stage. | • ***Prescription commences to run*** and is not suspended by MPAC processes, as the MPAC report should include the material facts of the UIFWE incurred and |

| **UIFWE process step:** | **Factual position at the stage:** | **Knowledge assessment:** | **Prescription impact:** |
|---|---|---|---|
| the UIFWE incurred | | | the persons responsible for the UIFWE.<br>**BUT**<br>***Where the UIFWE report to MPAC does not identify the person(s) responsible for the UIFWE and the material facts,***<br>**AND**<br>**The UIFWE report, as contemplated in section 32(4) [section 32(4(b)] of the MFMA, does not indicate the person(s) responsible for the UIFWE incurred *prescription does not commence.*** |
| **Step 5:** MPAC concludes its investigation and recommends recovery | Liability, causation, and amounts are confirmed through an oversight process. | Deemed knowledge is fully established because the facts and debtor identity should be clear. | • Prescription continues to run.<br>**BUT**<br>**Where the identity of the person(s) responsible for the UIFWE was not stated in the UIFWE report to the MPAC, prescription will commence to run after the conclusion of the MPAC process.** |
| **Step 6:** Council resolves to recover UIFWE from the liable person | Council formally endorses recovery through a resolution. | Council approval confirms an existing position and does not constitute new factual knowledge. | • Prescription is running and is not interrupted by the council resolution. |

**General remarks relating to prescription of UIFWE:**

1. ***Where the municipality institutes UIFWE recovery proceedings before referral of UIFWE matter to the MPAC or Council, the following principles apply:***
    - Prescription will commence because the municipality has the minimum facts required to institute action or is deemed to have the relevant knowledge.

- A specific individual is identified as being potentially liable, and recovery action is considered feasible.
- At this point, a justified belief exists based on identifiable facts and the debtor's identity.

2. ***Where the municipality institutes UIFWE <u>disciplinary</u> proceedings before referral of UIFWE matter to the MPAC or Council, the following principles apply:***
    - <u>Prescription will commence</u> because the municipality has the minimum facts required to institute action or is deemed to have the relevant knowledge.
    - A specific individual is identified as being potentially liable, and recovery action is considered feasible.
    - At this point, a justified belief exists based on identifiable facts and the debtor's identity.

3. ***If the Accounting Officer, as required in section 32(4)(b), reports that a person(s) is responsible for the UIFWE, the prescription period begins to run on submitting the report to the mayor, the MEC for local government in the province and the Auditor-General:***
    - <u>Prescription will commence</u> because the municipality has the minimum facts required to institute action or is deemed to have the relevant knowledge.
    - A specific individual is identified as being potentially liable, and recovery action is considered feasible.

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