



CONSTITUTIONAL COURT OF SOUTH AFRICA

Trinity Asset Management (Pty) Limited v Grindstone Investments 132 (Pty) Limited

CCT 248/16

Date of hearing: 4 May 2017
Date of judgment: 5 September 2017

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

On 5 September 2017, the Constitutional Court handed down a judgment in an appeal against the judgment and order of the Supreme Court of Appeal (SCA) against Trinity Asset Management (Pty) Ltd (Trinity). The SCA ruled that Trinity's claim for repayment of a debt of some R4.55 million against Grindstone Investments 132 (Pty) Ltd (Grindstone) was unenforceable because it had prescribed.

The parties entered into a written loan agreement, effective from 1 September 2007, in terms of which Grindstone borrowed a capital amount of R3 050 000 (loan capital) from Trinity. Clause 2.3 of the loan agreement provided that the loan capital was due and repayable to the applicant within 30 days from the date of delivery of Trinity's written demand. Trinity advanced the loan capital to Grindstone in three tranches during February 2008.

There was an exchange of emails between Trinity and Grindstone during September 2013 regarding the repayment of the advanced loan capital. But Grindstone made no repayment. Accordingly, on 9 December 2013, Trinity's attorneys served a letter of demand by the Sheriff of the Court on Grindstone as contemplated in section 345(1)(a)(i) of the Companies Act 61 of 1973 (Companies Act). In terms of the letter, Trinity claimed payment of R4 613 310.52 within 21 days. The attorneys for Grindstone responded to the letter on 23 December 2013, denying the debt.

On 18 July 2014, Trinity launched an application in the High Court of South Africa, Western Cape Division, Cape Town (High Court), to provisionally liquidate Grindstone

on the basis that Grindstone was unable to pay its debts as provided for in section 345 of the Companies Act. Grindstone raised a number of defences including that Trinity's claim against it for repayment of the debt had prescribed. It contended that the amounts lent and advanced during February 2008 prescribed in 2011. Grindstone made this contention on the basis of two principles, namely that (1) a debt repayable on demand is in law repayable immediately so that a formal demand is not necessary in order to complete the cause of action; and (2) a creditor cannot delay the commencement of prescription by failing to take a step, which is in its power, to recover the amount owed.

Trinity challenged the prescription defence on three broad fronts, namely that (1) it was never the intention of the parties that the loans advanced during February 2008 would become due and repayable immediately upon being advanced; (2) it was never the intention of the parties that prescription would start running on the dates the tranches were paid; and (3) Grindstone had not pleaded and proved both the date of inception and the date of completion of the period of prescription. Trinity submitted accordingly that the prescription defence was not raised on bona fide and reasonable grounds.

The High Court applied the principle in *Badenhorst v Northern Construction Enterprises* that, where there is a genuine dispute about a debt, an application for liquidation is inappropriate and should be dismissed. The Court held that Grindstone's defence of prescription was valid. Accordingly, the High Court dismissed the application for provisional liquidation, but granted Trinity leave to appeal to the SCA.

The SCA decided the matter by a majority of three judges to two. The majority upheld the High Court's judgment. It noted that the parties had agreed on appeal that the central issue between them was whether the debt had prescribed. It held that the debt was due the moment it was lent. The wording of the parties' contract did not change that. The appeal was therefore dismissed.

The minority's view was that Grindstone failed to plead and prove the date when prescription started running. It reasoned that the loan agreement contemplated that a demand was an essential requirement for Trinity's cause of action. The minority agreed with the general principle that where no time for repayment is stipulated in an agreement then the debt is due immediately. But, here, the parties expressly agreed otherwise. Accordingly, the minority concluded, prescription would "only begin to run from the date of demand".

In the Constitutional Court, Trinity submitted that the parties agreed that the determinative issue is prescription. The main object of the law of extinctive prescription is to create legal certainty and finality. Trinity further submitted that the Prescription Act provides that a debt is extinguished by prescription after the lapse of three years, and that prescription commences as soon as the debt is "due". Trinity agreed with the reasoning of the minority judgment in the SCA, as 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.

Having been provisionally liquidated in other proceedings in the meantime, Grindstone indicated that it would not lodge written argument and would abide the decision of the Court. At the request of the Court, Adv Nkosi-Thomas SC of the Johannesburg Society of Advocates filed written submissions and appeared as *amicus curiae* (friend of the court). She supported the view that the appeal should be dismissed, with no costs order.

The Court considered three primary questions:

1. Whether the defence of prescription is properly before the Court;
2. Whether the parties' contract points to an intention to defer when the debt became due and thus to delay the onset of prescription; and
3. Whether the applicant's claim has prescribed.

The majority judgment, written by Cameron J (Khampepe J, Madlanga J, Mhlantla J and Pretorius AJ concurring), finds that, on a holistic reading of the loan agreement, the parties did not intend to delay when the debt would become due or when prescription would begin to run. The parties' language in the contract did not signify an intention to delay. The parties simply meant to allow Grindstone 30 days to repay the debt once Trinity had issued demand, not to postpone the due date of the debt to an indeterminate future date. The debt thus became due, and prescription began to run, immediately on conclusion of the contract. Grindstone therefore raised a valid prescription defence, and the appeal was dismissed.

Concurring in part and dissenting in part, Froneman J held 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.

According to him, whether the *Badenhorst* principle also applies to purely legal issues that arise in provisional liquidation proceedings needed to be dealt with before the issue of prescription. He found that the High Court judgment did apply the *Badenhorst* principle to a disputed legal issue, and an appeal against it could succeed only if its application of the principle was incorrect.

Froneman J did not agree that the prescription issue is properly before the Court. But, if it were, he held that the reasons for rejecting the applicability of the *Badenhorst* principle to legal issues, even on undisputed facts, had to be articulated. He however agreed with the majority judgment regarding the interpretation of the contract and outcome of the prescription enquiry with additional reasons in which the majority concur.

The minority judgment, by Mojapelo AJ (Mogoeng CJ, Nkabinde ADCJ, Jafta J and Zondo J concurring), held that Trinity's claim had not prescribed. It reasoned that 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 is a condition precedent to claimability – a necessary part of the creditor's cause of action – and prescription begins

to run only from the demand. Here, the parties intended for Trinity to be able to determine the time for performance by making demand. It did so at the end of 2013, at which point prescription began to run. Prescription was then interrupted by the service of a summons claiming payment from Grindstone in November 2015.