14 SEPTEMBER 2017

DISPUTE RESOLUTION ALERT

NEWSFLASH

IN THIS **ISSUE**

WE REPEAT – DEMAND LOANS PRESCRIBE AFTER THREE YEARS – OUCH!

You may recall our previous alert where we discussed the decision of the Supreme Court of Appeal in *Trinity Asset Management*. We thought this judgment was a big deal. As it turns out, so does the Constitutional Court.

CDH
CLIFFE DEKKER HOFMEYR

WE REPEAT – DEMAND LOANS PRESCRIBE AFTER THREE YEARS – OUCH!

Prescription starts to run on an on-demand loan from the date of advance of the loan!

You may recall our previous alert where we discussed the decision of the Supreme Court of Appeal (SCA) in *Trinity Asset Management*. We thought this judgment was a big deal. As it turns out, so does the Constitutional Court.

Spoiler alert: Prescription starts to run on an on-demand loan from the date of advance of the loan!

This legal conclusion, although not always appreciated, is not revolutionary. In fact, it is a rather settled aspect of our law. Its application, however, has not always been predictable.

It is fair to say that the SCA judgment ruffled some feathers. The parties expressly agreed that the loan in question would be due and repayable within 30 days from the date of delivery of the lender's written demand. This notwithstanding, the SCA decided that the wording, read in context, was insufficient to delay the running of prescription and that the claim for the repayment of the loan, prescribed three years after the initial advance. No surprise then that the debate was taken to the highest court of the land: the Constitutional Court.

There, 11 of our country's sharpest legal minds grappled with this issue. To say that there was a difference in opinion would be an understatement. The decision of the Constitutional Court was split down the middle: five judges finding that the loan had prescribed, another five finding that it had not. This left Froneman J with the final say on the matter (advancing slightly different reasoning), but concurring with the view that the claim had prescribed.

Cameron J led the charge for the majority in finding that "prescription started its deadly trudge on the day the loan … was advanced". When a contract doesn't say precisely when a debtor must perform or repay a loan, the general rule is that the debt is "due immediately upon conclusion of the contract". The agreement that the debt would fall due only within 30 days of written demand was in these circumstances insufficient to delay the running of prescription largely because of the inconsistent use of the word due in the agreement.

The effect of the Constitutional Court judgment is that if that the parties intend delaying prescription, they have to say so in clear and unequivocal terms. "If they don't," as highlighted in the judgment, "the featurelessness of their agreement – as here – means that prescription starts to run immediately once the money is paid over".

More often than not, on-demand loans are not concluded on an arms-length basis. Repayment terms are often left

The effect of the Constitutional Court judgment is that if that the parties intend delaying prescription, they have to say so in clear and unequivocal terms.

CDH
CLIFFE DEKKER HOFMEYR

WE REPEAT – DEMAND LOANS PRESCRIBE AFTER THREE YEARS – OUCH!

CONTINUED

If you do not expressly agree to delay prescription, you may very well face a defence of prescription if you do not institute proceedings for the recovery of the loan.

blank to allow the borrower as much flexibility as possible. Consider loans to family members or shareholder loans to a company which may be caught in the cross-hairs of this judgment.

Using template agreements for loans repayable on demand is risky business. If you do not expressly agree to delay prescription, you may very well face a defence of prescription if you do not institute proceedings for the recovery of the loan, within three years of the initial advance.

Of course, an acknowledgement of debt renews the running of prescription from date of the acknowledgement and this acknowledgement may be tacit. The recordal of a shareholder loan in signed financial statements may be sufficient to acknowledge the debt – but only if the debt is owed by the company. As is often the case, this will depend on the facts at hand.

Clare Boothe Luce warned us that "no good deed goes unpunished". This may be more accurate than originally thought, especially when one starts to analyse the possible tax consequences of a loan which has prescribed as a result of this judgment.

Jonathan Ripley- Evans, Tim Smit and Thapelo Malakoane

OUR TEAM

For more information about our Dispute Resolution practice and services, please contact:

Tim Fletcher
National Practice Head
Director
T +27 (0)11 562 1061
E tim.fletcher@cdhlegal.com

Grant Ford
Regional Practice Head
Director
T +27 (0)21 405 6111
E grant.ford@cdhlegal.com

Timothy Baker
Director
T +27 (0)21 481 6308
E timothy.baker@cdhlegal.com

Roy Barendse
Director
T +27 (0)21 405 6177
E roy.barendse@cdhlegal.com

Eugene Bester
Director
T +27 (0)11 562 1173
E eugene.bester@cdhlegal.com

Tracy Cohen
Director
T +27 (0)11 562 1617
E tracy.cohen@cdhlegal.com

Lionel Egypt
Director
T +27 (0)21 481 6400
E lionel.egypt@cdhlegal.com

Jackwell Feris
Director
T +27 (0)11 562 1825
E jackwell.feris@cdhlegal.com

Thabile Fuhrmann
Director
T +27 (0)11 562 1331
E thabile.fuhrmann@cdhlegal.com

Anja Hofmeyr
Director
T +27 (0)11 562 1129
E anja.hofmeyr@cdhlegal.com

Willem Janse van Rensburg
Director
T +27 (0)11 562 1110
E willem.jansevanrensburg@cdhlegal.com

Julian Jones
Director
T +27 (0)11 562 1189
E julian.jones@cdhlegal.com

Tobie Jordaan
Director
T +27 (0)11 562 1356
E tobie.jordaan@cdhlegal.com

Corné Lewis
Director
T +27 (0)11 562 1042
E corne.lewis@cdhlegal.com

Janet MacKenzie
Director
T +27 (0)11 562 1614
E janet.mackenzie@cdhlegal.com

Richard Marcus
Director
T +27 (0)21 481 6396
E richard.marcus@cdhlegal.com

Burton Meyer
Director
T +27 (0)11 562 1056
E burton.meyer@cdhlegal.com

Rishaban Moodley
Director
T +27 (0)11 562 1666
E rishaban.moodley@cdhlegal.com

Byron O'Connor
Director
T +27 (0)11 562 1140
E byron.oconnor@cdhlegal.com

Lucinde Rhoodie
Director
T +27 (0)21 405 6080
E lucinde.rhoodie@cdhlegal.com

Jonathan Ripley-Evans
Director
T +27 (0)11 562 1051
E jonathan.ripleyevans@cdhlegal.com

Willie van Wyk
Director
T +27 (0)11 562 1057
E willie.vanwyk@cdhlegal.com

Joe Whittle
Director
T +27 (0)11 562 1138
E joe.whittle@cdhlegal.com

Jonathan Witts-Hewinson
Director
T +27 (0)11 562 1146
E witts@cdhlegal.com

Pieter Conradie
Executive Consultant
T +27 (0)11 562 1071
E pieter.conradie@cdhlegal.com

Nick Muller
Executive Consultant
T +27 (0)21 481 6385
E nick.muller@cdhlegal.com

Marius Potgieter
Executive Consultant
T +27 (0)11 562 1142
E marius.potgieter@cdhlegal.com

Nicole Amoretti
Professional Support Lawyer
T +27 (0)11 562 1420
E nicole.amoretti@cdhlegal.com

BBBEE STATUS: LEVEL THREE CONTRIBUTOR

Cliffe Dekker Hofmeyr is very pleased to have achieved a Level 3 BBBEE verification under the new BBBEE Codes of Good Practice. Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

JOHANNESBURG
1 Protea Place, Sandton, Johannesburg, 2196. Private Bag X40, Benmore, 2010, South Africa. Dx 154 Randburg and Dx 42 Johannesburg.
T +27 (0)11 562 1000 F +27 (0)11 562 1111 E jhb@cdhlegal.com

CAPE TOWN
11 Buitengracht Street, Cape Town, 8001. PO Box 695, Cape Town, 8000, South Africa. Dx 5 Cape Town.
T +27 (0)21 481 6300 F +27 (0)21 481 6388 E ctn@cdhlegal.com

CDH
CLIFFE DEKKER HOFMEYR