PRESCRIPTION OF ON-DEMAND LOANS – THE CONSTITUTIONAL COURT'S DECISION IN TRINITY V GRINDSTONE

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INTRODUCTION

Towards the end of 2016, we drew to your attention a decision of the Supreme Court of Appeal (SCA) in *Trinity Asset Management (Pty) Ltd v Grindstone Investments (Pty) Ltd* (1040/15) [2016] ZASCA 135 (29 September 2016) in which it was held that a loan which is repayable on demand becomes due the moment it is advanced to the debtor. This was despite the fact that the loan agreement in question provided that the loan would be "due and payable" within 30 days from the date of delivery of the lender's written demand.

In terms of the Prescription Act, 1969, prescription begins to run as soon as a debt is "due". Accordingly, an on-demand loan will ordinarily prescribe (or be extinguished) three years after the date on which the loan was advanced, unless prescription is interrupted by an express or tacit acknowledgment of liability by the debtor or the service on the debtor of any process whereby the lender claims payment of the debt. In this matter, the lender had demanded repayment of the loan more than three years after the loan was advanced and the SCA held that the debt had prescribed by that time.

The argument was raised that if the parties clearly indicate that they intend demand to be a condition precedent for the debt to become due, prescription will only begin to run from the date of demand. However, the SCA did not decide this question as, in its view, it was far from clear that the parties had such an intention.

This decision was taken on appeal to the Constitutional Court and on 5 September 2017 judgement in *Trinity Asset Management (Pty) Limited v Grindstone Investments 132 (Pty) Limited* [2017] ZACC 32 was handed down.

THE CONSTITUTIONAL COURT'S DECISION

The Constitutional Court confirmed that the general rule is that a loan that is repayable on demand becomes due and, accordingly, prescription begins to run, as soon as the loan is advanced to the debtor. This because the creditor has the exclusive power to demand that performance be made when the creditor so chooses. In reaching this conclusion, the Court referred to previous decisions in which it was held that a debt is due if the debt is immediately claimable by the creditor and the debtor is under an obligation to perform immediately in respect of the debt. In other words, a debt is due when the creditor's cause of action is complete, when everything has happened which would entitle the creditor to institute action and to pursue his or her claim.

However, the Court accepted that the parties may contractually agree that demand is required to render the debt "due", thereby delaying the commencement of prescription until demand is made. But the Court required a "clear indication" that this was the parties' intention, in light of the policy consideration that a creditor should not be able to delay prescription unilaterally.

The Court first considered whether the text of the agreement provided a sufficiently clear indication of the parties' intention to justify a departure from the general rule referred to above. The Court analysed the manner in which the word "due" was used elsewhere in the agreement as well as the context of the wording, which the Court stressed was "pivotal in reaching a sound assessment of meaning". However, the Court found that the context gave no clue as to the parties' intention, as the loan agreement was run-of-the-mill and blandly routine.

The Court concluded that the term "due and payable" was used loosely in the relevant provision in the agreement and did not provide a clear and unequivocal indication of the parties' intention. The Court also held that there were no circumstances surrounding the conclusion of the agreement to justify a finding that the parties intended demand to be necessary in order for the debt to be due.

CONCLUSION

This judgement will undoubtedly affect the way in which notice provisions are drafted in on-demand loan agreements. The Court stated that in order for parties to delay prescription "they just have to say so", but gave little guidance as to what the parties should say. The clearest possible indication that the parties wish to delay prescription would, in our view, be an express provision in a written agreement that the loan will not be due, and prescription shall not commence running, unless and until demand has been made. There was, however, a suggestion in the judgement that, in addition, the making of the demand must be subject to some condition. For example, the lender will not demand repayment of the loan until the happening of an event, or until a period of time has elapsed. The difficulty with including such a condition is that, in many instances, it may be contrary to the commercial terms of the agreement and may defeat the very purpose of an on-demand loan.

In the absence of an express term regarding the commencement of prescription, it appears that the courts will consider contextual factors such as the circumstances under which the loan agreement was entered into and whether the parties have a special relationship, such as a familial relationship. However, what constitutes a "clear indication" in certain circumstances may not necessarily be so in others and each loan agreement will have to be assessed on a case-by-case basis.

It should also be borne in mind that the Court pronounced on this issue in the context of a freely negotiated agreement. It remains to be seen whether the courts will accept that an express term that purports to delay the commencement of prescription in a standard-form agreement between a bank and its customer (which the customer is not permitted to amend in any way) will constitute a sufficiently clear indication of both parties' intentions. It would therefore be prudent for commercial lenders to consider ways, in addition to the inclusion of express wording in their loan agreements, of minimising the risk of an on-demand loan owing to them being inadvertently extinguished by prescription.

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