

Prescription of debt

The Prescription Act, No. 68 of 1969 (Prescription Act) deals with the prescription of debt. Once the relevant time period has passed the debt is extinguished, unless prescription was interrupted.

Section 10 of the Prescription Act states that:

“(1) A debt shall be extinguished by prescription after the lapse of the period which in terms of the relevant law applies in respect of the prescription of such debt.

(2) By the prescription of a principal debt a subsidiary debt which arose from such principal debt shall also be extinguished by prescription.

(3) Notwithstanding the provisions of subsections (1) and (2), payment by the debtor of a debt after it has been extinguished by prescription in terms of either of the said subsections, shall be regarded as payment of a debt.”

The periods of prescription of debts ranges between three to thirty years depending on the type of the loan as set out in section 11 of the Prescription Act.

A recent court case, Trinity Asset Management (Pty) Ltd v Grindstone Investments (Pty) Ltd (1040/15) [2016] ZASCA 135 dealt with some misconceptions regarding the impact of prescription on loans payable “on demand” and has important implications for the understanding of prescription.

The appellant, Trinity Asset Management (Pty) Ltd, which was the applicant in the court, sought a provisional order of liquidation of the respondent, Grindstone Investments 132 (Pty) Ltd. The parties have agreed that the central issue in the appeal is whether the debt in question had prescribed.

The respondent borrowed the sum of R3 050 000 (the loan capital) from the appellant in February 2008. The relevant clause, upon which the outcome of this case depends, is clause 2.3 of the agreement. It reads as follows: “The Loan Capital shall be due and payable to the Lender within 30 days from the date of delivery of the Lender’s written demand.”

Grindstone Investments (Pty) Ltd argued that the debt had prescribed as three years had passed but Trinity Asset Management (Pty) Ltd argued that because the debt was payable on demand, as stated above, prescription only commenced once payment of the debt has been demanded, which was done on 9 December 2013.



Judge Willis stated that the loan capital was immediately claimable from the respondent, but it was a term of clause 2.3 (above) that it would only become payable once the respondent had received the written demand for which provision is made, and the notice period had expired.

Judge Willis stated that: “One must be careful not to conflate the date when a debt becomes “due” and that upon which repayment thereof is demanded. A debt which is repayable on demand becomes due the moment the money is lent to the debtor – or, to use banking terminology, “the advance is made”.”

The start of prescription

Prescription starts to run as soon as the debt is due unless:

- the debtor wilfully prevented the creditor from coming to know of the existence of the debt - prescription then starts once the creditor becomes aware of the existence of the debt; or
- the creditor did not have knowledge of the identity of the debtor and of the facts from which the debt arises - prescription then starts from the time the creditor is deemed to have such knowledge based on the fact that he, she or it could have gained such knowledge by exercising reasonable care).

It is important that parties to loans take note of this judgment and ensure that loan agreements set out when debt is due and when debt is payable.

To read the judgment:

http://www.justice.gov.za/sca/judgments/judgem_sca_2016quick.html