IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NO: 12677/14

In the matter between:

TRINITY ASSET MANAGEMENT (PTY) LTD Applicant

And

GRINDSTONE INVESTMENTS 132 (PTY) LTD Respondent

Coram:	Yekiso, J
Dates of Hearing:	4 June 2015
Date of Judgment:	31 July 2015

JUDGMENT

YEKISO, J

[1] By way of a notice of motion issued out of this court the applicant seeks an order for the provisional liquidation of the respondent on the grounds that the respondent is unable to pay its debts as contemplated in section 344(f), read with section 345(1) (a) and (c) of the Companies Act, 61 of 1973 ("the Companies Act"); that the respondent is commercially insolvent; and that it is just and equitable that the respondent be wound up as contemplated in section 344(h) of the Companies Act.

[2] It is alleged on behalf of the applicant in the founding affidavit that the respondent is indebted to the applicant in an amount of R4,613,310-52, together with interest thereon, arising out of a loan agreement concluded between the applicant and the respondent on 1 September 2007. The material terms of the agreement were that the respondent borrowed from the applicant a capital amount of R3,050,000-00; that the loan capital would be due and repayable to the applicant within thirty (30) days from the date of delivery of a written demand by the applicant; that interest would be charged on the loan capital at the money market rate from date of payment to date of repayment; and that interest would be due and payable on the date on which the loan would become due and payable as contemplated in clause 2.3 of the agreement.

[3] Clause 2.3 and 2.4 of the agreement read as follows:

> "2.3 The loan capital shall be due and repayable to the lender within thirty (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."

[4] It was a further term of the agreement that the respondent would procure that a second mortgage bond be registered on portion 9, being a portion of the farm Paarl Diamant No 459, situate in the Drakenstein Municipality, Division Paarl, in the province

of the Western Cape. Although the latter is a material term of the agreement, the mortgage bond was never registered over the property.

[5] As at the time of the institution of these proceedings the applicant alleged in the founding affidavit that the respondent is indebted to it in an amount of R4,613,310-52 being the capital amount due inclusive of interest.

[6] The respondent opposes the relief sought on the basis that the applicant's claim became prescribed in 2011; that the applicant was not licensed in terms of the Financial Advisory & Intermediary Services Act, 37 of 2007 and that, in view thereof, the applicant is precluded from collecting money payable in terms of a financial product; and that the amounts allegedly due were paid into the account of a director of the respondent, James Dean, and thus not advanced to the respondent.

ACTUAL BACKGROUND

[7] The loan agreement which constitutes the basis of the respondent's alleged indebtedness to the applicant was concluded on 1 September 2007. James Dean, who was the sole director of the respondent at the time, signed the agreement. On 13 February 2008, on the instructions of the directors of the respondent, the applicant paid an amount of R1,5m into the account of James Dean, a director of the respondent. On 15 February 2008 a further amount of R1m was paid into the same account and on 21 February 2008 an amount of R500,000-00 was paid into the same account.

[8] On 6 April 2011 it was resolved by the directors of the respondent that the respondent enter into a covering mortgage bond in favour of the applicant and that Nicholas Lawrence Cunningham-Moorat be entitled to negotiate and settle the terms and conditions of the agreement on behalf of the respondent; to sign all documentation, including but not limited to application forms, agreements, facility letters, security documents, including but not limited to indemnities, suretyships, cessions, undertakings and mortgages. The resolution was signed by the directors of the respondent in the persons of James Mark Dean ("Dean") and Nicholas Lawrence Cunningham-Moorat ("Cunningham-Moorat").

[9] On 6 April 2011, at Paarl, Cunningham-Moorat, in his capacity as director of the respondent, signed a power of attorney in favour of various persons to appear before the registrar of deeds, Cape Town to do what may be necessary to make the covering mortgage bond valid and effective.

[10] On 19 September 2013 the applicant sent the respondent an email in which an enquiry was made regarding when the outstanding amount on the property fund would be paid. The email, which is addressed to Cunninghma-Moorat, reads as follows:

> "Nick, could you confirm that you are happy to settle the outstanding amount on the property fund and give an indication as to when it will be done? Steve, could you confirm with Nick the amount currently outstanding?
>
> Regards, Quinton George
>
> CEO Trinity Asset Management (Pty) Limited"

[11] On 25 September 2013 Cunningham-Moorat responded to the email referred to in the preceding paragraph as follows:

> "Quinton, this note serves to confirm that Trinity has called the property fund. The current outstanding balance is R4,55m. We have executed on an associated asset sale to support this call. All things being equal we expect these funds to release within 60-90 days.
>
> Thanks
>
> Nick
>
> Nick Cunningham-Moorat
>
> Chairman and Chief Executive Officer"

[12] As at 9 December 2013 nothing further was heard from the respondent whereupon the applicant, through its attorneys of record, addressed a letter of demand, ostensibly in terms of section 345(1)(a)(i) of the Companies Act, in which letter it was stated that the amount specified in the loan agreement was due and payable. In its response the respondent, similarly through its attorneys of record, acknowledged receipt of the letter of demand, simultaneously indicating that the demand had not been a proper demand in terms of the agreement; that the respondent denied any indebtedness to the applicant; the respondent contended that the loan agreement was not authorised; and that, apart from the other defences stated in its response, the respondent had several other defences to the applicant's claim.

[13] The letter of the respondent's attorneys, in response to a letter of demand in terms of section 345(1)(a)(i) of the Companies Act is dated 23 December 2013. In paragraph 3 thereof it is stated

> "3. Our instructions are to deny that our client is indebted to your client as you have set out in your letter of demand in terms of the Companies Act 61 of 1973.
>
> 4. Our instructions are that no money was lent and advanced to our client in terms of the purported loan agreement and in fact the person to whom the funds were lent and advanced was one Jim Deane.
>
> …
>
> 7. Furthermore, we refer you to clause 2.3 of the agreement which states *'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.'*
>
> 8. The demand that you have been instructed to despatch does not accord with the provisions of the agreement and accordingly your client has not yet made proper demand on our client (insofar as our client has any liability to your client which is at this stage denied)."

[14] On 18 July 2014, and by way of notice of motion issued out of this court, the applicant instituted these proceedings in which is sought an order for the provisional liquidation of the respondent on the basis that the respondent is unable to pay its debts in the ordinary course of business, as and when these become due and payable; that the respondent is commercially insolvent; and that it is just and equitable that the respondent be placed under order of provisional liquidation.

THE RESPONDENT'S DEFENCES

[15] The respondent, over and above other defences raised, raises prescription as a defence to the applicant's claims. It is contended on behalf of the respondent that in as much as the amounts which constitute the applicant's claims were lent and advanced during February 2008, any claim based on the amounts so advanced would have become prescribed in 2011, being three years after the loan amounts were lent and advanced.

[16] The law relating to defences in liquidation applications is set out in several authorities, notably *Hülse-Reutter v Heg Consulting Enterprises (Pty) Ltd* 1998 (2) SA 208 (C) where Thring J observed that a party challenging an application for the winding up of a company as an abuse of the process of the court on the grounds that the applicant's claim against the company is disputed must show (a) that the claim is disputed; (b) that it is *bona fide* disputed; and (c) that the grounds for disputing the claim are reasonable. Thring J went further to observe that it does not have to be established, even on the probabilities, that the company would, as a matter of fact, succeed in any action which the applicant might bring to enforce the disputed claim. The court need merely be satisfied that the grounds upon which the claim is disputed are not unreasonable. To do that it is not necessary that the actual evidence which would be relied upon at a trial be adduced on affidavit or otherwise. It is sufficient, provided it is done *bona fide,* to allege facts which, if proved at a trial, would constitute a good defence to the claim made against the company.

THE APPLICANT'S SUBMISSIONS

[17] *Mr Sievers*, for the applicant, challenges the defence based on prescription on what appears to be three broad fronts, these being that it never was the intention of the parties that the three tranches of loan amounts lent and advanced to the respondent during February 2008 would immediately become due and payable; that the dates such tranches of loan amounts were lent and advanced were never intended by the parties to be dates on which prescription would set in; that the respondent has not pleaded and proved both the date of inception and the date of the completion of the period of prescription; that, in view thereof, the defence of prescription is not raised on *bona fide* and reasonable grounds; and that in view of the fact that the respondent did not respond to the letter of demand in terms of section 345(1)(a)(i) of the Companies Act, the applicant, as an unpaid creditor, is entitled to an order *ex debito justitiae.*

[18] In as far as the challenge based on the intention of the parties is concerned, *Mr Sievers* makes a point in his submissions that the mere fact that clause 2.3 of the loan agreement provides that the loan capital shall be due and repayable to the lender within 30 days from date of delivery of the lender's written demand, and the mere fact that the loan agreement, in clause 3 thereof, provides for procurement of a second mortgage bond on the respondent's property, reinforces the view that it was the intention of the parties that the debt, arising from the loan agreement, would only become due and payable after delivery of the lender's letter of demand and not on the date the loan capital was lent and advanced.

[19] That demand, so the submission goes, was made by way of an email of 19 September 2013. The response by the respondent to that demand, by way of an email of 25 September 2013 further reinforces the view that the debt would only become due and payable from the date the demand was made and, in any event, within 30 days of the lender's written letter of demand. The submission boils down thereto that the loan capital became due and payable within 30 days from 19 September 2013 and that the letter of demand in terms of section 345(1)(a)(i) was as a consequence of failure by the respondent to make repayment within the stipulated period of 30 days.

[20] *Mr Sievers*, in his submissions and argument, further refers to the resolution adopted by the directors of the respondent on 6 April 2011. On that date the directors of the respondent resolved that the respondent enter into a coverage mortgage bond on one of its properties in favour of Trinity Asset Management Limited (the applicant in these proceedings) and that Nicholas Lawrence Cunningham-Moorat, one of the directors, be entitled to negotiate and settle the terms and conditions of the agreement on behalf of the respondent.

[21] On the same date, namely, 6 April 2011 Cunningham-Moorat, on the basis of a resolution referred to in the preceding paragraph and in his capacity as director of the respondent, signed a power of attorney in favour of various persons for execution and registration of a bond in favour of the applicant.

[22] Based on these submissions it is contended on behalf of the applicant that it could never have been the intention of the parties that the tranches of capital loan amounts lent and advanced during February 2007 would become due and payable on the dates such capital loan amounts were lent and advanced to the respondent.

[23] It is thus submitted on behalf of the applicant that it was not the intention of the parties that the prescription period would commence on the dates the loan capital amounts were advanced but, it was always the intention of the parties, that the debt arising from the amounts so advanced would only become due and payable on delivery of the written letters of demand. In advancing this proposition, *Mr Sievers,* relies on the judgment of this court in *Stockdale & another v Stockdale* 2004 (1) SA 68 (C) where Traverso AJP held that the intention of the parties was that the debtor would be afforded a reasonable opportunity to make payment of the loan; that the delay in calling the loan was not deliberate or negligent; and that it was intended that notice would be necessary for prescription to commence. The submission boils down thereto that in as much as the debt, in the instance of this matter, came into existence during February 2007 the recoverability thereof would have to be preceded by a written demand demanding payment within 30 days of date of the lender's demand and that prescription would start running after delivery of the written demand.

[24] *Ms Gassner* SC (with her *D Van Reenen)* in advancing the defence of prescription, makes a point in her submissions that, in considering the defence of prescription, as pleaded in the instance of this matter, there are two legal principles that

ought to be borne in mind. The first such principle is that a debt repayable on demand is in law considered to be payable immediately so that a formal demand is not necessary in order to complete the cause of action. In such circumstances, prescription starts to run immediately the debt arises or immediately the loan is lent and advanced.

[25] The second such principle, so the submission goes, is based on the notion that a creditor cannot delay the commencement of prescription by failing to take a step that is in his power to recover the amount advanced by way of a loan. The principle is thus based thereon that a creditor cannot simply sit back and by supine inaction arbitrarily and at will postpone the commencement of prescription. The rationale for this proposition is based on the assertion that if the date on which the debt shall become due is to be unilaterally determined by the creditor, if the creditor, in such an instance, fails to take such a step to recover the debt within the prescription period, the debt shall be deemed to have been due at the earliest date when the creditor would have been in a position to make a demand. What is thus meant by this proposition is that the law deems the creditor to have been in a position to demand the debt earlier and therefore prescription is deemed to have run from the earliest date on which the demand could have been made which will, in all instances, be the date on which the loan was advanced to the debtor.

[26] In advancing this proposition *Ms Gassner* relies on several authorities, notably De Wet & Van Wyk: *Die Suid-Afrikaanse Kontraktereg en Handelsreg* (5 Ed) at 292;

Nicholl v Nicholl 1916 WLD 10; *Van Vuuren v Boshoff* 1964 (1) 395 (TPD); *Damont NO v Van Zyl* 1962 (4) SA 47 (C), amongst other authorities relied on.

[27] In De Wet and Van Wyk; *Die Suid-Afrikaanse Kontraktereg en Handelsreg*, supra, the authors make the following observation at 292:

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

[28] In *Nicholl v Nicholl,* supra, Mason J made the following observation at p12:

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

[29] In *Van Vuuren v Boshoff,* supra, at p400 next to the letter D, Coleman J made the following observation:

> "In support of this argument reliance was placed upon the authorities which hold that, in respect of a claim for money lent and repayable on demand, prescription begins to run as soon as the loan is made, and not only when it is demanded. But the necessary demand, in such a case, is a simple procedural step which the creditor, without

> extraneous aid, can take at any time. If, therefore, he fails to take that step and institute his action within the prescriptive period, he is guilty of the type of inaction which the Prescription Act is designed to penalise. The same reasoning cannot, in my view, apply when there is a necessary element in the creditor's cause of action which is dependent upon something other than his own conduct."

[30] That the creditor cannot rely on his or her inaction to delay the running of prescription was confirmed in this court in *Kotze v Ongeskiktheidsfonds van die Universiteit van Stellenbosch* 1996 (3) SA 252 (C) where this court made the following observation at 261H:

> "Daarby is daar ten minste sterk indrekte steun vir die beginsel dat 'n skuldeiser nie deur sy eensydige willekeurige optrede die aanvang van die verjaringstermyn kan uitstel nie, en daar is vir dekades reeds met goedkeuring in ons regspraak daarna verwys, ofskoon dit miskien nie altyd nodig of in die huidige samehang was nie."

[31] Finally, on this point, this court, per Rogers J, as recent as 27 February 2015, in *Johan de Bruyn v Derick du Toit Case No 1162/2015* p3 made the following observation and specifically with reference to *Stockdale & another v Stockdale*, supra, relied on by the applicant:

> "*Stockdale* and earlier cases dealing with amounts payable "on demand" do not lay down a rule that such a debt becomes due for purposes of prescription only after demand has been made. On the contrary, and in keeping with the principle that a creditor cannot delay the commencement of prescription by failing to take a step within its 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 a notice."

[32] Based on those authorities *Ms Gassner* submits that the defence of prescription raised by the respondent is, in essence, a legal defence which is good and that, if it is found to be a good defence, the question of *bona fides* raised by the applicant should not have a bearing on a defence which is presented on grounds that are not unreasonable. The submission goes further to suggest that prescription, advanced as a defence in the instance of this matter, is a good and valid defence, based on facts that are common cause and, that being so, the hurdle of *bona fides* has been met. What in effect is being raised here is a dispute on a debt which, on the applicant's submission, has since become prescribed. All that I am required to do, in the instance of this matter, is to determine whether the defence raised by the respondent is not unreasonable.

[33] I have considered the parties' submissions relating to the defence of prescription raised by the respondent as well as the authorities relied on and I am of the view that prescription, as raised by the respondent, is indeed a valid defence. As pointed out by Thring J in *Hülse-Reutter & another v Heg Consulting Enterprises (Pty) Ltd*, supra, it need not be established at this stage of the proceedings whether the defence raised by the respondents might be successful at trial. I am not required to determine the merits of this defence or whether the defence raised is likely to succeed at trial. All that I am required to determine is whether the defence, as advanced by the respondent, is reasonable and, if that be so, whether the debt sought to be recovered is disputed on reasonable grounds. I am satisfied that the grounds upon which the claim

is disputed are not unreasonable and, for that reason, the application falls to be dismissed.

[34] Whilst *bona fides* in a factual dispute may become very important, in the matter such as the one before me there is no reliance on a factual dispute. As has already been pointed out elsewhere in this judgment the facts in this matter are virtually common cause. What in effect is happening in the instance of this matter is that prescription is being raised as a defence and, in my view, this is done on grounds that are not unreasonable.

[35] In the light of the conclusion I have reached in the preceding paragraph it is not necessary for me to determine the other issues raised by the parties in these proceedings, as for an example, the other defences raised in the respondent's submissions; and whether the respondent's response by way of an email of 25 September 2013 to what is suggested as a demand contemplated in clause 2.3 of the loan agreement constitutes interruption of prescription. These are all issues that may possibly be ventilated at trial should the applicants be advised to proceed by way of an action for recovery of the debt allegedly due.

[36] And, then of course, there is a matter of costs occasioned by the postponement of this matter on 30 April 2015. That postponement was occasioned by the need to afford the respondent an opportunity to launch an application in terms of rule 6(5)(e) of the Uniform Rules of Court for the admission of supplementary affidavits. In my view it

was not necessary for the proceedings to be postponed for purposes of such an exercise or, such a postponement has had no bearing on the outcome of the matter, so that all costs occasioned by that postponement ought to be borne by the respondent.

[37] In the result, the following order is made:

(1) The application for the provisional winding up order of the respondent is dismissed;

(2) The applicant is ordered to pay the respondent's costs, save for those costs occasioned by the postponement on 30 April 2015, which shall be borne by the respondent.

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N J Yekiso
Judge of the High Court