



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 November 2015
Date of Judgment: 5 November 2015

10

JUDGMENT Iro
APPLICATION FOR LEAVE TO APPEAL

YEKISO, J

[1] On 31 July 2015 I handed down a judgment in this matter in terms of which I dismissed the applicant's application for the provisional winding up of the respondent. On 1 September 2007 the applicant and the respondent concluded a written loan agreement in terms of which the applicant lent and advanced to the respondent an amount of R4 613 310.52 repayable to the applicant within 30 days from the date of

[AR - P50]

delivery of a written demand by the applicant. Clause 2.3 of the written loan agreement provided 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.

[2] On 19 September 2013 the applicant sought to invoke the provisions of clause [AR - P50] 2.3 of the agreement by ascertaining from the respondent if the respondent would be in a position to settle the outstanding amount and also to give an indication as to when such settlement would be made. As at 9 December 2013 the respondent had not made any payment. On that date, the applicant, through its attorneys, addressed a letter of demand to the respondent. In that letter it was stated that the amount outstanding in terms of the loan agreement was due and payable. No payment was made despite the letter of demand.

10

[3] On 18 July 2014 the applicant launched an application for the provisional winding up of the respondent, on the basis that the respondent is unable to pay its debts as these become due and payable. Amongst other defences raised, the respondent raised the defence of prescription. In my judgment referred to in the preceding paragraph I held that the defence of prescription raised by the respondent is a valid defence raised on grounds that are not unreasonable.

[4] On 24 August 2015 the applicant filed its notice of intention to apply for leave to appeal against the whole of my judgment delivered on 31 July 2015. The grounds of appeal in the proposed appeal are fully set out in the applicant's notice of intention to apply for leave to appeal. The application for leave to appeal was argued before me on

20



Wednesday, 4 November 2015. I have considered all those grounds on the basis of which the applicant proposes to appeal. I am persuaded that there is reasonable prospects that a court of appeal could very well find differently on a question as to whether prescription, in the instance of this matter, should have been held as a valid defence.


[5] In upholding the defence of prescription I held the view that the creditor cannot rely on his or her inaction to delay the running of prescription as was held in authorities such as *Kotze v Ongeskiktheidsvonds van die Universiteit van Stellenbosch* 1996 (3) SA 252 (C). In upholding the defence of prescription I held that prescription, in the instance of this matter, began to run from the moment the amount claimed was lent and advanced to the respondent.

[6] It would appear on the basis of comments by commentators and legal writers that opinions are divided as to whether, in an instance where payment is payable on demand, prescription begins to run from the moment when the creditor acquires a right to demand that performance be made or from the moment when the actual demand is made by the creditor. Whilst policy considerations support the view that prescription ought to run from the moment the creditor acquires the right to demand, it could very well be that the parties, in the exercise of their freedom to enter into contracts, may by way of a stipulation in the contract, agree to defer the running of prescription until formal demand by the creditor. In view there I am of the view that this is a matter where leave to appeal should be granted to the Supreme Court of Appeal.



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

- (1) Leave to appeal is granted to the Supreme Court of Appeal against the whole of my judgment handed down on 31 July 2015.
- (2) The costs of the application for leave to appeal shall be costs in the appeal.


N.J. Yekiso
Judge of the High Court

