

Loan Agreements Without Payment Terms

By **Ashly Fowler** (Candidate Attorney),
and **Jarrold Van Der Heever** (Senior Associate)

13 August 2024

INTRODUCTION

If two parties enter into and conclude a loan agreement which does not contain repayment terms, a question arises as to when the loan and/or debt becomes due and payable. In the matter of *Trinity Asset Management (Pty) Ltd v Grindstone Investments 132 (Pty) Ltd* [2017] ZACC 32 (“Trinity”), wherein the Constitutional Court discussed, at length, the law as relating to loan agreements which do not stipulate a time period wherein the borrower must attend to the repayment thereof.

THE LAW

At paragraph 47 of *Trinity*, Mojapelo AJ, in his minority judgment, succinctly states that the principles as relating to when contractual debts are due and payable, are 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.”

The majority judgment, as penned by Cameron J, agrees with Mojapelo at paragraph 101, wherein Cameron J, states:

“When a contract doesn’t say when precisely a debtor must perform or repay, the general rule is that the debt is “due immediately upon conclusion of the contract.”

In his discussion as relating to loan agreements, at paragraph 102, Cameron J reiterates the long-standing common law principle that a loan without stipulation as a time for repayment, is repayable on demand. Cameron J, when considering the meaning of “repayable on demand”, had regard to *Standard Bank of SA v Oneanate Investments (Pty) Ltd* 1995 (4) SA 5120 (C) (“Oneanate”), and confirmed, as follows:

“But what does “repayable on demand” mean?

The Court said that “although by no means linguistically clear”, the phrase means that “no specific demand for repayment is necessary and the debt is repayable as soon as it is incurred.” The practical effect is this. When suing for repayment the creditor doesn’t need to allege a demand....

After considering English, Canadian, Australian and New Zealand law, the Court held that, unless the parties agree otherwise, a loan “repayable on demand” is repayable from the moment the advance is made and that no specific demand for repayment need be made for the loan to be immediately due and repayable.”

In other words, unless the parties agree otherwise, a loan repayable on demand is repayable from the moment the loan is made and no specific demand for repayment need be made for the loan to become due and repayable.

This notwithstanding, the court recognises that the aforesaid principle cannot always be the case. Ultimately, it is question of fact whether the parties intended demand to be a condition precedent for the debt to be due.

For purposes of illustrating the aforementioned, the court at paragraph 124 reads as follows:

“Loubser postulates the vivid example of a family trust. Say you make a loan to a close relative, your daughter, or your father. The daughter is studying. Or the parent is hard up. The circumstances show that the loan is on the never-never. The debt won’t be due, in any sense, legal, technical or practical, until you say, “Please won’t you pay back. In that case, it is clear that the parties intend demand to be a condition precedent to repayment. The parties do not intend the debt to be “due” until demand is made. This contrasts strongly with any ordinary commercial loan agreement. For the parties to delay prescription is simple. They just have to say so. But they must say so. If they don’t, the featurelessness of their agreement – as here – means that prescription starts to run immediately once the money is paid over.”

CONCLUSION

Despite the general common law position that a loan agreement which is silent on the repayment terms, constitutes a loan “payable on demand”, which is interpreted to mean that the loan is repayable as soon as it is paid to the borrower, the law makes provision for those circumstances wherein the parties intend demand to be a condition precedent to repayment of the loan.



Jarrod Van Der Heever
(Senior Associate)



Ashly Fowler
(Candidate Attorney)