THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 1040/2015

In the matter between:

TRINITY ASSET MANAGEMENT (PTY) LTD **APPELLANT**

and

GRINDSTONE INVESTMENTS 132 (PTY) LTD **RESPONDENT**

Neutral citation: *Trinity Asset Management (Pty) Ltd v Grindstone Investments (Pty) Ltd* (1040/15) [2016] ZASCA 135 (29 September 2016)

Coram: Bosielo, Theron, Willis and Swain JJA and Dlodlo AJA

Heard: 8 September 2016

Delivered: 29 September 2016

Summary: Prescription : the date upon which a debt becomes due must not be conflated with that when repayment thereof is demanded : a debt which is repayable on demand becomes due the moment the money is lent to the debtor : claim prescribed : appeal dismissed with costs.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (Yekiso J sitting as the court of first instance).

The appeal is dismissed with costs.

JUDGMENT

Willis JA (Theron and Swain JJA concurring):

[1] The appellant, Trinity Asset Management (Pty) Ltd, which was the applicant in the court a quo, sought a provisional order of liquidation of the respondent, Grindstone Investments 132 (Pty) Ltd. The court a quo (Yekiso J) dismissed the application with costs. The court a quo granted leave to appeal to this court. The parties have agreed that the central issue in the appeal is whether the debt in question had prescribed.

[2] In terms of a written agreement concluded between the parties in Cape Town on 1 September 2007, the respondent borrowed the sum of R3 050 000 (the loan capital) from the appellant. The relevant clause, upon which the outcome of this case depends, is clause 2.3 thereof. It reads as follows:

'The Loan Capital shall be due and payable to the Lender within 30 days from the date of delivery of the Lender's written demand.'

For reasons that I hope will become clear later in this judgment, the loan capital was immediately claimable from the respondent, but it was a term of this clause that it

would only become payable once the respondent had received the written demand for which provision is made, and the notice period had expired.

[3] Interest would accrue from the date of payment of the loan amount to the respondent. The agreement also provided that the respondent would take steps to have a second mortgage bond registered over certain immovable property, which it owned in Paarl, as security. This bond was never registered. The loan capital was paid by the appellant into accounts designated by the respondent, in three separate instalments: R1,5 million on 13 February 2008, R1 million on 15 February 2008 and R500 000 on 21 February 2008, respectively.

[4] On 19 September 2013, Mr Quinton George, the chief executive officer (CEO) of the appellant sent an email to Mr Nicholas Cunningham-Moorat, a director of the respondent, in which Mr George enquired as follows:

'Nick, could you confirm that you are happy to settle the outstanding amount on the property fund and give an indication as to when it will be done? Steve, could you confirm with Nick the amount currently outstanding?

Regards,

Quinton George

CEO Trinity Asset Management (Pty) Ltd'

[5] On 25 September 2013, Mr Cunningham-Moorat replied as follows:

'Quinton, this note serves to confirm that Trinity has called the property fund. The current outstanding balance is R4,55 [million]. We have executed on an associated asset sale to support this call. All things being equal we expect these funds to release within 60-90 days.

Thanks.

Nick Cunningham-Moorat

Chairman and Chief Executive Officer'

[6] The appellant received no payment from the respondent. On 9 December 2013, the appellant, by service of the sheriff, delivered a letter of demand upon the respondent in terms of s 345(1)(*a)*(i) of the Companies Act 61 of 1973 (the old Companies Act). The amount claimed was R4,6 million. Some two weeks later, the respondent, via its attorneys, gave the appellant a written acknowledgement of

receipt of the letter but denied liability. I shall deal first with the question of whether the appellant's demand complied with the requirements of clause 2.3. As will become more fully apparent later that is, however, a different issue from the 'central' one of prescription.

[7] Relying on the deeming provision in s 345 of the old Companies Act, that a company served with such a letter of demand and which does not discharge the alleged debt within three weeks is, in fact, unable to pay its debts, the appellant brought the application for a provisional order winding-up the respondent.

[8] Mr Duminy SC, counsel for the appellant, argued that clause 2.3 established the making of a demand as a condition precedent or a suspensive condition for the obligation of the respondent to pay to come into being. A difficulty that presents itself is that the s 345 demand is one in which the debtor is given three weeks (ie 21 calendar days) in which to pay. This is less than the 30 days provided for in clause 2.3 of the applicable agreement between the parties. If, on the argument of Mr Duminy, the debt became due and payable only once the demand provided for in clause 2.3 had been delivered to the respondent, then the s 345 demand failed to fulfil this purpose. This would remain the case even if more than thirty days after its service, the amount allegedly owing had not been paid. It is trite that conditions in a contract are strictly interpreted and that fulfilment should ordinarily be *in forma specifica* (in the terms as specified).[1] Even a benevolent interpretation *per aequipollens* (by way of an equivalent that was contemplated by the parties)[2] is not permissible for the reason that there is a presumption in favour of the general requirement that the condition must be fulfilled *in forma specifica.*[3]

[9] Accordingly, if for purposes of this issue, (ie whether the correct demand had been made, rather than the issue of prescription), clause 2.3 is assumed, in favour of the appellant, to establish a condition precedent or a suspensive condition for the obligation of the respondent to pay to come into being, its absence of fulfilment at the

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[1] See for example *Borstlap v Spangenberg en andere* 1974 (3) SA 695 (A) at 705H. See also *AA Alloy Foundry (Pty) Ltd v Titaco Projects (Pty) Ltd* [1999] ZASCA 82; 2000 (1) SA 639 (SCA) para 6.
[2] See *Van Diggelen v De Bruin & another* 1954 (1) SA 188 (SWA) at 192H-193G. See also *Borstlap v Spangenberg & Andere* (*supra*) at 705H.
[3] See *Van Diggelen v De Bruin & another* (*supra*) at 193B.

time that the provisional order for liquidation of the respondent was sought, would justify the dismissal of that application: the amount claimed was not owing, never mind unpaid.

[10] In the alternative, Mr Duminy submitted that the appellant's email of 19 September 2013, referred to above, constituted a 'demand'. Not even the most vivid imagination can justify such a conclusion. If the case is decided without reference to prescription, it will be decided without reference to the 'central issue' agreed upon between the parties or the basis upon which the court a quo disposed of the matter and indeed granted leave to appeal to this court. For these reasons, I turn to the question of prescription.

[11] In terms of s 11*(d)* of the Prescription Act 68 of 1969 (the 1969 Prescription Act), prescription of this debt will have been completed three years after it had become 'due' unless, of course, prescription had been interrupted by, for example, an acknowledgement of debt in terms of s 14 of the 1969 Prescription Act or 'judicial interruption' in terms of s 15 thereof. Interruption of prescription, by acknowledging liability is one thing, attempting to revive an extinguished debt by acknowledgement is another. It is now trite that the 1969 Prescription Act, unlike its 1943 predecessor, created 'strong' prescription. In *Oertel v Direkteur van Plaaslike Bestuur,*[4] it was said that:

'Die 1969 Wet maak egter vir slegs sterk verjaring voorsiening. Na verstryking van die voorgeskrewe termyn gaan die skuld as sulks tot niet.'[5]

Once there has been the necessary effluxion of time, the debt is extinguished. Accordingly, even if one accepts, in the appellant's favour, that Mr Cunningham-Moorat's email of 25 September 2013, constituted an acknowledgement of liability, it would serve to interrupt prescription only if the three–year period had not completed its run before that date. Otherwise, the debt remains extinguished.

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[4] *Oertel en andere v Direkteur van Plaaslike Bestuur en andere* 1983 (1) SA 354 (A).

[5] At 366G-H. This may be translated as: 'The 1969 Act however makes provision only for strong prescription. After the lapse [effluxion] of the prescribed period of time, the debt as such is destroyed.' (The translation is mine.) See also *Protea International (Pty) Ltd v Peak Marwick Mitchell & Co* [1990] ZASCA 16; 1990 (2) SA 566 (A) at 568I-569A.

[12] The appellant argued that because the debt was repayable on demand, prescription commenced only once payment of the debt had been demanded (ie on 9 December 2013). One must be careful not to conflate the date when a debt becomes 'due' and that upon which repayment thereof is demanded. A debt which is repayable on demand becomes due the moment the money is lent to the debtor – or, to use banking terminology, 'the advance is made'.[6] The fact that a debtor may be given 30 days within which to repay that which has been demanded does not, in my opinion, alter the principle that the debt became due the moment it was lent and therefore, in terms of s 11*(d)* of the 1969 Prescription Act, prescription begins to run from that date.

[13] In *Deloitte Haskins & Sells Consultants (Pty) Ltd v Bowthorpe Hellerman Deutsch (Pty) Ltd*,[7] this court said (at 532G-I) that for a debt to be 'due':

'. . . there has to be a debt immediately claimable by the creditor or, stated in another way, that there has to be a debt in respect of which the debtor is under an obligation to perform immediately.'

It is easy for confusion to arise. A debt can be immediately claimable even though a demand may be necessary for it to be payable. The distinction between 'claimability' and 'payability' was one of which this court was keenly aware in *Union Share Agency & Investment Ltd v Spain*[8] where it said:

'The distinction between the indebtedness being subject to the happening of an event and the payment being so subject is a vital one and should not be overlooked.'[9]

[14] In any event, clause 2.3 refers to the loan being 'due and payable'. The very phrase 'due and payable', ie both 'claimable' and 'payable' as at a point in time, indicates that 'due' and 'payable' are not coextensive with one another. Ever since *Attorney-General Transvaal v Additional Magistrate for Johannesburg*[10] it has been

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[6] See *Nicholl v Nicholl* 1916 WLD 10 at 12. *Van Vuuren v Boshoff* 1964 (1) SA 395 (T) at 400D. See also *Sentrachem Ltd v Prinsloo* 1997 (2) SA 1 (A) at 15I.

[7] *Deloitte Haskins & Sells Consultants (Pty) Ltd v Bowthorpe Hellerman Deutsch (Pty) Ltd* [1990] ZASCA 136; 1991 (1) SA 525 (A).

[8] *Union Share Agency & Investment Ltd v Spain* 1928 AD 74.

[9] At 80-81. This passage was referred to with approval in *List v Jungers* 1979 (3) SA 106 (A). That case, in turn, was approved in *The Master v I L Back & Co Ltd & others* 1983 (1) SA 986 (A) and *Benson & another v Walters & others* 1981 (4) SA 42 (C). And both *I L Back and Benson* were followed in *Deloitte*. See also the title on 'Prescription' in 21 *Lawsa* 2 ed by J S Saner, especially para 125.

[10] *Attorney-General Transvaal v Additional Magistrate for Johannesburg* 1924 AD 421 AD.

trite that, when it comes to the interpretation of statutes, they 'should be construed that, if it can be prevented, no clause, sentence or word shall be superfluous, void or insignificant'.[11] Since *Crispette and Candy Co Ltd v Oscar Michaelis NO and Leopold Alexander Michaelis NO*[12] it has been clear that, in general, the same principles apply to all written instruments, including wills and contracts.[13]

[15] Moreover, there is clear authority in this court that a creditor cannot, by its own conduct (or lack thereof), postpone the commencement of prescription.[14] Profesor Max Loubser in his *Extinctive Prescription*[15] contends, without referring to any authority directly, that:

'On account of the policy consideration that a creditor should not be able to rely on his own failure to demand performance from the debtor in order to delay the running of prescription the courts will require a clear indication that the parties intended demand to be a condition precedent for the debt to become due, in which case prescription will only begin to run from the date of demand.'[16]

[16] A similar view was expressed by Rogers J in *De Bruyn v Du Toit*.[17] Mr Kaplan, who appeared for the respondent, accepted this as a correct statement of law. For reasons that follow, it is not necessary for this court to express itself finally on the correctness of this proposition by Loubser. The tension between the principle of freedom of contract and the policy considerations of our strict, indeed rigorous, law of prescription is both manifest and palpable. The legal community, including the courts, will benefit from yet further scholarly contributions on the issue. It is far from clear that, in the present case, the parties intended 'demand to be a condition precedent' for the debt to become due. This presents the appellant with an insuperable obstacle. In this regard, it is helpful to bear in mind the salutary

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[11] At 436.
[12] *Crispette and Candy Co Ltd v Oscar Michaelis NO and Leopold Alexander Michaelis NO* 1947 (4) SA 521 (A) at 541.
[13] At 541. See, more recently, *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para 18.
[14] See *Uitenhage Municipality v Molloy* [1997] ZASCA 112; 1998 (2) SA 735 (SCA) at 742G-743C. See also *The Master v I L Back & Co Ltd & others* 1983 (1) SA 986 (A) at 1004A-1005H; *Kotzé v Ongeskiktheidsfonds van die Unversiteit van Stellenbosch* 1996 (3) SA 252 (C) at 261H; *Benson & another v Walters & others* 1981 (4) SA 42 (C) at 49G-H; *Johan De Bruyn v Derick Du Toit* [2015] ZAWCHC 20 para 6.
[15] M M Loubser *Extinctive Prescription* (1996).
[16] At 63.
[17] *De Bruyn v Du Toit* [2015] ZAWCHC 20.

distinction between a condition, properly so called, and a term of a contract canvassed in *Tamarillo (Pty) Ltd v BN Aitken (Pty) Ltd*.[18] In my opinion, it is obvious that the requirement of demand being given on 30 days' notice was merely a procedural term of the agreement: in other words, the loan was to be repaid 30 days after written demand was made.

[17] Mr Duminy placed reliance on the following passage by Selikowitz J In *Standard Bank of SA Ltd v Oneanate Investments (Pty) Ltd*:[19]

'A loan without agreement as to time for repayment is at common law repayable on demand. Although by no means linguistically clear, the phrase "payable on demand" is used in this context in our law to mean that no specific demand for repayment is necessary and the debt is repayable as soon as it is incurred. When suing for repayment, there is no need to allege a demand and such a demand is not part of the plaintiff's cause of action.'

This passage was referred to with approval in *De Bruyn v Du Toit*.[20] This passage does not assist the appellant at all. On the contrary, it provides a further pointer to the fact that a provision in a contract requiring notice of demand is ordinarily a mere procedural term and not a necessary condition for the acquisition of a completed cause of action. It is correct, as Selikowitz J said, that a loan without agreement as to time for repayment is, at common law, repayable on demand.

[18] Mr Duminy also relied on a recent decision of this court in *Standard Bank of SA Ltd v Miracle Mile Investments 67 (Pty) Ltd*[21] to contend that it was the delivery of the demand that triggered the running of prescription, rather than the lending of the money itself. *Miracle Mile* dealt with a bank's right to enforce an acceleration clause in a lending agreement. It also dealt with a long-term loan that had been secured by mortgage bonds registered over immovable property. Very different considerations apply in such a situation: as the judgment points out, prescription runs against arrear instalments, as from dates when payment thereof was due, which differs from future instalments, which become due as a result of the requisite election by the creditor to accelerate payment of these future instalments, by reason of the debtor's breach.[22]

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[18] *Tamarillo (Pty) Ltd v BN Aitken (Pty) Ltd* 1982 (1) SA 398 (A) at 432C-H.
[19] *Standard Bank of SA Ltd v Oneanate Investments (Pty) Ltd* 1995 (4) SA 510 (C).
[20] Para 8.
[21] *Standard Bank of SA Ltd v Miracle Mile Investments 67 (Pty) Ltd & another* [2016] ZASCA 91.
[22] Para 15.

[19] In this case, the monies were advanced to the respondent in February 2008. There was no interruption of prescription. The debt therefore prescribed and was extinguished in February 2011 – well before any demand was made. The appeal cannot succeed.

[20] I have had the benefit of reading the minority judgment prepared by Dlodlo AJA. My fundamental difficulty is that clause 2.3 is a standard notice clause appearing in innumerable loan agreements throughout the land. The interpretation placed on this clause by Dlodlo AJA could have far-reaching implications for the running of prescription in all such everyday instances.

[21] There is an inherent contradiction in the minority judgment. Dlodlo AJA describes the demand referred to in clause 2.3 as 'an essential requirement for the appellant's cause of action.' As I have already pointed out, if this is indeed the case, there must be strict compliance therewith: precise fulfilment of such a requirement is imperative. I have also indicated that there was no such fulfilment *in forma specifica*. The appellant's failure strictly to comply with the terms of this clause has not been addressed in the minority judgment.

[22] The following order is made:

The appeal is dismissed with costs.

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N P WILLIS
Judge of Appeal

Dlodlo AJA dissenting (with Bosielo JA concurring)

[23] I am grateful to have had an opportunity to read my brother's (Willis JA) judgment in this matter. However, I am unable to agree therewith and am thus compelled to write separately. I differ with my learned colleague in my approach and the conclusion I reach, for which reason it will be necessary to recast the facts only in so far as is necessary to facilitate my reasoning.

[24] The appellant lent and advanced monies to the respondent pursuant to a written loan agreement. Clause 2.3 of the agreement (quoted in para 2 above) provides that the loan is due and *repayable within 30 days from the date of delivery of the appellant's 'written demand'*. The respondent contends, on the one hand that prescription commenced running on the earliest date on which the appellant could have made such written demand. On the other hand, the appellant contends that given all the circumstances, what the respondent contends was clearly not the intention of the parties.

[25] On 1 September 2007, the parties entered into the written loan agreement in terms of which the respondent borrowed a capital amount of R3 050 000 (the loan capital) from the appellant. The material terms of the loan agreement were thus, in summary, the following:

(a) The respondent borrowed a capital amount of R3 050 000 representing the loan capital from the appellant;

(b) The loan capital was deemed to be lent and advanced on 1 September 2007 notwithstanding the subsequent date of signature of the agreement;

(c) The loan capital was due and repayable to the appellant within 30 days from the date of delivery of the lender's written demand (clause 2.3);

(d) Interest accrued on the loan capital at the market rate from the date of payment to date of repayment (clause 2.4);

(e) The respondent was to procure that a second mortgage bond be registered over the property as security for the amounts due in terms of the agreement, (clause 3.1).

[26] On 13 February 2008 the appellant paid an amount of R1,5 million into the bank account identified by one Deane, the then sole director of the respondent. The balance of the loan capital was paid by the appellant to the respondent in tranches of R1 million and R500 000 on 15 February 2008 and 21 February 2008 respectively. The loan capital lent and advanced to the respondent would, as already mentioned, be due and repayable to the appellant within 30 days from the date of delivery of the appellant's written demand.

[27] On 2 June 2009, one Mr Cunningham-Moorat (Moorat) became a director of the respondent. On 6 April 2011 it was resolved by the respondent that it enters into a covering mortgage bond in favour of the appellant. On the same day, a Power of Attorney was signed on behalf of the respondent by Moorat in favour of one T M Gunston and various others, to register a covering mortgage bond in favour of the appellant.

[28] On 19 September 2013, one Mr Quinton George (George), a director of the appellant, sent an e-mail to Moorat reading inter alia as follows:

'Nick, could you confirm that you are happy to settle the outstanding amount on the property fund and give an indication as to when it will be done?'

In response, Moorat responded as follows on 25 September 2013:

'Quinton, this note serves to confirm that Trinity has called the property fund. The current outstanding balance is R4,55 million. We have executed on an associated asset sale to support this call. All things being equal, we expect these funds to release within 60 – 90 days.'

It should be clear from this response that the respondent does not deny the indebtedness. In fact it confirms that the outstanding balance is R4.55 Million.

[29] On 9 December 2013, Gunstons Attorneys, acting on behalf of the appellant, caused a letter in terms of s 345(1)*(a)*(i) of the Companies Act 61 of 1973 (the letter of demand claiming R4,6 million) to be served by the sheriff at the respondent's registered address. On 23 December 2013 a letter from M J Hood & Associates, on behalf of the respondent, was received by the appellant. This letter made reference to the letter of demand and denied the respondent's indebtedness.

[30] On 18 July 2014, the appellant caused to be issued an application for the provisional liquidation of the respondent on the basis of the respondent's failure to pay its debts within the stipulated time in terms of s 345 of the Companies Act. On 28 August 2014, in an answering affidavit filed in those proceedings, deposed to by Moorat, the defence of prescription was raised *in limine*.

[31] The court a quo held that there was no significant dispute of fact in the matter. It found the defence of prescription to be valid. The court held that it was not required to determine the merits of the defence or whether it (the defence) was likely to succeed at trial, but that it was merely required to determine whether the debt sought to be recovered was disputed on reasonable grounds. In the meanwhile the respondent, however, failed to register the covering bond.

[32] It bears mentioning that in response to the letter of demand, the respondent claimed that clause 3 of the agreement (providing for the registration of the covering Mortgage bond) constituted a condition precedent which had not been complied with. Accordingly, it was contended that the demand was premature. The respondent's attorney, in the letter referred to above (para 27), had also referred to clause 2.3 of the agreement stating that the appellant had not yet made a proper demand to the respondent. In its answering affidavit, the respondent admitted the conclusion of the loan agreement; the signature of the resolution and power of attorney; the exchange of e-mails; and the receipt of and its response to the s 345 letter. However, the respondent contends that its debt was extinguished by prescription in terms of s 11*(d)* of the Prescription Act 68 of 1969. The respondent contends further that the appellant was not entitled to postpone the commencement of prescription by delaying the making of the written demand referred to in clause 2.3 of the loan agreement (which would have rendered the debt due and repayable.) The respondent pleaded that it was incumbent upon the appellant to have issued the written demand on 1 September 2007. The latter date is the deemed date for the advancing of the loan stipulated in clause 2.7 of the loan agreement. In the alternative, in the heads of argument, the respondent contends that it was incumbent

upon the appellant to have issued the written demand 30 days from the date on which each tranche of the loan was advanced. This alternative contention was not argued in court though.

[33] I agree with the contention advanced on behalf of the appellant that the respondent failed to plead and prove the date of inception of the running of prescription. The respondent's allegation that the running of prescription commenced on 1 September 2007 is, to my mind, difficult to accept. On 1 September 2007 the appellant had not yet advanced any monies to the respondent. I similarly have extreme difficulty to accept the contention advanced in the alternative to the effect that demand should have been made within 30 days of each tranche advance. If the parties intended that to be the case, then they would have most certainly said so in the loan agreement. The reading of the loan agreement makes it clear that the parties did not contemplate demand having to be made within 30 days of the advance being made. Nor does the loan agreement oblige the appellant to make demand at or within such time or before any particular date at all.

[34] In my view, calling up the loan by way of demand as contemplated in clause 2.3 of the agreement, was an essential requirement for the appellant's cause of action. Accordingly, the running of prescription did not commence until 30 days after the making of a written demand. This view is reinforced by the fact that it was the intention of the parties that the debt arising from the loan agreement was to be secured by way of a second mortgage bond. Additionally, the resolution adopted by the director of the respondent on 6 April 2011, that the respondent register a

covering mortgage bond in favour of the appellant and the signing of a power of attorney by the respondent's director on the same day, evidences this intention.

[35] It is abundantly clear on the above articulated facts that it could never have been the intention of the parties that the tranches of loan capital could become due and repayable within 30 days of the dates on which such amounts were advanced. This too, although contained in the respondent's heads of argument, was not argued in court. In *Sassoon Confirming and Acceptance Co (Pty) Ltd v Barclays National Bank Ltd* 1974 (1) SA 641 (A), this court held as follows (at 646B):

'The first step in construing a contract is to determine the ordinary grammatical meaning of the words used by the parties (*Jones v Anglo-African Shipping Co (1936) Ltd* 1972 (2) SA 827 (AD) at 834E). Very few words, however, bear a single meaning, and the "ordinary" meaning of words appearing in a contract will necessarily depend upon the context in which they are used, their interrelation, and the nature of the transaction as it appears from the entire contract.'

Similarly, in *Privest Employee Solutions (Pty) Ltd v Vital Distribution Solutions (Pty) Ltd* [2005] ZASCA 52; 2005 (5) SA 276 (SCA) this court held as follows (para 21):

'The language used in the agreement is the first port of call in ascertaining the common intention of the parties. In this regard the language must be given its ordinary and grammatical meaning unless this results in absurdity, repugnancy or inconsistency with the rest of the agreement: *Sassoon Confirming and Acceptance Co (Pty) Ltd v Barclays National Bank Ltd* 1974 (1) SA 641 (A) at 646B and *Coopers & Lybrand and others v Bryant* 1995 (3) SA 761 (A) at 767 E-F.'

(See also *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA) para 18.)

[36] In *Stockdale & another v Stockdale* 2004 (1) SA 68 (C), the court held that in order to decide the issue of prescription which had been raised, the court had to have regard, inter alia, to the background circumstances and the wording of the two acknowledgments of debt. This was an appeal against a magistrate's judgment. The question for determination was whether, in the light of the specific terms of the acknowledgments of debt, and the relevant background circumstances, prescription began running on the debts immediately (ie with effect from 1 February 1991 – date of signature on the acknowledgments of debt) or not. The court held, inter alia, that s 12(1) of the Prescription Act expressly required that a debt be 'due' before prescription could begin to run. The question of when a debt becomes due (the court held) has to be determined by the intention of the parties and in the light of the policy consideration underlying the Act that a creditor should not be allowed to rely on its own inaction in order to delay the running of prescription against him. The court in *Stockdale* thus reasoned as follows (para 13):

'It is clear that in determining when a debt arises and when it becomes due (opeisbaar) different concepts are concerned. A distinction needs to be made between "the coming into existence of the debt on the one hand and recoverability thereof on the other" (*List v Fungers* 1979 (3) SA 106 (A) at 121C-D). The stage when a debt become recoverable, and therefore due in the sense in which the Act speaks of it, has been described as follows in *Deloitte Haskins & Sells Consultants (Pty) Ltd v Bowthorpe Hellerman Deutsch (Pty) Ltd* 1991 (1) SA 525 (A) at 532H:

"(T)here has to be a debt immediately claimable by the creditor or stated in another way, that there has to be a debt in respect of which the debtor is under an obligation to perform immediately."

Clearly then it is essential to determine the intention of the parties as regards the "immediate" payment of the debt.'

[37] I have, for instance, no quarrel with the fact that as a general rule of law in all obligations in which a time for payment was not agreed, the debt is due forthwith. (See *Lancelot Stellenbosch Mountain Retreat v Gore NO* [2015] ZASCA 37 para 12, and the authorities cited in fn 7.) This, of course, clearly might be qualified in the light of the particular circumstances of the case. Voet (12.1.19) says that in the case of a loan for consumption where no time for repayment has been fixed the money must be repaid 'not forthwith, but after the passage of a moderate time, so that in the meantime the borrower will have been able to enjoy at least some advantage out of the loan and the use of the money.' (See Sir Percival Gane's translation *The selective Voet being commentary on the Pandects Paris edition of 1829* (1955) vol 2 at 772.) In the words of Mohamed CJ in *Uitenhage Municipality v Molloy* 1998 (2) SA 735 (SCA) at 742H-743A:

'If creditors are allowed by their deliberate or negligent acts to delay the pursuit of their claims without incurring the consequences of prescription, that purpose would be subverted.'

Mahomed CJ expanded at 742G as follows:

'The rationale in the cases which have held that a creditor cannot "by his own conduct postpone the commencement of prescription" by refraining from satisfying the condition which would render a debt due and payable, apply equally where the creditor has failed to take or initiate the steps which fall within his or her power to make it possible for such a condition to be satisfied.'

[38] The court a quo in support of its findings quoted a passage from J C de Wet and A H Van Wyk *Die Suid-Afrikaanse Kontraktereg en Handelsreg* 5 ed (1992) at 292. It is apposite to set out this quotation hereunder:

'Uit die aard van die saak kan verjaring eers begin loop op die dag waarop die skuldenaar moet voldoen, dit wil sê, op die dag waarop die skuld opeisbaar word. Hierdie benadering word, soos mens kan verwag, in die ou wet en in die nuwe wet aangetref. Soos hierbo al aangetoon, is 'n skuld, wat uit ooreenkoms ontstaan onmiddelik na sluiting van die ooreenkoms opeisbaar, *tensy anders ooreengekom*.' (My emphasis.)

I emphasise the portion of the authors' quotation which I think needed serious consideration by the court a quo. The words 'tensy anders ooreengekom' (ie unless otherwise agreed) has serious significance. I say so because in the present case the parties in the loan agreement indeed expressly agreed otherwise. This is pertinently set out in what I regard as the clear terms in clause 2.3 of the loan agreement. Therefore the 'tensy anders ooreengekom' in the authors' quotation brought about an exception to the general rule spoken of by the authors.

[39] *Nicholl v Nicholl* 1916 WLD 10, a judgment relied on by the court a quo, contains the following observation made by Mason J (at 12):

'Mr Greenberg argued for the applicant that as the claim came within these sections no right of action arose until demand was made, and no demand was made until January of this year. But even if this were a claim payable on demand, the right of action existed as soon as the advances were made; the rule that demand should be made so as to entitle the plaintiff to costs has never been construed to mean that demand is a condition precedent to the right of action.'

One must bear in mind that beside the fact that *Nicholl* dealt with the position under the Transvaal pre-Union Prescription Act 26 of 1908, it also dealt with demand as a pre-requisite for mora.

[40] I do agree with the judgment by Rogers J in *De Bruin v Du Toit* WCC case number 1162/2015 (27 February 2015) para 6 where he made the following observation:

'*Stockdale* and earlier cases dealing with amounts payable "on demand" do not lay down a rule that such a debt becomes due for purposes of prescription only after demand has been made. On the contrary, and in keeping with the principle that a creditor cannot delay the commencement of prescription by failing to take a step within his power, it has been held on a number of occasions that loan repayable on demand is immediately due for purposes of prescription. *It is only where the giving of notice is a condition precedent for a claim, and thus a necessary ingredient of the creditor's cause of action, that the running of prescription is deferred until the giving of notice*' (My emphasis.)

[41] The present case addresses itself to the emphasised portions of the judgment by Rogers J. There was extensive reference to the work of Professor Loubser (*Extinctive Prescription* (1996)) in submissions before us. Noticeably, Loubser contends that prescription serves to protect the debtor from liability in a case where he is justified in assuming that the creditor no longer intends to enforce his right. (See M M Loubser *Extinctive Prescription* (1996) at 62.) But in the present case this is of course not the situation. In this case the agreement clearly and unequivocally, in my view, provides in clause 2.3 that performance is due on demand. I accept in the

circumstances that this was intended to mean one thing and one thing only, namely that demand was a condition precedent for the debt to become payable. That being the case, undoubtedly prescription would only begin to run from the date of the demand. (See, also in this regard, Loubser op cit 63.) After reviewing the authorities on the subject-matter (op cit 53-56) Loubser concluded his discussion as follows (at 63):

'On account of the policy consideration that a creditor should not be able to rely on his own failure to demand performance from the debtor in order to delay the running of the prescription the courts will require *clear indication that the parties intended demand to be a condition precedent for the debt to become due*, in which case prescription will only begin to run from the date of demand.' (My emphasis.)

In my view, the 'clear indication that the parties intended demand to be a condition precedent for the debt to become due' is contained in clause 2.3 of the loan agreement and the agreed registration of a further mortgage bond covering the loan capital stipulated in the loan agreement.

[42] In the specific circumstances of the present case, to suggest differently would be difficult for me to accept. We must always bear in mind that this was a financial transaction entered into by two commercial entities. One must accept that seasoned business persons must have been involved in this loan agreement acting in the best interests of their respective business entities. Regard being had to the respondent's version, it was necessary for it to 'execute on an associated asset sale' in order to support the appellant's call on the property fund. The funds would then be released within 60 to 90 days to pay the appellant's debt. At the risk of repeating a point already made, the fact that the debt was to be secured by a mortgage bond

evidences the parties' intention and that active steps were taken by the respondent in passing a resolution and signing a power of attorney in order to give effect to this intention. The respondent's response to the s 345 letter was but a denial that the debt was due. The respondent alleged that there had not been proper demand. It did not then say the debt had prescribed.

[43] Regard being had to the aforegoing I would uphold the appeal with costs including costs of two counsel.

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D Dlodlo
Acting Judge of Appeal

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