

SOUTH AFRICA / JUDGMENT

Johannes v Christensen N.O. and Others (CIV APP FB 13/2019) [2021] ZANWHC 26 (19 August 2021)

[2021] ZANWHC 26

COURT

North West High Court, Mafikeng

BEFORE

R D Hendricks, S F Gura, A H Petersen

CASE / FILE NUMBER

CIV APP FB 13/2019

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IN

THE NORTH WEST HIGH COURT, MAFIKENG

CASE

NO: CIV APP FB 13/2019

Reportable:	YES / NO Circulate
to Judges:	YES / NO Circulate to Magistrates: YES / NO Circulate
to Regional Magistrates:	YES / NO In
the matter between:	PRETORIUS JACOBUS JOHANNES Appellant and SEAN CHRISTENSEN N.O. First Respondent DIMAKATSO ARNOLD MICHAEL MOHASOA N.O. Second Respondent KGASHANE CHRISTOPHER MONYELA N.O. Third Respondent

INTERTRANS
OIL SA (PTY)
LTD
Fourth Respondent
CORUM: HENDRICKS DJP
et GURA J et PETERSEN J
DATE
OF HEARING
:
13 AUGUST 2021
DATE
OF JUDGMENT
:
19 AUGUST 2021
FOR
THE APPELLANT
:
ADV. UYS
FOR
THE RESPONDENT
:
ADV. VORSTER

Delivered:

This judgment was handed down electronically by circulation to the parties' representatives via email. The date and time for hand-down is deemed to be 10h00 on 19 August 2021.

ORDER

(i)

The appeal is upheld.

(ii)

The order of the court a quo dated 06 September 2018 is set aside.

(iii)

The matter is remitted to the court a quo for hearing of oral evidence alternatively to refer the matter for trial.

(iv)

The fourth respondent is ordered to pay the costs of the appeal, which shall include the costs in the applications for leave to appeal both in the court a quo and the Supreme Court of Appeal (SCA).

JUDGMENT

HENDRICKS DJP

- [1] The appellant Mr. Jacobus Johannes Pretorius was employed by Intertrans Oil SA (Pty) Ltd (fourth respondent), [Intertrans] which was a family owned business in that his parents were the shareholders and directors, from the year 2000 until his resignation on 25 January 2014.
- During the time of his employment, monies were from time to time loaned and advanced to him. At the time of his resignation he was indebted to Intertrans in an amount of R426 003.90 as reflected in the general ledger. Intertrans experienced financial difficulties and was placed under voluntary business rescue on 25 August 2016 in terms of section 129 (1) of the Companies Act 71 of 2008. On 25 November 2016 Intertrans was placed under provisional liquidation and on 06 February 2017 it was placed in final liquidation. The first to the third respondents were appointed as joint liquidators (liquidators). Having detected the aforementioned amount of R426 003.90 on the appellant's loan account at Intertrans as a debt owed by the appellant, the liquidators demanded payment thereof on 03 November 2017. When payment was not forthcoming, they launched an application for payment thereof. An order was granted in their favour. The appellant unsuccessfully applied for leave to appeal from the court a quo. Dissatisfied about leave being refused by the court a quo, the appellant petitioned the Supreme Court of Appeal (SCA) for leave to appeal. Leave to appeal was granted to the Full Court of this Division; hence this appeal.
- [2] The appeal is premised mainly on three grounds to wit:
- (a) whether the debt had prescribed;
 - (b) whether there was a compromise agreement entered into between the appellant and Intertrans to the effect that the debt was written off;
 - (c) whether there exists a genuine and bona fide dispute of fact between the parties to the extent that this matter could not be resolved on papers and had to be referred either to oral evidence or trial.
- [3] Insofar as prescription is concerned, the court a quo stated the following in paragraph [11] of its judgment:

"[11] At the insolvency hearing the Respondent specifically stated that "so daar was nooit 'n spesifieke tyd aan gekoppel nie" loosely translated "so there was never a specific time linked". The fourth Applicant was a family company where the directors and shareholders were the parents of the Respondent. It was not disputed that the loans were advanced to fund the Respondent's personal expenses and served no business purpose. At the time the fourth Applicant was wound up no demand was ever made by the directors from the Respondent. It is clear from the above that the company never intended the loans to be payable immediately after they were advanced to the Respondent. This fits hand in glove with the circumstances referred to in the Trinity case supra which is the exception to the

general rule of a debt being due immediately upon conclusion of the contract. The parties in this instance did not intend the debt to be due until demand was made. As a result, prescription did not begin to run from when the loans were advanced but only from the time the liquidators made demand on 3 November 2017. Therefore the claim of the Applicants has not prescribed. As a result of this finding, it is unnecessary to deal with other aspects of prescription raised in this matter.”

(emphasis added)

Reference to the Trinity case in the judgment of the court a quo, is reference to the case of Trinity Asset Management (Pty) Limited v Grindstone Investments 132 (Pty) Ltd 2018 (1) SA 94 (CC).

[4] It is common cause that from the general ledger of Intertrans, there were amounts loaned and advanced to the appellant from 02 July 2012. This happened from time to time and some payments were also made. The period concerned in the general ledger loan account is until 15 May

2014. The appellant contends that these were commercial loans and not

family loans or advances on the basis of never-never repayment. As such it is contended by the appellant that his employee loan account became due and payable on each of the respective transactional dates and that prescription began to run on each individual claim the day that the debt arose. According to him his last debt occurred on 10 February 2014 even though he resigned on 25 January

2014. Therefore, so it was further contended, the claims had clearly prescribed before demand was made by the liquidators on 04 November 2017 and before this application was launched.

[5] The Appellant relies on the principle that unless otherwise specified in the underlying agreement, a debt becomes due and payable there and then (immediately”) and prescription begins to run immediately on conclusion of the contract. In other words, the Appellant argues that one should not look at the Respondents’ demand on 4 November 2017 as the starting point from which prescription began to run but from the date that the individual loans were advanced. Reliance for this proposition is based on what is stated in paragraph

[47] of the Trinity judgment, which states:

“[47] In sum, the relevant principles may, in my view, be restated as follows. 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 will be a condition precedent to claimability, a necessary part of the creditor’s cause of action, and prescription will begin to run only from demand. This, in my view, is not an incident of the creditor being allowed to unilaterally delay the onset of prescription. It is the parties, jointly and by agreement seriously entered into, determining when and under what circumstances or conditions a debt shall become due.”

This is the correct legal principle to be applied.

[6] In paragraph [104] of the Trinity judgment the following is stated:

“[104] Here, of course, the loan was not “payable on demand” but rather repayable 30 days after demand. Does the additional 30-day period afforded to the debtor to repay change anything? Does it take this agreement outside the law applying to loans “payable on demand”? No. The 30-day period makes no difference. The point of the jurisprudence is that the creditor has the unilateral power to demand performance from the debtor at any time from advance – not that, following demand, the debtor must pay immediately (“on demand”) or 30 days later. In both instances, the creditor has the sole power to demand performance at any time.

Even in cases where the debt is stipulated as only being “repayable upon demand,” the default position is that prescription will still run from the date the debt arose.

See: Trinity judgment, *supra*, at paragraphs [102] – [105].

[7] It is quite apparent that there was no demand made for repayment of the various loan amounts advanced to the appellant before 03 November

2017. As such, prescription began to run on each claim the date that the debt arose. This being the case, the cut-off date must be 25 August 2016 (the date of voluntary business rescue of Intertrans), which is the date of an intervening event. From 25 August 2016 (business rescue) until 06 February 2017 (final liquidation) is the period that the running of prescription was interrupted and should not be included. Three (3) years must be calculated retrospectively from 25 August 2016 which will be until 25 August 2013. In essence it will mean that all the loans advanced up until 25 August 2013 has prescribed. This is on the basis that these are purely commercial transactions and not family “never-never”

loans. This is not what was decided by the court *a quo* as quoted *supra*. On this basis, the court *a quo* incorrectly applied the principle with regard to prescription as enunciated in the Trinity judgment of the Constitutional Court. This aspect is better left to be determined by the trial court, who should calculate the transactions (dates and amounts) which was not extinguished by prescription.

[8] It is quite clear that there exists a genuine and bona fide dispute of fact whether a compromise agreement was entered into between the appellant and Intertrans. On the version of the appellant

as pleaded there was an agreement entered into between him and Intertrans in terms whereof the debt on his loan account at Intertrans would be written-off and that he would be given motor vehicles in exchange for the non-compensation of his accumulated leave days in excess of 100 days (or 169 days) amounting to in excess of R1 million (or R1 255 798.44). In this regard, the court *a quo* found that there is no document produced to corroborate this state of affairs. No agreement document was produced either to prove how the leave days and the monetary value

attached thereto was computed and calculated. The corroborated versions in the form of confirmatory affidavits by the director's does not assist in this regard. This makes the version of the appellant "far-fetched and implausible" and "improbable and stands to be rejected." The court a quo continues and states:

"[11] Adding salt to the Respondent's wound is the fact that the accounting records of the fourth Applicant do not reflect the write off of the loan amounts. The explanation by the Respondents mother that it was an administrative oversight for the write off not to be reflected in the company records cannot be acceptable. Lack of any information to corroborate the Respondent's version in relation to the write-off weakens his case. This makes the version of the Respondent far-fetched and Implausible."

[9] In my view, the appellant has demonstrated that his version is not clearly untenable and far-fetched that it can be summarily dismissed as found by the court a quo. There is in my view a genuine and bona fide dispute of fact in this regard which amounts to the triable issue to be adjudicated by the trial court. The court a quo should have referred the matter for oral evidence, if not for trial. This is an aspect best left to be dealt with by the trial court. It is for the aforementioned reasons that I am of the view that the appeal should succeed and that the order of the court a quo be set aside. Furthermore, that the matter should be remitted to the court a quo to hear oral evidence or alternatively to refer the matter to trial with regard to the compromise agreement and to determine the exact loan transactions and amounts which were not extinguished by prescription.

[10] Insofar as costs are concerned, it should follow the result and be awarded in favour of the appellant as the successful litigant. There is no plausible reason to order otherwise.

Order

[11] Consequently, the following order is made:

(iv) The fourth respondent is ordered to pay the costs of the appeal, which shall include the costs in the applications for leave to appeal both in the court a quo and the Supreme Court of Appeal (SCA).

R D HENDRICKS

DEPUTY JUDGE PRESIDENT OF THE HIGH COURT,

NORTH WEST DIVISION, MAHIKENG

I agree

SAMKELO F GURA

JUDGE OF THE HIGH COURT,

A H PETERSEN

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