CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 248/16

In the matter between:

TRINITY ASSET MANAGEMENT (PTY) LIMITED Applicant

and

GRINDSTONE INVESTMENTS 132 (PTY) LIMITED Respondent

Neutral citation:	*Trinity Asset Management (Pty) Limited v Grindstone Investments 132 (Pty) Limited* [2017] ZACC 32
Coram:	Mogoeng CJ, Nkabinde ADCJ, Cameron J, Froneman J, Jafta J, Khampepe J, Madlanga J, Mhlantla J, Mojapelo AJ, Pretorius AJ and Zondo J.
Judgments:	The Court: [1] to [7] Mojapelo AJ (minority): [8] to [85] Cameron J (majority): [86] to [139] Froneman J (dissenting): [140] to [153]; (majority): [154] to [166]
Heard on:	4 May 2017
Decided on:	5 September 2017
Summary:	Contract — interpretation — when debt becomes "due and payable" Prescription — general rule — begins to run when debt arises — unless parties clearly stipulate otherwise Prescription Act 68 of 1969 — section 12 — prescription generally not delayed when debt is "due and payable" only after demand

JUDGMENT

THE COURT:

[1] This is an application for leave to appeal against a decision of the Supreme Court of Appeal (hearing an appeal from the High Court of South Africa, Western Cape Division, Cape Town), which dismissed an application in which an order provisionally liquidating the respondent was sought. In the three judgments that follow, the Court considers three primary questions:

(a) Given the provisional nature of the proceedings, is the defence of prescription properly before this Court?

(b) Does the parties' contract point to an intention to defer the date when the debt became "due" and thus to delay the onset of prescription?

(c) Did the applicant's claim prescribe?

[2] The factual background and issues are set out in the first judgment by Mojapelo AJ. All members of the Court concur in his exposition of the facts and issues. The Court unanimously concludes, though for different reasons, that leave to appeal should be granted. By a majority of ten judges to one, it further holds that the defence of prescription is properly before the Court. Froneman J disagrees, on the basis that the parties failed to deal adequately with the "*Badenhorst* principle". He sets out his reasoning in the third judgment.

[3] The Court, by a majority of six to five, finds that the parties to the contract did not intend to defer when the debt became due and hence to delay prescription. The debt is found to have prescribed. The appeal is consequently dismissed. The second (majority) judgment is written by Cameron J with Khampepe J, Madlanga J, Mhlantla J and Pretorius AJ concurring.

[4] Froneman J, the sixth member of the majority, concurs in the dismissal of the appeal first because of the *Badenhorst* principle. He holds that, in the absence of a finding that the *Badenhorst* principle does not apply to disputed legal issues, there is no ground for faulting the High Court's dismissal of the application for provisional liquidation. The appeal must fail and the refusal of the provisional liquidation application in the High Court should be confirmed on this ground.

[5] Second, however, if he is wrong in his view that the failure to deal adequately with the *Badenhorst* principle precludes final determination of the prescription issue, Froneman J concurs in the second judgment's construction of the parties' contract, with additional reasons. Cameron J, Khampepe J, Madlanga J, Mhlantla J and Pretorius AJ concur in these additional reasons.

[6] Mojapelo AJ, with Mogoeng CJ, Nkabinde ADCJ, Jafta J and Zondo J concurring, finds that the parties to the contract intended to defer when the debt became due, and thereby the running of prescription, until demand was made for payment of the debt. They would therefore have upheld the appeal.

[7] In the result, the following order is granted:

1. Leave to appeal is granted.
2. The appeal is dismissed.
3. The applicant is to pay any taxed costs incurred by the respondent.

MOJAPELO AJ (Mogoeng CJ, Nkabinde ADCJ, Jafta J and Zondo J concurring):

Introduction

[8] This matter concerns the interaction between prescription and contractual freedom. More specifically, it raises the issue of whether a policy consideration of not allowing an inactive creditor to delay prescription should override the intention of the contracting parties to give the right to the creditor to determine the date of repayment by demand.

[9] The applicant is Trinity Asset Management (Pty) Limited (Trinity) and the respondent is Grindstone Investments 132 (Pty) Limited (Grindstone).

Factual background

[10] On 1 September 2007, the parties entered into a written loan agreement in terms of which the respondent borrowed a capital amount of R3 050 000 (loan capital) from the applicant. At the time of the conclusion of the agreement, the directors who represented the applicant and the respondent were Mr Quinton George and Mr James Deane, respectively.

[11] The applicant paid the loan capital in three tranches of R1.5 million, R1 million and R500 000 on 13 February 2008, 15 February 2008 and 21 February 2008, respectively. The three tranches were paid into the bank account of Mr Deane. On 2 June 2009, Mr Nicholas Cunningham-Moorat also became a director of the respondent. Then, on 6 April 2011, the respondent resolved to enter into a covering mortgage bond in favour of the applicant. On the same day, a power of attorney was signed by Mr Cunningham-Moorat on behalf of the respondent in favour of Mr Thomas Gunston and various others to register a covering mortgage bond in favour of the applicant.

[12] On 19 September 2013, Mr George requested repayment in an email which he sent to Mr Cunningham-Moorat. In response, on 25 September 2013, Mr Cunningham-Moorat acknowledged and accepted the request as a call on the loan and stated that he would start liquidating assets in order to make repayment.[1] However, no payment was made by the respondent to the applicant. Accordingly, on 9 December 2013, a letter of demand was served by the Sheriff on the respondent as contemplated in section 345(1)(a)(i) of the then Companies Act.[2] In terms of the letter, the applicant claimed payment of R4 613 310.52 within 21 days. In response, the respondent denied indebtedness to the applicant.

Litigation history

High Court

[13] On 18 July 2014, the applicant applied in the High Court of South Africa, Western Cape Division, Cape Town (High Court)[3] for the provisional liquidation of the respondent on the basis of the respondent's failure to pay its debts, as provided for in section 345 of the Companies Act. The applicant alleged that the respondent was indebted to it in the amount of R4 613 310.52 together with interest thereon. It sought an order for the provisional liquidation of the respondent on the grounds that: the

[1] He also confirmed that the "outstanding balance [was] R4.55m".

[2] 61 of 1973. This section in relevant part reads:

> "(1) A company or body corporate shall be deemed to be unable to pay its debts if—
>
> (a) a creditor, by cession or otherwise, to whom the company is indebted in a sum not less than one hundred rand then due—
>
> (i) has served on the company, by leaving the same at its registered office, a demand requiring the company to pay the sum so due".

[3] *Trinity Asset Management (Pty) Ltd v Grindstone Investments 132 (Pty) Ltd*, unreported judgment of the High Court of South Africa, Western Cape Division, Cape Town, Case No 12677/2014 (31 July 2015) (High Court judgment).

respondent was unable to pay its debts[4]; the respondent was commercially insolvent; and it was just and equitable that it be wound up.[5]

[14] The respondent raised the preliminary defence of prescription to the applicant's claims. It raised further defences that are not of immediate relevance to this judgment.[6] With regard to prescription, the respondent contended that the amounts lent and advanced during February 2008 prescribed in October 2010,[7] alternatively, on 13 March 2011, 15 March 2011 and 21 March 2011, being three years after the loan amounts were lent and advanced.

[15] The High Court considered only the defence of prescription,[8] referred to the law relating to defences in liquidation applications as set out in *Hülse-Reutter*[9] and held that prescription raised by the respondent was indeed a valid defence.[10] It held further that it was not required to determine the merits of the defence or whether the defence raised was likely to succeed at trial.[11] Accordingly, the application for provisional liquidation was dismissed.

[16] The High Court granted leave to appeal to the Supreme Court of Appeal (SCA).

---

[4] Section 344(f) of the Companies Act provides that a company may be wound up by a court if "the company is unable to pay its debts as described in section 345".

Section 345(1)(c) provides that a company or body corporate shall be deemed to be unable to pay its debts if "it is proved to the satisfaction of the Court that the company is unable to pay its debts."

[5] Section 344(h) of the Companies Act stipulates that a company may be wound up by a court if "it appears to the Court that it is just and equitable that the company should be wound up."

[6] The other defences included: (a) the applicant's license to provide financial services in terms of the Financial Advisory and Intermediary Services Act 37 of 2007 had been suspended on 11 June 2014 and the applicant was thus precluded from collecting monies; (b) no instructions were given by the directors of Grindstone to Trinity to advance the loan amounts to Mr Deane; and (c) the loan amounts were paid over to Mr Deane personally, and thus the respondent was not indebted to the applicant.

[7] As per clause 2.2 of the agreement, the loan was deemed to be advanced on 1 September 2007.

[8] The High Court specifically stated that it did not find it necessary to consider the other defences in the light of its finding on prescription. See High Court judgment above n 3 at para 35.

[9] *Hülse-Reutter v HEG Consulting Enterprises (Pty) Ltd* 1998 (2) SA 208 (C).

[10] High Court judgment above n 3 at para 33.

[11] Id.

Supreme Court of Appeal

[17] The SCA dismissed the appeal with a majority judgment written by Willis JA, with Theron JA and Swain JA concurring (majority). A dissenting minority judgment was written by Dlodlo AJA, with Bosielo JA concurring (minority).

[18] The majority found that the claim had prescribed. It held that the debt was due "the moment it was lent and therefore, in terms of section 11(d) of the 1969 Prescription Act, prescription begins to run from that date".[12] On whether there is or should be an exception to the general rule that debts payable on demand are due immediately upon advance, the majority held that it was "not necessary . . . to express itself finally on the correctness of this proposition" as, in its view, it was "far from clear" that the parties had this intention.[13] Further, the majority held that clause 2.3 was "merely a procedural term of the agreement" and thus not a necessary condition for the cause of action.[14]

[19] The minority held that the debt had not prescribed. It reasoned that in order to determine when a debt is "due", regard must be had to (1) the intention of the parties and (2) the policy considerations concerning a supine creditor delaying prescription.[15] As per *Deloitte Haskins*,[16] a debt is due (and thus prescription starts to run) when it is immediately claimable or when the debtor is under an obligation to perform immediately.

[12] *Trinity Asset Management (Pty) Ltd v Grindstone Investments 132 (Pty) Ltd* [2016] ZASCA 135 (SCA judgment) at para 12.

[13] Id at para 16.

[14] Id at paras 16-8.

[15] Id at para 36. See *Stockdale v Stockdale* 2004 (1) SA 68 (C).

[16] *Deloitte Haskins & Sells Consultants (Pty) Ltd v Bowthorpe Hellerman Deutsch (Pty) Ltd* [1990] ZASCA 136; 1991 (1) SA 525 (A) (*Deloitte Haskins*) at 532G-H.

[20] The minority agreed with the general principle that, where no time for repayment is stipulated, the debt is due immediately.[17] However, it recognised an exception to the rule: where the parties expressly agree otherwise.[18] In this case, it reasoned, the agreement clearly and unequivocally provided that performance is due on demand.[19] In other words, demand is a condition precedent for the debt to become payable. Accordingly, prescription would "only begin to run from the date of the demand."[20]

[21] The applicant applied on 18 October 2016 to this Court for leave to appeal.

Further developments

[22] While the appeal processes were underway, the respondent was provisionally liquidated in the High Court by FirstRand Bank Limited on 28 November 2016 on the basis that it was unable to pay its debts (FirstRand application). A rule *nisi* was initially issued returnable on 10 January 2017. Following an intervention in the application by the applicant in this matter (Trinity), a settlement agreement was reached among the applicant, FirstRand Bank Limited and the provisional liquidators of the respondent. In this regard, it was agreed, among other things¸ that the rule *nisi* in the FirstRand application would be extended to 5 June 2017 (or such further extension date as may be required) to allow this Court to deliver its judgment in this matter. The FirstRand application will, therefore, not affect this application. Following the provisional liquidation order in the FirstRand application, the liquidators of the respondent decided to abide the decision of this Court. This Court then appointed a member of the Johannesburg Society of Advocates to argue the position of the respondent pro bono, in order to enable a balanced consideration of the

[17] SCA judgment above n 12 at para 37.

[18] Id at para 38. See De Wet and Van Wyk *Die Suid Afrikaanse Kontraktereg en Handelsreg* 5 ed (LexisNexis Butterworths, Durban 1992) (De Wet and Van Wyk) at 292.

[19] SCA judgment above n 12 at para 41.

[20] Id.

issues by this Court. The Court appreciates counsel making themselves available at short notice.

In this Court

Applicant's submissions

[23] The applicant's main contention is that the majority in the SCA erred in finding that, as a matter of law, a debt which is repayable on demand becomes due the moment the advance is made, without regard to the expressed intention of the parties. The correct approach, the applicant contends, is that in all contractual cases where the debt is payable on demand, the court must interpret the contract to ascertain the intention of the parties as expressed in the contract and establish whether demand is a condition precedent for the enforcement of a claim. If it is, then the debt becomes due only after demand has been made in the terms of the agreement. The applicant accepts that, in all other cases, a debt payable on demand is immediately due. The applicant supports the reasoning of the minority in the SCA, submitting further that it respects the intention of the contracting parties and thereby honours the principle of freedom of contract and ultimately the right of access to court.

Respondent's submissions

[24] The respondent submits that this Court should not invoke its jurisdiction in the applicant's favour as, firstly, winding-up a company is a discretionary remedy. In this regard, the respondent submits that it is not proper for this Court to exercise its discretion in favour of the applicant given that (1) the applicant brought the liquidation application to resolve a bona fide dispute and (2) the applicant persists in this appeal while at the same time pursuing an alternative remedy (with reference to the fact that the applicant has instituted action proceedings to recover the debt involving the same subject matter as this appeal). Secondly, the respondent submits that the matter has become moot as the winding-up order being sought in these proceedings has already been granted against the respondent. Accordingly, no

practical effect stands to be served by granting leave to appeal as well as a second provisional winding-up order.

[25] On the merits, the respondent submits that it is a well-established principle that a creditor cannot postpone the running of prescription against it if all that is required to render the debt payable is a unilateral act by the creditor. A creditor cannot avoid the incidence of prescription by refraining from performing that act.

Leave to appeal

[26] The two issues are (1) the liquidation of the respondent and (2) the prescription of the applicant's claim against the respondent.

[27] As regards liquidation, there is a general principle that, where there is a genuine and bona fide dispute concerning the respondent's indebtedness to the applicant, the application for liquidation should be dismissed (*Badenhorst* principle).[21] This principle acknowledges that liquidation proceedings are not the proper realm to determine disputed debts, and that the proceedings should not be abused in an attempt to enforce repayment.[22]

[28] Applying the *Badenhorst* principle, the High Court held that the defence of prescription raised by the respondent was indeed a valid defence.[23] The High Court held further that it was not required to determine the merits of the defence or whether the defence raised was likely to succeed at trial.[24] Accordingly, the application for provisional liquidation was dismissed.[25] As the High Court found, whether the

[21] *Badenhorst v Northern Construction Enterprises* (*Pty*) *Ltd* 1956 (2) SA 346 (T) at 347-9; reaffirmed by the SCA in *Kalil v Decotex (Pty) Ltd* 1988 (1) SA 943 (A) at 980B and discussed in *Exploitatie- en Beleggingsmaatschappij Argonauten 11BV v Honig* [2011] ZASCA 182; 2012 (1) SA 247 (SCA) (*Honig*) at paras 11-2.

[22] Id.

[23] High Court judgment above n 3 at para 33.

[24] Id.

[25] Id at paras 33 and 37.

respondent is indebted to the applicant or not is a genuine and bona fide dispute. The dispute turns on whether the applicant's claim has prescribed. The High Court correctly applied the *Badenhorst* principle and dismissed the application. The dispute was indeed palpable and this was confirmed (in retrospect) by the very fact that the issue led to a split decision in the SCA and is now before this Court.

[29] However, on appeal, the parties agreed that the central issue was whether the applicant's claim had prescribed. This was the issue which they formulated for the SCA and which that Court interrogated and gave judgment upon. It is against that judgment and decision that the applicant seeks leave to appeal to this Court. Neither the majority nor the minority judgment grappled with the *Badenhorst* principle.

[30] The issue placed squarely before this Court is therefore the correctness or otherwise of the decision of the SCA on prescription. There is no issue with regard to the application of the *Badenhorst* principle by the High Court.

[31] The question that arises is whether *Badenhorst* bars this Court from considering the prescription issue.[26] In other words, would it, in the circumstances, be in the interests of justice to dismiss this matter based on the *Badenhorst* principle? I think not.

[32] The prescription issue that arises on these facts, namely whether parties may by agreement give the creditor the right to determine when a debt falls due and, therefore, the commencement of the running of prescription, is properly before this Court. As noted by the SCA, the wording of this particular agreement[27] appears in many loan agreements.[28] An interpretation of clause 2.3 requires a balance between the expressed intention of the contracting parties and the policy considerations underlying

[26] In *Honig* above n 21, the SCA stated at para 12 that "the *Badenhorst* [principle] is not inflexible".

[27] See [55] below.

[28] SCA judgment above n 12 at para 20.

prescription. This will undoubtedly have weighty implications for commerce in general, as well as the banking and credit industries in particular. Accordingly, the issue raises an arguable point of law of general public importance.

[33] Furthermore, this is a constitutional matter as it directly concerns the Prescription Act,[29] which, this Court has held, "limits the rights guaranteed by section 34 of the Constitution".[30] It involves the interpretation of legislation and activates the constitutional duty to promote the spirit, purport and objects of the Bill of Rights.[31]

[34] It is thus in the interests of justice for leave to appeal to be granted for this Court to clarify and to provide some certainty on the prescription point.

Prescription and contractual freedom

[35] Professor Loubser summarises the purpose of prescription as ensuring protection of and fairness to the debtor, enhancing effectiveness and efficiency of the courts, promoting social stability, and achieving legal certainty and finality between the debtor and creditor.[32] With this in mind, I turn to examine the apparent tension between prescription and contractual freedom.

Prescription

[36] The current Prescription Act provides that "a debt shall be extinguished after the lapse of [the applicable period]"[33] which in this instance is "three years",[34] and that prescription "shall commence to run as soon as the debt is due."[35]

[29] 68 of 1969.

[30] *Makate v Vodacom Ltd* [2016] ZACC 13; 2016 (4) SA 121 (CC); 2016 (6) BCLR 709 (CC) at para 90.

[31] Section 39(2) of the Constitution.

[32] Loubser *Extinctive Prescription* (Juta & Co Ltd, Cape Town 1996) at 24. See also *Road Accident Fund v Mdeyide* [2010] ZACC 18; 2011 (2) SA 26 (CC); 2011 (1) BCLR 1 (CC) at para 8.

[33] Section 10(1).

[37] The term "due" is not defined in the Prescription Act. Its meaning was recently considered by the SCA in *Miracle Mile* where it was held:

> "In terms of the [Prescription] Act, a debt must be immediately enforceable before a claim in respect of it can arise. In the normal course of events, a debt is due when it is claimable by the creditor, and as the corollary thereof, is payable by the debtor. Thus, in [*Deloitte Haskins*][36] at 532G-H, the court held that for prescription to commence running,
>
> > 'there has to be a debt immediately claimable by the creditor or, stated in another way, there has to be a debt in respect of which the debtor is under an obligation to perform immediately'.
>
> (See also *The Master v I L Back & Co Ltd* 1983 (1) SA 986 (A) at 1004F-H). In *Truter v Deysel* 2006 (4) SA 168 (SCA) ([2006] ZASCA 16) para 16, Van Heerden JA said that a debt is due when the creditor acquires a complete cause of action for the recovery of the debt, i.e. when the entire set of facts which a creditor must prove in order to succeed with his or her claim against the debtor is in place".[37]

[38] A debt is due when it is immediately claimable by the creditor and immediately payable by the debtor. In *Truter*[38] the SCA held that, for the purpose of prescription, a debt is due when the creditor acquires a complete cause of action to approach a court to recover the debt.

[39] The provision was differently worded in section 5(1)(d) of the repealed 1943 Prescription Act which provided that prescription began to run "in respect of an

---

[34] Section 11(d). This is the applicable provision in this case as the debt does not fall into any of the other prescribed categories.

[35] Section 12(1).

[36] *Deloitte Haskins* above n 16.

[37] *Standard Bank of South Africa Ltd v Miracle Mile Investments 67 (Pty) Ltd* [2016] ZASCA 91; 2017 (1) SA 185 (SCA) (*Miracle Mile*) at para 24.

[38] *Truter v Deysel* [2006] ZASCA 16; 2006 (4) SA 168 (SCA) at para 16.

action, other than for damages, from the date on which the right of action first accrued against the debtor".[39]

[40] A fundamental principle of prescription, which is much clearer under the current Prescription Act, is that it will begin to run only when the creditor is in a position to enforce his right in law, not necessarily when that right arises.[40]

[41] A further principle has been developed, based on policy considerations, which provides that a creditor should not by his or her own inaction delay the running of prescription.[41] This policy-based principle appears to have influenced courts to accept as a general rule that all debts payable on demand are immediately enforceable on the conclusion of the contract, and that it is at this point that prescription begins to run.[42]

[42] Thus, when interpreting the words, "payable on demand", the Court in *Oneanate* stated:

> "A loan without agreement as to a 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."[43]

[39] Act 18 of 1943.

[40] See Lubbe "Die Aanvang van Verjaring waar die Skuldeiser oor die Opeisbaarheid van die Skuld kan Beskik" (1988) 51 *THRHR* 135.

[41] *Uitenhage Municipality v Molloy* [1997] ZASCA 112; 1998 (2) SA 735 (SCA) at 742E-743B; *Benson v Walters* 1984 (1) SA 73 (A) at 86C; and *The Master v I L Back and Co Ltd* 1983 (1) SA 986 (A) (*I L Back*) at 1005G.

[42] See *Webb v Van der Wath* 1914 OPD 17 at 19; *Nicholl v Nicholl* 1916 WLD 10 at 12; *Cassimjee v Cassimjee* 1947 (3) SA 701 (N); *Lambrecht v Lyttleton Township (Pty) Ltd* 1948 (4) SA 526 (T) at 529; and *Damont N.O. v Van Zyl* 1962 (2) SA 47 (T) at 50D-51F.

[43] *Standard Bank of SA Ltd v Oneanate Investments (Pty) Ltd* 1995 (4) SA 510 (C) (*Oneanate*) at 546I-547B.

Contractual freedom

[43] However, the parties to an agreement may intend that demand be a condition precedent to the enforcement of the debt, and consequently, the debt will be "due" only when demand is made in terms of the agreement.[44] This sound principle of contracts has been accommodated by the courts as an exception to the general rule stated above.[45] The "exception"[46] was, for instance, noted by the High Court in *De Bruyn*:

> "[I]n 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 a 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."[47]

[44] This formulation honours the principle of freedom of contract and the corollary principle that agreements seriously entered into should be enforced (*pacta sunt servanda*). As this Court noted in *Barkhuizen*:

> "[P]ublic policy, as informed by the Constitution, requires in general that parties should comply with contractual obligations that have been freely and voluntarily undertaken. This consideration is expressed in the maxim *pacta sunt servanda*, which, as the Supreme Court of Appeal has repeatedly noted, gives effect to the central constitutional values of freedom and dignity. Self-autonomy, or the ability to

[44] See Loubser above n 32 at 60; Delport "Prestasie 'op aanvrag' en Art 12(1) van die Verjaringswet 1969" (1979) 12 *De Iure* 65 at 70 and De Wet and Van Wyk above n 18.

[45] See *Santam Ltd v Ethwar* [1998] ZASCA 102; 1999 (2) SA 244 (SCA) at 252I-J and *Stockdale* above n 15 at paras 15-8.

[46] I am not sure why such a basic principle of the law, the need to interpret contracts by seeking to establish the objective intention of the parties, should be regarded as an exception. Surely this is a basic rule. The rule with regard to the meaning of "payable on demand" is an aid to interpretation which is invoked only where the parties did not make their intention clear as to what meaning they attach thereto. The starting point in contractual interpretation is the intention of the parties, as expressed in their agreement.

[47] *De Bruyn v Du Toit* [2015] ZAWCHC 20 (*De Bruyn*) at para 6.

> regulate one's own affairs, even to one's own detriment, is the very essence of freedom and a vital part of dignity."[48]

[45] With regard to the policy consideration in issue before this Court, an analogous matter was recently considered by the SCA in *Miracle Mile*.[49] The Court was called upon to decide whether prescription began to run when the creditor was *able to elect* to accelerate payment or whether it began to run when the creditor *actually elects* to accelerate payment.

[46] The SCA held that the debt in that case became due only when the creditor *actually* elected to accelerate payment, at which point prescription began to run.[50] Further, it held that the policy considerations concerning an inactive creditor cannot override the clear provisions of the Prescription Act.[51] This seems to me to be correct: such policy considerations should not override the intention of the parties clearly expressed in a contract.

[47] In sum, the relevant principles may, in my view, be restated as follows. A contractual debt becomes due as per the terms of that contract. When no due date is specified, the debt is generally due immediately on conclusion of the contract. However, the parties may intend that the creditor be entitled to determine the time for performance, and that the debt becomes due only when demand has been made as agreed. Where there is such a clear and unequivocal intention, the demand will be a condition precedent to claimability, a necessary part of the creditor's cause of action, and prescription will begin to run only from demand. This, in my view, is not an incident of the creditor being allowed to unilaterally delay the onset of prescription. It is the parties, jointly and by agreement seriously entered into, determining when and under what circumstances or conditions a debt shall become due.

---

[48] *Barkhuizen v Napier* [2007] ZACC 5; 2007 (5) SA 323 (CC); 2007 (7) BCLR 691 (CC) at para 57.

[49] *Miracle Mile* above n 37.

[50] Id at para 15.

[51] Id.

[48] What of the creditor who fails to exercise the right to make a demand for a prolonged or even indefinite period? Firstly, the latter. It is within the creditor's discretion to enforce or not to enforce the debtor's obligation to repay. Secondly, as for the creditor who makes demand after a prolonged delay, the court would interpret the agreement to discern the intentions of the parties and read in that such a right must be exercised by the creditor within a reasonable period.[52] What is reasonable will depend on the facts of each case. This formulation would honour the parties' intentions while giving effect to the purposes of prescription.

---

[52] See *Stockdale* above n 15 at para 15 where Traverso AJP stated:

> "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 advantages out of the loan and the use of the money'. This sentiment was echoed by Mason J in the case of *Mackay v Naylor* 1917 TPD 533 at 538, where the Court held that a reasonable time must be allowed to the borrower to enable him to have some 'real benefit from the transaction'."

And at para 16 held that "[t]he plaintiffs, cognisant of the circumstances in which the defendant found herself obviously afforded her a reasonable time, in the circumstances, to make the repayment of the loan."

See also the authorities quoted in *Fluxman v Brittain* 1941 AD 273 at 294:

> "Voet (45.1.19) states that the rule must be accepted with some moderation of the time for performance, and in regard to the contract of *mutuum* he states in the passage already quoted (12.1.19) that the loan must be repaid after a reasonable time, remarking that, although it is true that in all obligations in which the time for fulfilment is not fixed, the debt is presently due, yet it should not be presumed that for that reason the humanity and even the discretion of the Judge are taken away, so that a reasonable delay may be given ('must be given' – according to the translation in the *Aanhangzel tot het Hollandsch Rechtsgeleerdheid Woordenboek, s.v. Mutuum*) by the lender or the Judge to the borrower who is sued, as the nature of the case requires. Pothier (*Mutuum, Oeuvres*, vol. 5, sec. 48), dealing with contracts of loan in which no term is mentioned for repayment states that the lender ought to grant a time more or less long according to the circumstances, in the discretion of the Judge, for the restitution of the sum lent, and that the borrower has against the demand of the lender, if he sues him before this time, an exception by which he ought to obtain from the Judge a delay for the payment."

See also *Bowditch v Peel and Magill* 1921 AD 561 at 572-3 wherein Innes J, examining the time at which a creditor must elect a method of enforcement, stated that:

> "A person who has been induced to contract by the material and fraudulent misrepresentations of the other party may either stand by the contract or claim a rescission. (Voet, 4.3, secs. 3, 4, 7). It follows that he must make his election between those two inconsistent remedies *within a reasonable time* after knowledge of the deception. And the choice of one necessarily involves the abandonment of the other. He cannot both approbate and reprobate."

This quotation from *Bowditch* was cited with approval in *Absa Bank Ltd v Moore* [2016] ZACC 34; 2017 (1) SA 255 (CC); 2017 (2) BCLR 131 (CC) at para 50.

[49] At first glance, a provision which gives one party the sole discretion to determine the claimability of a loan appears to constitute an invalid potestative condition. Upon closer examination, however, this is not so. The nature of potestative conditions was examined in *Benlou*:

> "I am fortified in my view by the distinction drawn in our law between a pure and a mixed potestative condition. Commonplace examples of the two types of conditions are respectively: 'I will pay you R500 if I wish to do so' (a *condicio si voluero*). And: 'I will pay you R500 if I do not visit Cape Town before the end of the year'. The pure condition is invalid because it depends entirely upon the will of the promisor whether or not he will pay. The mixed condition is, however, unobjectionable (D.45.1.99.1; D.45.1.108; D.45.1.115.1; Voet 45.1.19). The reason for the benevolent approach to mixed conditions is thus explained by Pothier [in] *A Treatise on the Law of Obligations* (translation by Evans) vol 1 at 29:
>
> > 'Lastly, though I promise something under a condition, which depends upon my will whether I will accomplish it or not . . . as, if I promise to give you ten pistoles in case I go to Paris, the agreement is valid; for it is not entirely in my power to give the money or not, since I can only refuse to do so in case I refrain from going to Paris.'"[53]

[50] As is readily apparent, such a condition concerns the unilateral decision to *perform* by the party who is so "obliged". When it comes to a provision mutually and expressly agreed concerning the making of demand, that which is left in the sole discretion of the creditor is the contractual right given to choose if and when to *enforce* the agreement. This is not nearly as controversial as it may first appear considering that a creditor is not ignoring a duty to enforce, but rather has that right (flowing from a contract seriously entered into) and as such has a choice on whether to exercise this right or not, subject to the proviso that the creditor must do so within a reasonable time. The policy-based rule should apply to a creditor who unilaterally

[53] *Benlou Properties (Pty) Ltd v Vector Graphics (Pty) Ltd* [1992] ZASCA 158; 1993 (1) SA 179 (A) (*Benlou*) at 186F-H. See also *Withok Small Farms (Pty) Ltd v Amber Sunrise Properties 5 (Pty) Ltd* [2008] ZASCA 131; 2009 (2) SA 504 (SCA) at para 7.

assumes the right to determine when prescription will start to run, and not to one who is authorised by contract to do so.[54]

Has the debt prescribed?

[51] Did the parties in this case intend that the creditor would be entitled to determine the time for performance and that the debt would become due only once demand had been made? The answer turns on the proper interpretation of the contract.

[52] In *Endumeni*, the SCA held:

> "[I]nterpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible, each possibility must be weighed in the light of these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context, it is to make a contract for the parties other than the one they in fact made. The inevitable point of departure is the language of the provision itself, read in context and having regard to

[54] In the field of contracts, and with reference to prescription, I cannot see any problem with the legality of the following transaction. A says to B: "With regard to that loan you requested, here is R100 000. I will not need it any time soon and will let you know when I need it (demand). But should I die before I ask you to pay it back (make the demand), please pay it into my estate within a year of my death". B accepts. It is a serious loan agreement, and the debt ought not to prescribe before A calls up the loan.

> the purpose of the provision and the background to the preparation and production of the document."[55]

[53] Further guidance in interpreting contracts may be gathered from the following further decisions of the SCA. In *Sassoon*, the SCA (then Appellate Division) held:

> "The first step in construing a contract is to determine the ordinary grammatical meaning of the words used by the parties (*Jonnes v AngloAfrican 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."[56]

[54] Similarly, in *Privest*, the SCA held as follows:

> "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."[57]

[55] As this is an objective assessment, regard must be had, not to the parties' stated intentions about the provisions of the contract, as these would be subjective, but to the particular provision and the agreement as a whole. The material terms of the agreement which stand to be interpreted to shed light on the intention of the parties are as follows:

---

[55] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA) (*Endumeni*) at para 18. See also *Cool Ideas 1186 CC v Hubbard* [2014] ZACC 16; 2014 (4) SA 474 (CC); 2014 (8) BCLR 869 (CC) at para 28.

[56] *Sassoon Confirming and Acceptance Co (Pty) Ltd v Barclays National Bank Ltd* 1974 (1) SA 641 (A) (*Sassoon*) at 646B.

[57] *Privest Employee Solutions (Pty) Ltd v Vital Distribution Solutions (Pty) Ltd* [2005] ZASCA 52; 2005 (5) SA 276 (SCA) (*Privest*) at para 21. See also *Coopers & Lybrand v Bryant* 1995 (3) SA 761 (A) at 767E-F.

> "2.1 The Lender hereby lends to the Borrower and the Borrower hereby borrows from the Lender, the sum of R3 050 000. This sum is hereinafter referred to as the 'Loan Capital'.
>
> 2.2 The Loan Capital was lent and advanced on 1 September 2007, notwithstanding the date of signature hereof.
>
> 2.3 The Loan Capital shall be due and repayable to the Lender within 30 days from the date of delivery of the Lender's written demand.
>
> 2.4 Interest shall be charged by the Lender on the Loan Capital at the Money Market Rate from date of payment to date of repayment. This interest shall be due and payable on the date on which the Loan Capital is due and payable in terms of clause 2.3. Any interest which accrues after this date shall be due and payable on accrual thereof.
>
> 3.1 The Borrower shall procure that a second mortgage bond is registered over the Property as security for the amounts due in terms of this agreement."

[56] The agreement is not silent on the date of payment. It also does not provide that the debt be payable on demand *simpliciter* (without qualification). It prescribes demand in a specific manner as an essential step to be taken, and with a particular effect. It was a necessary step and a condition precedent to the enforcement of the debt. There are a few textual pointers to this. In terms of clause 2.3: (a) demand had to be made in writing (an oral one would not have been compliant) and (b) once demand had been made in the prescribed manner, then the "date" from which the loan capital would become repayable would become determinable. Not before. It would be "30 days from the date of delivery of the [creditor's] written demand." The debtor would be allowed 30 days within which to settle the debt. In this context, demand was not a simple procedural step that they had in mind. It was a material condition from which the due date would be determined. Without fulfilment of this condition, the due date could not be determined. It was an agreed way in which the creditor would put the debtor under an obligation to pay, a condition precedent to enforceability.

[57] Further, clause 2.4 (the interest clause), with which clause 2.3 must be read, makes it clear that the parties had two separate dates in mind: (i) the date from which

interest was to be charged which is the date on which the loan is advanced ("from the date of payment of the loan") and (ii) the date on which the interest so charged shall be repayable – becomes due – which is the date on which the capital shall become repayable in terms of clause 2.3 ("due and repayable"). Interest was not to be repaid on the same date on which it was charged. If the parties had intended these two dates to be the same, they would have said so in the agreement – namely that interest shall be repayable on the same date that it is charged. They did not say so. That was not their intention. Interest was to be charged on one day, and then at another future date and following certain conditions, it would be repayable. The future event was the making of demand by the creditor in writing in terms of clause 2.3. The parties provided for the two events (the charging of interest and its repayment) in two separate sentences, each fairly clear in its meaning. This adds to the clarity of their intention.

[58] Furthermore, it appears that the parties intended the loan to be a long term one, repayable after a long period, certainly long after the date on which the loan was advanced. They did not anticipate the creditor taking steps to enforce repayment immediately after advancing the loan capital. Interest was to be charged in the meantime and at some future date still to be determined the capital and interest would be repaid. Hence, in order to secure the debt over this long period, the parties placed the debtor under an additional obligation in clause 3.1. The debtor had to procure that a second mortgage bond was registered over a property to secure the amounts due in terms of the agreement. A registered mortgage bond would have given the parties at least 30 years before the debt prescribed.[58] That was the approximate period in which their mental timeline ran.

[59] It was the intention of the parties thus that the debt would not become repayable until and unless it was called up in writing by the creditor. The demand made as prescribed would constitute the calling up of the loan and trigger its

[58] See section 11(a)(i) of the Prescription Act.

enforceability. As it happened, the bond was never registered. However, the fact that they had in mind that type of security reinforces the interpretation and the view that what they intended was not immediate repayment, but repayment after a fairly long time. Clause 3.1 thus sheds light on clause 2.3, as indeed the contract as a whole should and does. It is not insignificant that even on 6 April 2011, more than three years from the date of the agreement, and in keeping with the initial intention of the parties, the respondent was still taking steps to pass a covering bond in favour of the applicant.

[60] The fact that, in providing for repayability, the parties employed the term "due and repayable", which mirrors the language of the Prescription Act, indicates that they had in mind to shift the commencement of prescription – the due date of the debt. They intended to provide for the due date of the debt and not leave it up to the operation of the law to determine. They thus provided that the loan capital, and consequently its interest, would be due and repayable within 30 days "from the date" of the creditor's written demand, not earlier. To suggest that they intended the debt to be due immediately is to overlook the meaning of the words and language they used and to render them naught.

[61] Finally, while the parties used the word "due" in the combination "due and repayable" with reference to the time when the debt would be repayable (in clauses 2.3 and 2.4), they also used the single word "due" in a different context in clause 3.1 to describe the amount that had to be secured by the bond. In this context, the word "due" in clause 3.1 probably means an existing debt and not necessarily a repayable or claimable debt. This, however, does not affect the unambiguous meaning of the word in clauses 2.3 and 2.4 where, with the emphatic conjunction with "repayable", it bears the same meaning as in the Prescription Act, namely payable or enforceable.

[62] Another factor worth mentioning is that the parties fixed 1 September 2007 as the date of the agreement, on which "the loan capital was advanced" (clause 2.2). In

actual fact, however, the loan capital was only paid to the debtor in three tranches in February 2008, more than five months later. An interpretation that holds that the repayment of the debt was "due" immediately would lead to an absurdity in that the debt would then be held to have been due (repayable) even before the capital had been paid to the debtor. It is the kind of absurdity that *Endumeni*[59] urges us to avoid.

[63] In short, applying the rules of interpretation referred to earlier, on a simple interpretation of clause 2.3, read in context, the parties intended very specific things for the debt to become due: firstly, there had to be a demand, secondly, the demand had to be made in writing, and thirdly, once the demand had been made the debtor would then have 30 days to settle the debt before the creditor would be entitled to enforce repayment.

[64] Considering all of the above, it is apparent that the most sensible meaning to ascribe to clause 2.3 is that the parties intended that the applicant be entitled to determine the time for performance and that the debt only became due when demand was made. In other words, the parties intended for a written demand to be a necessary condition to the enforcement of the loan agreement.

[65] The SCA majority stated that a debt can be immediately claimable even though demand may be necessary for it to be payable.[60] In other words, a distinction, it is suggested, must be drawn between payability and claimability. I am unable to agree with this formulation. In the context of prescription, claimability is the flip side of payability. To demonstrate the obvious difficulty with the payable/claimable distinction let us consider the following. Where a debt is not yet *payable*, the debtor is under no obligation to repay. However, if the debt is nevertheless *claimable* prescription would begin to run. This will leave the creditor in the impossible position of being unable to recover the debt as any attempt to do so would be met with the

[59] *Endumeni* above n 55.

[60] SCA judgment above n 12 at para 13.

successful exception that the debtor is currently not under any obligation to repay or, after three years, a successful plea of prescription. In this scenario, how is it possible to say that the debt is claimable if not yet payable? The debtor's obligation to make payment (payable) is a necessary part of the creditor's cause of action (claimable).

[66] This distinction is illusory as held by the SCA in *Miracle Mile* where it was stated that "a debt is due when it is claimable by the creditor, and as the corollary thereof, is payable by the debtor".[61]

[67] In the present matter, had the applicant attempted to enforce the agreement by means of legal action before delivering a written demand and awaiting the lapse of the 30 day period, the respondent would have raised a successful exception that the debt was not yet payable and as such not yet "due" (claimable).

[68] What must not be conflated or confused is the coming into existence of a debt and when that debt becomes due. In *List*, the SCA (then Appellate Division) observed:

> "[T]he date on which a debt arises usually coincides with the date on which it becomes due, but that is not always the case. The difference relates to the coming into existence of the debt on the one hand and the recoverability thereof on the other hand."[62]

[69] Furthermore, the SCA majority found clause 2.3 to be "merely a procedural term of the agreement" not a necessary condition for the cause of action.[63] Reference was made to *Tamarillo* wherein it was stated that:

[61] *Miracle Mile* above n 37 at para 24.

[62] *List v Jungers* 1979 (3) SA 106 (A) at 121C-E.

[63] SCA judgment above n 12 at para 16.

> "A true suspensive condition in a contract has the effect of postponing the operation of the contract until the happening of some uncertain future event. (*Resisto Dairy (Pty) Ltd v Auto Protection Insurance Co Ltd* 1963 (1) SA 632 (A) at 644.)"[64]

[70] In *Resisto Dairy*, the SCA (then Appellate Division) stated:

> "The question whether a condition in the [contract] is one suspending the operation of the [contract] depends upon the nature of the condition; if in its nature it is not suspensive, it cannot be made so merely by calling it a condition precedent."[65]

[71] This is merely another way of calling for the proper interpretation of the contract. Moreover, the SCA in *Miracle Mile* held that compliance with the notice provisions of an acceleration clause was "not simply a procedural matter but is essential to establishing a cause of action".[66] Similarly, in this matter compliance with clause 2.3 is essential to establishing the applicant's cause of action.

[72] The SCA quoted *Oneanate*, presumably with regard to the qualifier "without agreement as to time".[67] It is true that clause 2.3 does not specify a date nor is the date objectively determinable. It is a date to be determined by the creditor. *Oneanate*, as is readily apparent from the quote, was dealing with a situation where there was no agreement as to time for repayment. Moreover, and what makes that case distinguishable on the law, is that there was no intention by the parties in *Oneanate* to make demand necessary.[68] All this then brings us back to the main question whether this was the intention of the parties. In other words, did the parties intend for demand to be a condition precedent to enforcement? And my short answer is yes.

---

[64] *Tamarillo (Pty) Ltd v BN Aitken (Pty) Ltd* 1982 (1) SA 398 (A) (*Tamarillo*) at 432C.

[65] *Resisto Dairy (Pty) Ltd v Auto Protection Insurance Co Ltd* 1963 (1) SA 632 (A) (*Resisto Dairy*) at 643H.

[66] *Miracle Mile* above n 37 at para 26.

[67] SCA judgment above n 12 at para 17. See *Oneanate* above n 43 at 546I.

[68] *Oneanate* id. Furthermore, this case was overturned on appeal: *Standard Bank of South Africa Ltd v Oneanate Investments (Pty) Ltd (In Liquidation*) [1997] ZASCA 94; 1998 (1) SA 811 (SCA) (*Oneanate* SCA judgment), although this *dictum* as quoted above [42] was not discussed (see 823I-827F).

When was demand made?

[73] On 19 September 2013, the applicant sent an email to the respondent stating:

> "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 outstanding?"

[74] On its own, this does not seem to be sufficiently clear and unequivocal to be a demand.[69] However, this must be read in light of the response by the respondent:

> "This note serves to confirm that Trinity has called the property fund. The current outstanding balance is R4,55 m. 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."

The respondent understood the applicant's email (and the applicant intended it) to constitute a demand calling for the repayment of the debt. Written demand was properly made in terms of clause 2.3 on 19 September 2013. Although it is not necessary to decide this point, on this interpretation prescription commenced 30 days after that demand which falls on or about 20 October 2013.[70]

---

[69] What constitutes a valid demand in law is a question of fact. See *Kragga Kamma Estates CC v Flanagan* [1994] ZASCA 137; 1995 (2) SA 367 (A) at 374E-G wherein discussing whether there had a been a valid cancellation the Court stated that:

> "But whatever its form, the demand had to be unambiguous and indicate a fixed date, reasonable in the circumstances, for performance (*Nel vs Cloete* 1972 (2) SA 150 (A) at 159H). And, of course, it had to indicate that the creditor wished to receive his money (*Dougan vs Estment* 1910 TPD 998 at 1001); that the debtor was required to perform (*Alfred McAlpine and Son* (*Pty*) *Ltd vs Transvaal Provincial Administration* 1977 (4) SA 310 (T) at 351H); and he must have been placed on terms to do so (*Johannesburg City Council vs Norven Investments* (*Pty*) *Ltd* 1993 (1) SA 627 (A) at 633E). Whether this has been done, is a question of fact for the decision of the court (*Wessels' Law of Contract*, 2 ed, vol 2 at 2893)."

[70] The 31st day after demand had been made. Applying the civil method of computation: including the day on which the period begins to run and excluding the last day. See the discussion and cases cited in *Holmes v North Western Motors (Upington) (Pty) Ltd* 1968 (4) SA 198 (C) at 202F-203D.

[75] I would suggest that, properly construed, the demand prescribed in clause 2.3 need not be scrutinised too strictly. It is not a formal letter of demand to initiate legal proceedings, which has to contain all the elements of the cause of action. What clause 2.3 contemplated is something in writing to call up the debt (making it due). In the language of *De Bruyn*[71] it is no more than "the giving of notice" that the repayment is no longer suspended. This appears to be how the author of the email and its recipient understood it to be.

[76] Even if I were wrong on the above construction of demand and the email was not a demand, the letter sent on 9 December 2013, although drafted as a letter for the purposes of section 345(1)(a) of the Companies Act, nevertheless constituted a written demand within the purview of clause 2.3. There could have been no doubt after that date or, at the latest 30 days after that date, that the loan was due and repayable. The loan was advanced in tranches in February 2008. On either interpretation, there was approximately a six-year period between the loan being advanced and the demand being made. Is this within a reasonable time?

[77] This question cannot be answered in abstract. As stated above, each case must be determined on its own facts. Had the debt been due immediately, the creditor would have had three years in which to enforce repayment. Here, the parties intended to give the creditor the right to determine when the debt became due. It was, by necessary inference, the parties' intention for the debt to become due at the very least more than three years after each advance was made. In the circumstances discussed above, this period was not unreasonable and thus falls within the acceptable limits of the creditor's contractual right to call up the debt.

[71] Above n 47 at para 6 and see [43] above.

[78] In my view, therefore, from the end of 2013, prescription began to run. It was then interrupted in terms of section 15(1) of the Prescription Act by the service of summons on the respondent in November 2015.[72]

[79] The applicant's claim has not prescribed. In the light of this conclusion, and having regard to the developments that preceded it, it would have been necessary to make a declaratory order to that effect in order to provide certainty.

Remedy

[80] In the light of my conclusion on prescription, would I have ordered that the respondent be provisionally liquidated as prayed for by the applicant? There are numerous considerations pointing away from making such an order.

[81] Firstly, the High Court (and subsequently the SCA) considered and decided the defence of prescription only. There are other defences that the respondent raised in the High Court which have not been considered. Having regard to the test for evaluating the defence to liquidation, which the High Court articulated correctly, there is no reason why this Court should now consider the remaining grounds and defences to liquidation and decide the matter as a court of first and final instance.

[82] Secondly, the respondent has already been placed under provisional liquidation on 28 November 2016 by the High Court in the FirstRand application.

[83] Thirdly, the applicant has successfully intervened and is now a party in the liquidation application pending in the High Court. It is therefore in a position to assert whatever right it may have with regard to the liquidation of the respondent.

[72] This section provides that: "The running of prescription shall, subject to the provisions of subsection (2), be interrupted by the service on the debtor of any process whereby the creditor claims payment of the debt."

[84] The applicant has sought to persuade this Court to grant a second provisional winding-up order so that it may achieve an earlier *concursus creditorum* (crystallisation of creditors), because the date for the liquidation of the respondent will then be deemed to be the date on which the application was presented, namely 18 July 2014. This is earlier than the date when the FirstRand liquidation was instituted.[73] This fact is however countered by the fact that the applicant has already committed itself, in an agreement with the parties in the FirstRand application, to not seek the final liquidation of the respondent in this case, even if this Court was to grant it a provisional liquidation. I am unable to appreciate the interests of justice in granting a provisional order to a party which is already committed not to seek a final order. This has elements of an abuse of court process.

[85] Lastly, as discussed in considering whether to grant leave to appeal, the *Badenhorst* principle, although not a bar to considering the prescription issue, may be a bar to granting a provisional liquidation order as prayed for. Although I find that the debt has not prescribed, prescription was a valid and bona fide defence when it was raised. Furthermore the other defences raised in the High Court have not been considered. As far as I am aware, they have also not been withdrawn. There is no compelling case for this Court to consider those defences as a court of first and last instance.

[73] Section 348 of the Companies Act provides that: "A winding-up of a company by the Court shall be deemed to commence at the time of the presentation to the Court of the application for the winding-up."

CAMERON J (Khampepe J, Madlanga J, Mhlantla J and Pretorius AJ concurring):

Introduction

[86] I have had the benefit of reading the judgment of my colleague, Mojapelo AJ (first judgment). I agree that leave to appeal should be granted. I also agree that the *Badenhorst* principle does not obstruct a determination of the point at issue here. That principle is less of a principle than a sensible rule of practice. It says that if you want to claim a debt you know is disputed, you should not bring liquidation proceedings to do it. You should claim the debt by way of action – and only once your claim has been established may you, if necessary, seek to liquidate or sequestrate.

[87] When the dispute about the debt is not about whether it exists or its amount but about its exigibility, things are different. Then the doubt arises from a disputed principle, not contested facts. This means that the liquidating or sequestrating court is not diverted into a time-consuming and complex factual enquiry. The only point before it is a law point. That law point can be determined with precision and with dispatch.

[88] That is what happened here. Yekiso J at several points seemed to be stating that he was applying *Badenhorst*. However, what he in fact did was to rule conclusively against Trinity that, for legal not factual reasons, its claim had prescribed. The fact that the High Court may seem to have disposed of the matter by applying *Badenhorst* does not diminish the conclusory nature of its finding on prescription.

[89] The High Court considered the parties' submissions, including Grindstone's submission that the prescription defence was a "good and valid defence, *based on facts that are common cause*".[74] It concluded that "prescription, as raised by the

[74] High Court judgment above n 3 at para 32.

respondent [i.e. based on common cause facts] is indeed a valid defence".[75] This after a detailed analysis of case law relating to prescription. When the High Court went further to state what it was "required" to do and, seemingly based on what it was "required" to do, concluded that "the grounds upon which the claim is disputed are not unreasonable"[76], it did not invalidate its finding that, in law, the prescription defence, as raised by Grindstone, was valid. If, then, based on common cause facts, the prescription defence was valid, what more had to be established at trial, in relation to this "valid" defence?

[90] The High Court's judgment conclusively extinguished Trinity's claim. That was also the parties' understanding. They set aside their other disputes and expressly agreed that the only issue on appeal to the SCA would be the law point – whether Trinity's claim had prescribed. They did so for perfectly sound reasons. It made good practical sense for them to do so.

[91] A good analogy is when an applicant at risk of harm seeks an interim interdict. When the facts are unclear, the interdicting court must weigh prospects, probabilities and harm. But when the respondent, who is sought to be interdicted, has a killer law point, it is just and sensible for the court to decide that point there and then. The court is in effect ruling that, whatever the apprehension of harm and the factual rights and wrongs of the parties' dispute, an interdict can never be granted because the applicant can never found an entitlement to it.

[92] Exactly the same here. The High Court found that Trinity could never enforce its claims against Grindstone, regardless of any factual dispute or rights and wrongs. The question then is whether the High Court was wrong, as a matter of law, to decide this law point. I do not understand the *Badenhorst* principle to preclude a

[75] Id at para 33.

[76] Id at para 32.

determination, by a liquidating or sequestrating court, of a killer law point based on common cause facts. As Rogers J pointed out in *Orestisolve*:

> "[T]he rule, which is not inflexible, would not generally be an obstacle to liquidation if the court felt no real difficulty in deciding the legal point. . . . [T]he equivalent rule in England finds application where the dispute is shown to be one 'whose resolution will require the sort of investigation that is normally within the province of a conventional trial'. A purely legal question would not have that character."[77]

[93] This is not to say that a liquidating or sequestrating court can never rely on *Badenhorst* to refer legal issues, even on common cause facts, to a trial court. First-instance courts may have many reasons for kicking for touch. But *Badenhorst* does not preclude a court from deciding a straight-forward legal issue based on common cause facts. And that is what the High Court did here. The prescription point was therefore properly before the SCA and was understood as being so by both the majority and minority. And it is properly before this Court.

[94] But beyond that, I cannot agree with the first judgment. I disagree that the appeal should succeed. In my view, prescription started its deadly trudge on the day the loan at issue in these proceedings was advanced, and the parties' written agreement did not postpone it. My primary basis for disagreement is that the first judgment attaches undue significance to the word "due" where it appears in clause 2.3 of the parties' loan agreement.

[95] That said, I agree with the first judgment's exposition of the legal principles governing when a debt payable on demand is due[78] – but I disagree with the way the

---

[77] *Orestisolve (Pty) Ltd t/a Essa Investments v NDFT Investments Holdings (Pty) Ltd* 2015 (4) SA 449 (WCC) (*Orestisolve*) at para 12.

[78] See [47]:

> "In sum, the relevant principles may, in my view, be restated as follows. A contractual debt becomes due as per the terms of that contract. When no due date is specified then the debt is generally due immediately on conclusion of the contract. However, the parties may intend that the creditor be entitled to determine the time for performance and that the debt becomes

first judgment applies those principles to the facts here. I cannot agree that a holistic reading of the loan agreement shows that the parties intended to delay the "dueness" of the claim, and consequently the running of prescription, until a letter of demand was issued. The first judgment finds that the letter of demand was an essential ingredient of Trinity's cause of action,[79] and a "necessary condition to the enforcement of the loan agreement".[80] I disagree.

Meaning of "due"

[96] Section 12(1) of the Prescription Act provides that prescription "shall commence to run as soon as the debt is due".[81] The Prescription Act doesn't define "due", but long-standing SCA decisions have given it content. In *Deloitte Haskins* the Court said that "prescription shall commence to run as soon as the debt is due" means that—

> due only when demand has been made as agreed. Where there is such a clear and unequivocal intention, the demand will be a condition precedent to claimability, a necessary part of the creditor's cause of action, and prescription will only begin to run from demand. This, in my view, is not an incident of the creditor being allowed to unilaterally delay the onset of prescription. It is the parties, jointly and by agreement seriously entered into, determining when and under what circumstances or conditions a debt shall become due."

[79] See [64].

[80] Id.

[81] Section 12 of the Prescription Act provides:

> "(1) Subject to the provisions of subsections (2), (3), and (4), prescription shall commence to run as soon as the debt is due.
>
> (2) If the debtor wilfully prevents the creditor from coming to know of the existence of the debt, prescription shall not commence to run until the creditor becomes aware of the existence of the debt.
>
> (3) A debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises: Provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care.
>
> (4) Prescription shall not commence to run in respect of a debt based on the commission of 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, and an alleged offence as provided for in sections 4, 5, and 7 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."

> "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 follows that prescription cannot begin to run against a creditor before his cause of action is fully accrued, i.e. before he is able to pursue his claim."[82]

[97] *Truter* said a debt is "due"—

> "when the creditor acquires a complete cause of action for the recovery of the debt, that is, when the entire set of facts which the creditor must prove in order to succeed with his or her claim against the debtor is in place or, in other words, when everything has happened which would entitle the creditor to institute action and to pursue his or her claim."[83]

[98] In *Miracle Mile*, the SCA reaffirmed the existing doctrine applied in *Deloitte Haskins* and *Truter*. Under the statute, it said—

> "a debt must be immediately enforceable before a claim in respect of it can arise. In the normal course of events, a debt is due when it is claimable by the creditor, and as the corollary thereof, is payable by the debtor."[84]

---

[82] *Deloitte Haskins* above n 16 at 532F-J. See also *I L Back* above n 41 at 990D-E, where the Court held:

> "A debt being due in this context involves two things, namely that the creditor is in a position to claim payment forthwith and that the debtor does not have a defence to the claim. In other words, that the creditor's cause of action is complete."

For more detail regarding the meaning of "cause of action", see *Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 (A) at 838D-H, where Corbett JA made the following pertinent remarks:

> "In *McKenzie v Farmers' Co-operative Meat Industries Ltd* 1922 AD 16 this Court held that, in relation to a statutory provision defining the geographical limits of the jurisdiction of a magistrate's court, 'cause of action' meant—
>
> > 'every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to judgment of the Court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be provided.'"

[83] *Truter* above n 38 at para 16.

[84] *Miracle Mile* above n 37 at para 24.

[99] Section 5(1) of the 1943 Prescription Act differed from section 12 of the Prescription Act. Section 5(1)(d) of the 1943 Prescription Act provided that prescription began to run "in respect of an action, other than for damages, from the date on which the right of action first accrued against the debtor".

[100] The current statute is markedly different (due versus first accrual). This is because the date on which a debt becomes "due" may not coincide with the date on which it arises. There is a difference between the debt coming into existence, and the date on which it becomes "due". *List* illuminated this:

> "The difference relates to the coming into existence of the debt on the one hand and the recoverability thereof on the other hand. . . . It is a distinction which is recognised by the Legislature in the 1969 Prescription Act; section 12 provides that prescription begins to run 'as soon as the debt is due', whereas section 16, which relates, not to the running of prescription, but to the application of the Act, significantly refers to 'a debt which arose'."[85]

[85] *List* above n 62 at 121C-E. The majority in the SCA sought to rely on this case as authority for the proposition that a distinction could be drawn between the claimability and payability of a debt (SCA judgment above n 12 at para 13). But this seems wrong. The Court in *List* was not concerned with when the debt became "due", but rather when the debt arose. It had to decide that to determine whether the Prescription Act or the South-West African Proclamation applied. See 121E-H and 122C:

> "Counsel for the appellant accepted as correct the finding of the Judge a quo that the debt became due on 1 January 1971, but submitted that the debt arose on the same date as that on which it became due. . . . The obligation *arose* when List wrote the letter; only payment was suspended.
>
> . . .
>
> I am accordingly satisfied that this was a debt which arose before 1 December 1970 when the Prescription Act came into force; from this it follows that the provisions of the South-West African Proclamation must be applied in order to determine whether or not the debt is prescribed."

I agree with the first judgment that the distinction sought to be drawn between claimability and repayability is somewhat artificial. It also does not accord with the existing jurisprudence. See, for example, *Umgeni Water v Mshengu* [2009] ZASCA 148; (2010) 31 *ILJ* 88 (SCA) at para 5, where the Court held that "due" in terms of section 12(1) of the Prescription Act "must be given [its] ordinary meaning. In its ordinary meaning a debt is due when it is immediately claimable by the creditor and, as its correlative, it is immediately payable by the debtor. Stated another way, the debt must be one in respect of which the debtor is under an obligation to pay immediately." See also *HMBMP Properties (Pty) Ltd v King* 1981 (1) SA 906 (N) at 909B-E; *Western Bank Ltd v S J J van Vuuren Transport (Pty) Ltd* 1980 (2) SA 348 (T) at 351C-D; and *Lancelot Stellenbosch Mountain Retreat (Pty) Ltd v Gore N.O.* [2015] ZASCA 37 at para 15.

When are loans "payable on demand" ordinarily due?

[101] When a contract doesn't say when precisely a debtor must perform or repay, the general rule is that the debt is "due immediately upon conclusion of the contract".[86] But what about a creditor whom the contract gives power unilaterally to determine when the debtor must perform – by making demand? Loubser points out that "opinions are divided" on whether prescription begins to run as soon as the creditor has the right to demand that performance be made, or when actual demand is made.[87] Saner suggests that a contractual term that performance is due "on demand" simply reinforces the implicit term that performance is due as soon as the deal is made.[88]

[102] *Oneanate* is instructive.[89] The first-instance Court had to determine when prescription began to run on a bank's claim for repayment of four separate amounts debited to a current account.[90] When were the separate debts in the overdrawn account "due and repayable"? The Court invoked the long-standing common law rule that a loan without stipulation as to a time for repayment is "repayable on demand". [91] But what does "repayable on demand" mean? The Court said that "[a]lthough by no means linguistically clear", the phrase means that "no specific demand for repayment is necessary and the debt is repayable as soon as it is incurred."[92] The practical effect is this. When suing for repayment the creditor doesn't need to allege a demand: demand is not part of the plaintiff's cause of action.[93] After considering English,

[86] Loubser above n 32 at 53.

[87] Id at 53-4.

[88] Saner *Prescription in South African Law* (LexisNexis, Durban 1996) at 3-65.

[89] *Oneanate* above n 43 (reversed on grounds not material to this analysis); *Oneanate* SCA judgment above n 68 at 827A-B held that "the facts averred in the [bank's] declaration in relation to the three debits which the court a quo held had prescribed were 'part and parcel of the original cause of action' and merely represented a fresh quantification of the original claim 'or the addition of further items' to make up the claim based on monies lent and advanced referred to in the simple summons", with the result that "due and repayable" was not in issue.

[90] *Oneanate* above n 43 at 542H-I.

[91] Id at 546I-J.

[92] Id.

[93] Id.

Canadian, Australian and New Zealand law, the Court held that, unless the parties agree otherwise, a loan "repayable on demand" is repayable from the moment the advance is made and that no specific demand for repayment need be made for the loan to be immediately due and repayable.[94]

[103] Hence the High Court in *Oneanate* concluded that prescription begins to run against the bank in respect of monies loaned on overdraft as soon as the advance is made. For practical purposes, prescription commences running on the date upon which the debit is entered into the account.

[104] Here, of course, the loan was not "payable on demand" but rather repayable 30 days after demand. Does the additional 30-day period afforded to the debtor to repay change anything? Does it take this agreement outside the law applying to loans "payable on demand"? No. The 30-day period makes no difference. The point of the jurisprudence is that the creditor has the unilateral power to demand performance from the debtor at any time from advance – not that, following demand, the debtor must pay immediately ("on demand") or 30 days later. In both instances, the creditor has the sole power to demand performance at any time.

[105] It is this fact – that the creditor has the exclusive power to demand that performance be made when the creditor so chooses – that has given rise to the general rule applying to loans "payable on demand", namely that prescription begins to run when the debt arises, unless there is a clear indication to the contrary.[95]

This loan agreement

[106] So the question is whether this loan agreement gives us enough signs to justify dumping the general principle that in loans "payable on demand" prescription begins

[94] Id at 550-1.

[95] Id. See also *De Bruyn* above n 47 at para 7.

to run as soon as the money is paid. And our starting premise is that the parties' contract fixes when a contractual debt becomes due.[96]

[107] In a sophisticated argument, counsel for Trinity invoked the shift in statutory wording from 1943 to 1969. She contended that "due and payable" in clause 2.3 was significant because it resonated with "due" in section 12(1) of the present statute. This meant that the parties intended that prescription should not run until demand under clause 2.3 had been made. The wording is indeed suggestive. But counsel's argument doesn't bring the conclusion home.

[108] One telling sign is that the agreement itself uses the word "due" elsewhere – with results that knock a hole in the argument. Clause 3.1 provides that "[t]he Borrower shall procure that a second mortgage bond is registered over the Property as security for the amounts due in terms of this agreement."

[109] If Trinity's argument is right, no mortgage bond could ever have been registered for any amounts "due" under the agreement, because none were "due" until 30 days after demand was made. And, once demand was made, and the amounts "due" became payable, it would (on Trinity's argument) be silly to try to register a mortgage bond for only 30 days (registration itself usually takes months).

[110] This means "due" in clause 3.1 cannot mean what Trinity says "due" means in clause 2.3. "Due" must, for reasons of ordinary intelligibility,[97] mean the same wherever it appears in the parties' agreement. In its setting, "due" here plainly means "the amounts advanced and repayable in terms of this agreement". But the parties didn't say that. They said "due". And that is a strong pointer away from Trinity's

[96] Loubser above n 32 at 53.

[97] Compare, in a statutory context, *Head of Department, Mpumalanga Department of Education v Hoërskool Ermelo* [2009] ZACC 32; 2010 (2) SA 415 (CC); 2010 (3) BCLR 177 (CC) at para 70:

> "[P]recepts of statutory interpretation suggest that the word . . . should have the same meaning wherever it occurs in the statute, since there is 'a reasonable supposition, if not a presumption' that the same words in the same statute bear the same meaning throughout the statute."

argument. It significantly weakens the suggestion that, because of the verbal resonance with "due" in the statute, "due" in clause 2.3 means that the monies paid over to Grindstone are claimable only after demand.

[111] The first judgment relies on the loan agreement's interest clause to say that the demand requirement delayed prescription.[98] The suggestion is that, because the parties clearly intended interest to be charged from when the loan was paid over, but that interest was "due and payable" only when the loan capital was "due and payable", prescription was delayed. To me, this doesn't wash. "Charged" in clause 2.4 doesn't entail that the word "due" in clause 2.3 should be afforded a heightened significance. It is conceivable that, as with the loan capital, interest would be "due" for the purposes of the Prescription Act on advance, but would only be repayable along with the loan capital. Indeed, interest usually only starts running from when a debt is "due".[99] On the first judgment's approach, interest would only start running from when demand was made, as this would be the point at which the debt became "due". That is commercially unsound. And hence improbable.

[112] The loan agreement provides that, regardless of the date of signature, the loan capital was deemed to be "lent and advanced on 1 September 2007" (clause 2.2). In actual fact, the funds were advanced in separate tranches in 2008. The first judgment holds that, if the debt were "due" on advance, this would be an absurdity because the

---

[98] See [57].

[99] See section 2 of the Prescribed Rate of Interest Act 55 of 1975, which provides that:

> "(1) Every judgment debt which, but for the provisions of this subsection, would not bear any interest after the date of the judgment or order by virtue of which it is due, shall bear interest from the day on which such judgment debt is payable, unless that judgment or order provides otherwise.
>
> (2) Any interest payable in terms of subsection (1) may be recovered as if it formed part of the judgment debt on which it is due.
>
> (3) In this section 'judgment debt' means a sum of money due in terms of a judgment or an order, including an order as to costs, of a court of law, and includes any part of such a sum of money, but does not include any interest not forming part of the principal sum of a judgment debt."

This provision should be contrasted with section 2A, which provides that interest on unliquidated debts runs from the date on which payment of the debt is claimed by the service on the debtor of a demand or summons.

debt could not have been "due" before it was even advanced.[100] No. This misses that clause 2.2 creates a fictitious advance date for the loan. And fiction often entails absurdity. But if it is absurd that the debt should be "due" before the funds were advanced, then it is even more absurd that the agreement stipulated that the actual advance took place before it did.

[113] This is not to play clever tricks with logic or the parties' expressed language. The point is that absurdity is inherent in the clause itself. And the first judgment's approach is caught up in it too. The first judgment finds that interest was charged on advance.[101] 1 September 2007 is the agreed advance date. How can interest be charged from this date when we know that the funds were advanced only in 2008? The point is this. If the parties agree on a fictional advance date – as often happens in commercial loan agreements – any seemingly "absurd" consequences are attributable to the deeming provision itself, and not because of the general principle that prescription begins to run as soon as the money is paid for loans "payable on demand".

[114] Back to the mortgage bond Grindstone was supposed to register under clause 3.1. Trinity said this obligation shows that the parties envisaged a long non-prescriptive period. This argument too is weak. Even a short-term loan can be secured by a mortgage bond (as long as the registration formalities can be practicably accomplished). Still less does the fact that the parties envisaged a mortgage bond being registered over the property help the conclusion that demand was necessary to make the debt "due".

[115] Trinity subtly invoked the principle that "deals are deals" and must be upheld (*pacta sunt servanda*). That is a grand principle, but its roots find stony ground here. Context is pivotal in reaching a sound assessment of meaning. The context, really,

[100] See [62].

[101] See [57].

gives us no clue that the parties' meaning was to delay prescription until 30 days after demand.

[116] The loan agreement is short and featureless. It's a run-of-the-mill loan deal, plucked from some attorney's desk in a hurry, and almost certainly not specially crafted or drafted. The agreement is devoid of significant attributes; the loan itself is not unusual; the terms are blandly routine; there is little distinctive about the parties; and there are no unusual stipulations.

[117] All this points to the conclusion that "due and payable" in clause 2.3 was used loosely. It said Grindstone would have to pay up 30 days after Trinity sent a written demand – not that the written demand was required to render the debt "due", still less that prescription was held up until demand was properly made.

[118] The majority in the SCA made a telling point along these lines. It said that clause 2.3 is a—

> "standard notice clause appearing in innumerable loan agreements throughout the land. The interpretation placed on this clause by [the minority judgment] could have far-reaching implications for the running of prescription in all such everyday instances."[102]

[119] The first judgment does not engage with these "far-reaching implications". But they are significant. They should not be trampled roughshod. To hold that a run-of-the-mill notice clause delays prescription is to place enormous power in the hands of a creditor. It is to permit a deviation from otherwise applicable prescription principles where the parties' signification is anything but clear and unequivocal.

[102] SCA judgment above n 12 at para 20.

Existing jurisprudence

[120] The first judgment holds that the debt is not "due" until demand has been made because, absent demand, Trinity has not acquired a complete cause of action.[103] In other words, the debt is neither claimable nor repayable until demand has been made.[104] Since the debt is neither claimable nor repayable until then, the debt is not "due" for prescription purposes.

[121] This is not without force. "Due" and "due". One in the statute; the other in this contract. Indeed, at first blush, there seems to be some shoehorning required to find that, despite the requirement of demand, the loan here was "due" as soon as it was paid over. The conclusion that the loan was "due" on advance for the purposes of the Prescription Act entails that, as soon as the loan was paid over, the debt was "immediately claimable" by Trinity, and that Grindstone was therefore "under an obligation to perform immediately".[105]

[122] On closer examination, there is no inconsistency. What prescribes is Trinity's right to claim payment. And that right is unaffected by when payment must actually be made. This means that Trinity had the right to claim payment immediately, even though Grindstone had 30 days to pay. Once paid over, Trinity is able to trigger repayment of the loan from Grindstone anytime. The debt, in this sense, is immediately claimable and enforceable. There is no conditionality attached to the making of demand and the claimability of the debt.

---

[103] See [47]. It must be pointed out that, despite the use of the phrase "cause of action" as it features in the case law, what prescribes in terms of the Prescription Act is not a "cause of action" per se, but a claim or a right of action. See Saner above n 88 at 3-61. See also *Drennan Maud & Partners v Pennington Town Board* [1998] ZASCA 29; 1998 (3) SA 200 (SCA) at 212F-J where Harms JA held:

> "In short, the word 'debt' does not refer to the cause of action, but more generally to the 'claim'. . . . In deciding whether a 'debt' has become prescribed, one has to identify the 'debt', or, put differently, what the 'claim' was in the broad sense of the meaning of that word."

[104] See [47].

[105] *Deloitte Haskins* above n 16 at 532F-J.

[123] By contrast, if the loan agreement had provided that "the lender will not demand repayment of the loan at any time before at least 30 days have lapsed since advance of the funds", it would have been very different. There, the conditionality attached to the lender's right to claim back the loan would delay enforceability and claimability of the debt. But that is not so here. Here, the right to claim back the loan is exercisable by Trinity at any time from advance. And Grindstone is by corollary under an immediate obligation to perform in terms of the demand. There is no incongruence between the finding that prescription begins to run on advance of the loan and the meaning given to the term "due".[106]

[124] Ultimately, it is a question of fact whether the parties intended demand to be a condition precedent for the debt to be "due".[107] Loubser postulates the vivid example of a family trust.[108] Say you make a loan to a close relative, your daughter, or your father. The daughter is studying. Or the parent is hard up. The circumstances show that the loan is on the never-never. The debt won't be due, in any sense, legal,

[106] The first judgment relies on *Miracle Mile* above n 37 in support of the proposition that prescription begins to run only when the creditor actually elects to accelerate payment and not when the creditor is able to accelerate payment (see [45] to [46]). But this finding must be assessed in the light of the facts of that case. *Miracle Mile* involved an acceleration clause. In such an instance, there are effectively two prescription periods at play: the prescription period in relation to each instalment that is due on a specific date, and the prescription period in relation to the right to accelerate payment of the full debt. The latter right only arises if and when the debtor defaults on the relevant instalment repayments. In such an instance, it makes sense that prescription in relation to the right to accelerate payment of the full debt may only arise when the creditor actually elects to accelerate payment and not before then. This is because, before this point, the prescription period at play is that in relation to the instalment that has not been paid. In the case of two debts, it makes sense for the prescription periods to differ. But this is markedly different to a loan repayable on demand, where there is only one debt and one prescription period. The former is the situation in *Miracle Mile* where there were set dates for instalment repayments. The implication of this was that, from the date the debtor did not repay the instalments due, prescription began to run in relation to that instalment. If prescription also began to run on that same date in respect of the acceleration clause, it would effectively render the acceleration clause nugatory. Because then the prescription period for the instalment and for accelerating the full amount of the loan would be the same. In such an instance, one can appreciate the Court's finding. But this does not mean that, in all cases, prescription begins to run only when the creditor actually demands repayment of the debt and not when the creditor can demand repayment – in the acceleration clause context or outside of it. This view is reinforced by Saner above n 88 at 3-65, where the author provides that, in the context of demand not delaying prescription:

> "This [principle] must not, however, be extrapolated too far: where an instalment agreement allows the creditor to elect, on breach of payment of an instalment . . . to give notice to accelerate payment of the full outstanding amount, prescription only starts to run when that notice is given, and not from when the debtor commits the breach on failure to pay an instalment."

[107] Loubser above n 32 at 61.

[108] Id at 60.

technical or practical, until you say, "Please won't you pay back". In that case, it is clear that the parties intend demand to be a condition precedent to repayment. The parties do not intend the debt to be "due" until demand is made.[109] This contrasts strongly with any ordinary commercial loan agreement. For the parties to delay prescription is simple. They just have to say so. But they must say so. If they don't, the featurelessness of their agreement – as here – means that prescription starts to run immediately once the money is paid over.

[125] *Stockdale*[110] provides a further example that contrasts with the contract here. In that case, the defendant had signed two acknowledgments of debt in favour of the plaintiffs. When the plaintiffs wanted their money back, the defendant raised prescription. Traverso AJP scrutinised the circumstances surrounding the conclusion of the acknowledgements of debt. These were signed in favour of the plaintiffs, who were the parents of the defendant's husband. The plaintiffs lent the defendant money to pay off an existing bond. The "understanding" between the parties was that, while the plaintiffs' son lived in the house or worked for them or remained married to the defendant, the plaintiffs would not call up the debt.[111] That meant prescription didn't run.

[126] In terms of clause 2 of the *Stockdale* acknowledgments of debt, the defendant undertook to "repay the capital amount outstanding and interest . . . within 30 days from the date notice is given by the creditors".[112]

[127] The Court reinforced the general principle—

[109] Id.

[110] *Stockdale* above n 15.

[111] Id at para 4.

[112] Id.

> "in all obligations in which a time for payment has not been agreed the debt is due forthwith. However, it is also clear that this may be qualified in the light of the particular circumstances of the case."[113]

[128] The Court considered that – specifically because the parties were related to one another and had an understanding that the debt would not be called upon immediately or soon after advance – "the only reasonable inference to be drawn . . . is that nobody regarded the loan as immediately repayable". The loan would only become "due" if there were changes in the parties' living arrangements, marital status or employment situation.[114] So the prescription defence failed.

[129] Significantly, the Court pointed out that "no specific date for demand was fixed in the document and no condition was linked to the demand".[115] Despite this fact, the Court found that it was clear that it was "never contemplated that the 'notice' to repay could or would be given within 30 days of the date of the acknowledgements".[116]

[130] This is a good example of parties clearly intending demand to be made before prescription would run. The Court's reasoning was centred on the special, familial relationship between the parties. This formed the basis for the conclusion that the parties never intended demand to be made immediately following advance, or within any period of time soon thereafter. It was only if the specific circumstances changed that the plaintiffs would call up the loan.

[131] There's nothing like that here. No distinguishing features of the agreement. No circumstances surrounding its conclusion to justify a similar outcome. No suggestion that Trinity could not make demand straight after advance, or that it would demand only if circumstances changed. Indeed, anything like that would be

[113] Id at para 15.

[114] Id at para 6.

[115] Id at para 14.

[116] Id.

inimical to most ordinary commercial loan agreements. Of course, commercial circumstances might entail the opposite. Then the agreement will say so. This one doesn't. Loubser rightly reminds us that a clear indication is essential because of the policy considerations that a creditor should not unilaterally be able to delay prescription.[117]

Final observations

[132] The problem with Trinity's approach, were it vindicated, appeared vividly during oral argument. When asked whether the debt could endure indefinitely, say for 80 years, counsel for Trinity had a reply ready. It was that a term should be implied that Trinity must make demand within a reasonable time. But that creates more problems. What is "a reasonable time"? And given the utter featurelessness of this agreement, how do we determine when it would have been "reasonable" for Trinity to make demand? Immediately? No? Then when?

[133] My conclusion means it is not necessary to consider the effect of the emails dated 19 and 25 September 2013, or the letter of demand of 9 December 2013 in terms of section 345(1)(a)(i) of the Companies Act. This is because by then the debt had already long prescribed – at latest in 2011, three years after the loan tranches were advanced.

[134] To the extent that it is necessary to say so, I have serious misgivings about the conclusion that the September emails were a demand under clause 2.3.[118] In *Combined Developers*, Davis J considered whether a creditor's email to the debtor constituted proper demand, noting that no exact amounts were set out and no request

[117] Loubser above n 32 at 63. The author states:

> "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 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."

[118] See the first judgment [74].

was made to pay per return. Hence it was not unreasonable to conclude that the creditor was awaiting a response from the debtor as to when it would pay, and thereafter assess the situation.[119] The Court concluded that, because the clause was "draconian . . . it [was] the least that could be expected for a proper demand to be made, which would inform [the] respondents of the entire amount".[120]

[135] Here, the email of 19 September 2013 was not unambiguous – nor did it establish a fixed date for performance, nor did it set out the amount due. It did not place the debtor on terms. In fact, it "demands" nothing. The email back from Grindstone cannot alter the nature of the demand to make it unambiguous.[121] There are only two options: either the email constituted a valid demand under clause 2.3, or it did not – but unless Grindstone's response constituted a waiver of its entitlement to rely on the fact that the email did not constitute a valid letter of demand, that response couldn't fix up the holes in Trinity's demand. In short, the fact that Grindstone understood the email to constitute a demand didn't make demand valid for contractual purposes.

[136] In his judgment, Froneman J gives additional reasons for concluding that the parties' contract did not postpone the onset of prescription. I concur in those reasons.

Conclusion

[137] It is undoubtedly so that the verbal resonance of "due" in clause 2.3 with section 12(1) of the Prescription Act helps Trinity's argument. But in the end, it is just too slender to warrant the inference Trinity seeks. The plain and un-extraordinary nature of the loan agreement, coupled with the absence of a clear signification to the contrary, leads to the conclusion that the parties did not delay prescription until demand.

[119] *Combined Developers v Arun Holdings* 2015 (3) SA 215 (WCC).

[120] Id at para 43.

[121] See [74].

Costs

[138] On 30 March 2017, the provisional liquidators of Grindstone indicated their intention to abide by the decision of this Court, and not to make submissions. The Court then requested Ms Nkosi-Thomas SC of the Johannesburg Society of Advocates to assist it with submissions on behalf of Grindstone. We are indebted to her for her pro bono assistance in the best traditions of the legal profession. Ms Nkosi-Thomas supported an order dismissing the appeal with no order as to costs. However, there can be no reason why any costs that Grindstone may have incurred in the litigation before 30 March 2017 should not follow the outcome. The order will reflect that.

[139] The following order is granted:

1. Leave to appeal is granted.
2. The appeal is dismissed.
3. The applicant is to pay any taxed costs incurred by the respondent.

FRONEMAN J (Cameron J, Khampepe J, Madlanga J, Mhlantla J and Pretorius AJ concurring in [154] to [166]):

Introduction

[140] I have had the privilege of reading the judgments of Mojapelo AJ (first judgment) and Cameron J (second judgment). I agree that the outcome of this matter should be that the application for the provisional liquidation order must be dismissed. To get to that conclusion, I travel a different route, in some respects, from each of their judgments, hence the need for this one.

[141] Both judgments agree that leave to appeal must be granted. I do too, but also for an additional reason. I consider there to be an antecedent issue to be dealt with before one can get to the issue of prescription. It concerns whether what has become known as the *Badenhorst* principle also applies to purely legal issues that arise in

provisional liquidation proceedings. The principle holds that where there is a genuine and bona fide (good faith) factual dispute concerning a debtor's indebtedness to a creditor seeking provisional liquidation of the debtor's estate, the application for provisional liquidation should normally be dismissed.[122] There is as yet no authoritative certainty whether this principle also applies to genuine and reasonable legal disputes arising from undisputed facts.[123] It is in the interests of justice to consider this issue as well.

[142] Both the first and second judgments assume that the prescription issue is properly before us, in the main because the parties agreed before the SCA, and in this Court, that it should be. But that is not good enough. If, objectively, the High Court did not attempt to make a final pronouncement on the issue of prescription then the parties cannot turn that into a final decision by agreement between themselves to treat it as final. Nor can the High Court purport to make a final decision where the law does not allow it to do so. So the least that is required is for us to interrogate whether the High Court purported to make a final and definitive decision on the prescription issue and, if so, whether it was entitled to go that route.

[143] Having accepted that the prescription issue is squarely before this Court, the first and second judgments then veer off in opposite directions. In the first judgment Mojapelo AJ holds that Trinity's claim against Grindstone has not prescribed, while in the second, Cameron J holds that it has. If I am wrong in my view that the failure to deal adequately with the *Badenhorst* principle precludes final determination of the prescription issue, I need then to come clean on the merits of the prescription issue. On that issue I concur with the second judgment although, once again, with additional reasons.

[144] All this needs some explanation, which I will now attempt to provide.

---

[122] See above n 21.

[123] Compare *Orestisolve* above n 77 at para 12.

The Badenhorst principle

[145] Liquidation proceedings are designed to bring about a concurrence of creditors to ensure an equal distribution of the insolvent estate between them, and are inappropriate to resolve a dispute as to the existence of a debt. In order to prevent the possible abuse of the liquidation process, the rule was developed to the effect that where there is a genuine and good faith factual dispute concerning an alleged insolvent debtor's indebtedness to a creditor, the application for provisional liquidation should normally be dismissed.[124]

[146] The High Court judgment is capable of being understood as saying that its refusal of the provisional liquidation order was based on the existence of a good faith dispute about the legal issue of prescription – in other words, it *did* apply the *Badenhorst* principle to a disputed legal issue.[125] If that is a proper or feasible interpretation of the High Court judgment, which I think it is, then an appeal against it can only succeed if its application of the *Badenhorst* principle to legal disputes was incorrect. If not, its finding of a good faith legal dispute can hardly be faulted, given the difference of opinion on the merits of the prescription issue in both the SCA and this Court.

[147] The applicant argued before us that it was accepted practice that the rule does not apply to disputed legal issues, only disputed factual issues. That may or may not be correct, but hardly disposes of the legal question of whether the alleged practice is in accordance with the correct legal position.[126] This question has not been authoritatively settled.

---

[124] See above n 21.

[125] Compare paras 38-40 of the High Court judgment above n 3 with para 5 of *Trinity Asset Management (Pty) Ltd v Grindstone Investments 132 (Pty) Ltd* [2015] ZAWCHC 214.

[126] In *Orestisolve*, above n 77 at para 12, Rogers J remarked: "I have not found any case in which the *Badenhorst* [principle] has been applied, either at the provisional or final stage, to purely legal disputes".

[148] In dealing with this in *Orestisolve*, Rogers J pointed out that:

> "If the *Badenhorst* [principle]'s foundation is abuse of process, it might be said that it is as much an abuse to resort to liquidation where there is a genuine legal dispute as where there is a genuine factual dispute."

However, he went on to say:

> "[I]f the *Badenhorst* [principle] extends to purely legal disputes, I venture to suggest that the rule, which is not inflexible, would not generally be an obstacle to liquidation if the court felt no real difficulty in deciding the legal point."[127]

[149] A similar kind of ambivalence exists in relation to deciding legal issues in temporary interdict proceedings. In *Fourie*, Viljoen J held that a judge confronted with a legal issue needed to decide it, even if the relief sought was of a temporary nature.[128] Decision of the legal point would dispose of the matter finally. *Fourie* has not been uniformly followed. In *Ward*, Blignault AJ also adopted a kind of compromise approach to the effect that "ordinary questions of law" should be finally decided even in interlocutory proceedings, but not where "difficult questions of law" are involved.[129]

[150] This Court has not yet pronounced on what the correct position is. In *National Gambling Board* the issue was expressly left open.[130] What further complicates matters is that in some divisions of the High Court the practice of provisional liquidation orders being issued is not followed: most liquidation applications are followed by final orders.[131] In those instances the *Badenhorst*

[127] Id at 455C-E.

[128] *Fourie v Olivier* 1971 (3) SA 274 (T) at 285B-E.

[129] *Ward v Cape Peninsula Ice Skating Club* 1998 (2) SA 487 (C) at 498F-H.

[130] *National Gambling Board v Premier, KwaZulu-Natal* [2001] ZACC 8; 2002 (2) SA 715 (CC); 2002 (2) BCLR 156 (CC) at para 52.

[131] *Johnson v Hirotec (Pty) Ltd* [2000] ZASCA 43; 2000 (4) SA 930 (SCA) at para 9.

principle may be inapposite as an approach to the determination of factual disputes.[132] And, as pointed out by Cameron J in the second judgment, the facts relating to the "due" clause in the loan agreement are very sparse.[133]

[151] For these reasons I disagree with the acceptance in the first and second judgments that the prescription issue is properly before us. If it is, then the reasons for rejection of the applicability of the *Badenhorst* principle to legal issues, even on undisputed facts, must be articulated. That has not been done, nor did the SCA deal with that issue. And to do so now, in the absence of full argument, is not appropriate.

[152] In the absence of a finding that the *Badenhorst* principle does not apply to disputed legal issues, there is no ground for faulting the dismissal of the application for provisional liquidation in the High Court. For different reasons than those of the majority in the SCA, I would nevertheless hold that the outcome should have been the same: the appeal must be dismissed and the dismissal of the provisional liquidation application in the High Court should be confirmed.

[153] But if I am wrong in this, then I agree with the second judgment that the claim for repayment of the loan has prescribed, and that the appeal should be dismissed for that reason as well.

Prescription

[154] The second judgment expresses agreement with the first judgment's "exposition of the legal principles governing when a debt payable on demand is due",[134] but disagrees with its application here, primarily because "the first judgment attaches undue significance to 'due' where it appears in clause 2.3 of the parties' loan

[132] Compare *Orestisolve* above n 77 at para 11.

[133] See [116].

[134] See [95].

agreement".[135] I cannot endorse the first judgment's exposition of the legal principles governing when a debt payable on demand is due without qualification. And the content of that qualification also explains why my reason for holding that the debt here has prescribed goes beyond the treatment of the meaning of "due" in clause 2.3 of the loan agreement, even though I agree with the second judgment's treatment of that meaning.

[155] The first judgment states the general principles in this way:

> "In sum, the relevant principles may, in my view, be restated as follows. A contractual debt becomes due as per the terms of that contract. When no due date is specified then the debt is generally due immediately on conclusion of the contract. However, the parties may intend that the creditor be entitled to determine *the time for performance* and that *the debt becomes due only when demand has been made as agreed*. Where there is such a clear and unequivocal intention, *the demand will be a condition precedent to claimability*, a necessary part of the creditor's cause of action, and prescription will only begin to run from demand. This, in my view, is not an incident of the creditor being allowed to unilaterally delay the onset of prescription. It is the parties, jointly and by agreement seriously entered into, determining when and under what circumstances or conditions a debt shall become due."[136] (My emphases.)

[156] The qualification I have to this statement relates to equating a "*time for performance"* stipulated in a contract with a "*demand* [that] *has been made as agreed"*, and then characterising this demand as "*a condition precedent to claimability"*. I would prefer to stay with the recognised distinction in our law between contractual terms or obligations, time clauses, demands to place defaulting contracting parties in *mora debitoris* (default on the part of the debtor), and suspensive conditions. From my perspective, the failure to distinguish between these different

[135] See [94].

[136] See [47].

concepts creates uncertainty and also explains why the conclusion that the debt here has not prescribed is not sustainable.

[157] Our law recognises that the terms of the contract – express, tacit or implied – determine the obligations parties to a contract owe to each other.[137] To be distinguished from contractual terms or obligations are conditions:

> "[T]he word 'condition' in relation to a contract, is sometimes used in a wide sense as meaning a provision of the contract, i.e. an accepted stipulation, as for example in the phrase 'conditions of sale'.
>
> In this sense the word includes ordinary arrangements as to time and manner of delivery and of payment of the purchase price, etc – in other words the so called *accidentalia* of the contract. In the sense of a true suspensive or resolutive condition, however, the word has a much more limited meaning, viz. of a qualification which renders the operation and consequences of the whole contract dependent upon an uncertain future event . . . . Where the qualification defers the operation of the contract, the condition is suspensive, and where it provides for dissolution of the contract after interim operation, the condition is resolutive."[138]

[158] Where a qualification relates to a certain future event, even though the time it will occur is not certain, it is not a condition, but a time clause:

[137] Van der Merwe et al *Contract – General Principles* 4 ed (Juta & Co Ltd, Cape Town 2012) at 278-84; Lubbe and Murray *Contract – Cases, Materials and Commentary* (Juta & Co Ltd, Cape Town 1994) at 414-46; Maxwell "Obligations and Terms" in Hutchison and Pretorius (eds) *The Law of Contract in South Africa* 2 ed (Oxford University Press, Cape Town 2010) at 234-48; and Christie and Bradfield *Christie's The Law of Contract in South Africa* 6 ed (LexisNexis, Cape Town 2011) at 159-234.

[138] Per De Villiers AJ in *R v Katz* 1959 (3) SA 408 (C) at 417D-G. See also *Jurgens Eiendomsagente v Share* [1990] ZASCA 81; 1990 (4) SA 664 (A) at 674I (*Jurgens*); Van der Merwe et al. id at 287; Lubbe and Murray id at 429-37; Maxwell id at 249-51 and Christie and Bradfield id at 159-234.

> "A term or time clause in a contract is a clause by virtue of which the creditor grants to the debtor a period within which the latter may discharge his obligation . . . or by which the operation of the contract is restricted to a certain time."[139]

A time clause is a contractual term which qualifies an obligation with reference to a future event which is certain to occur even if it is uncertain when the event will occur,[140] unlike a condition where the qualification is dependent on whether an uncertain future event will occur or not occur.[141]

[159] Where no time for performance is stipulated in a contract the claim for performance arises upon conclusion of the contract and the need for a demand to place the debtor in breach does not change this. As Corbett J stated in *Theron*, "it is not the law that a debtor must be placed in *mora* before he may be sued for specific performance."[142]

Or as stated by Botha JA in *Standard Finance Corporation*:

> "The rule that demand is necessary to entitle a plaintiff to costs or other relief to which he may be entitled in consequence of the debtor's *mora*, does not mean that demand is a condition precedent to the plaintiff's right of action under the contract."[143]

[160] The necessity of a demand to place a debtor in *mora* in relation to an obligation where no time for performance has been stipulated, does not detract from the conclusion that specific performance of the obligation is available at any time at the

---

[139] Wessels *The Law of Contract in South Africa* (Hortors Ltd, Johannesburg 1937) at 1439. See also *Bernitz v Euvrard* 1943 AD 595 at 602; Lubbe and Murray above n 137 at 443-4; Van der Merwe et al above n 137 at 294-5 and Christie and Bradfield above n 137 at 251.

[140] *Jurgens* above n 138 at 674I.

[141] Wessels above n 139, see also [155] and [156].

[142] *Theron v Theron* 1973 (3) SA 667 (C) at 672.

[143] *Standard Finance Corporation of South Africa Ltd (in liquidation) v Langeberg Ko-operasie Bpk* 1967 (4) SA 686 (A) (*Standard Finance Corporation*) at 691. See also *Ridley v Marais* 1939 AD 5 at 9; *Lamprecht v Lyttleton Township (Pty) Ltd* 1948 (4) SA 526 (T) at 529; and *Nel v Cloete* 1972 (2) SA 150 (A) at 159-60.

option of the creditor. The exigibility of the primary performance obligation in terms of the agreement stands apart from the creation of a secondary obligation flowing from the breach of contract. Therefore the commencement of prescription of the primary obligation stands apart from the commencement of *mora* through demand.[144]

[161] Where does this leave clause 2.3 of the loan agreement? The clause is not a "condition precedent" or suspensive condition. It did not suspend the operation of the contract itself, because the loans were advanced. And it did not suspend the exigibility of repayment, because the lender could at any time make demand for repayment on 30 days' notice.

[162] Nor is it a time clause "by virtue of which the creditor grants to the debtor a period within which the latter may discharge his obligation . . . or by which the operation of the contract is restricted to a certain time".[145] To repeat: the lender could at any time demand repayment. Even if the 30-day demand clause was not a part of the loan agreement, the lender would still have had to place the borrower in *mora*. A *mora* demand for repayment must be reasonable, but parties may determine the reasonableness of the period by agreement. That is what happened here.

[163] The *mora* demand was a term of the contract, but it had nothing to do with the commencement of prescription. Specific performance for repayment of the loan could have been claimed by Trinity immediately upon conclusion of the loan agreement. That is when it became due. There is no underlying injustice in the sense that it was prevented by the clause from enforcing repayment of the loan at any time it wished to do so.[146]

[144] Lubbe above n 40 at 137.

[145] See Wessels above n 139.

[146] Compare Lubbe above n 40 at 136 and 149-52.

[164] The first judgment relies on *Miracle Mile*[147] in support of its interpretation of the clause as one where the debt becomes due only when the creditor actually elects to accelerate payment at which point prescription begins to run.[148] I have no difficulty with the principle that parties may contractually agree when prescription starts to run, and that in the case of acceleration clauses in instalment contracts that might only be when the acceleration clause is invoked, not when it is agreed to. But that deals with a situation where two different debts are involved: the normal monthly instalment that is due each month and in respect of which prescription starts to run; and the accelerated debt for the full amount. It makes good sense that the prescription periods will be different.[149] But loans payable on demand do not create two separate debts and the rationale underlying the interpretation of the acceleration clause in *Miracle Mile* is absent here.

[165] I thus agree with the second judgment that the claim under the loan agreement has prescribed, also for these additional reasons.

[166] On either of the two bases outlined, the dismissal of the application for provisional liquidation in the High Court was the correct outcome.

[147] Above n 37.

[148] Above at [45] to [46].

[149] Compare Lubbe's discussion of the views of McLennan in Lubbe above n 40 at 152.

For the Applicant:	D M Davis instructed by Korbers Incorporated.
For the Respondent:	L G Nkosi-Thomas SC and O Ben-Zeev instructed by the Chairperson of the Johannesburg Society of Advocates (upon request by the Court).