HYBRID DEBT INSTRUMENTS: AN INVESTIGATION OF INTERCOMPANY INSTRUMENTS PAYABLE ON DEMAND IN TERMS OF SECTION 8F.

in partial fulfilment of the requirements for the degree Master of Commerce in South African Taxation.

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Contents

i. Plagiarism declaration

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ii.Abstract

Section 8F of the Income Tax Act, No. 58 of 1962, was introduced as an anti-avoidance provision and its recharacterisation rules came into effect in respect of amounts incurred or accrued on or after 1 April 2014. Where the ambits of this section are applied to an intercompany instrument, the interest is denied as a deduction and deemed to be a dividend *in specie*. As a result, the risk exposure to intergroup companies could include understatement penalties, interest and dividends tax. However, intercompany instruments that are *payable on demand* are excluded from the provisions of Section 8F. Therefore, this dissertation seeks to interpret the meaning of *payable in demand* in relation to section 8F and intercompany instruments.

In order to interpret the meaning of *payable on demand*, this dissertation made use of a historical qualitative research approach, that is, doctrinal research. It took the form of a literature review of relevant South African and foreign jurisprudence. Non-empirical data was collected, predominantly in the form of academic articles and case law.

The research indicates that an intercompany instrument that is classified as *payable on demand* should be regarded as repayable from the date of the agreement. No repayment demand is required in order to render the loan as due and payable. Prescription on the debt begins immediately. Having said this, the context and circumstances of the particular case, that is the intergroup companies, must be considered in determining the obligation to make repayment. Regardless of all of this, the borrower needs to be afforded the opportunity to derive some benefit from the loan transaction and enjoy the usage of the debt. Therefore, irrespective of *payable on demand* classifying as immediately repayable, a reasonable amount of time must be given before repayment can be expected.

Keywords

Section 8F of the Income Tax Act; payable on demand; intergroup companies; intercompany instruments; prescription; due and payable; anti-avoidance; recharacterisation; hybrid debt instruments; deemed dividend; dividend in specie

iii. List of abbreviations

ITA – Income Tax Act No. 58 of 1962

OECD – The Organization for Economic Cooperation and Development

SARS – South African Revenue Service

Section 8F – Section 8F of the ITA

TAA – Tax Administration Act No. 28 of 2011

All sections refer to sections of the ITA unless otherwise stated.

Fluxman – Fluxman Appellant v Brittain Respondent 1941 AD 273

Oneanate – Standard Bank of SA Ltd v Oneanate Investments (Pty) Ltd [1995] 4 All SA 128 (C)

Phasha – Phasha v Southern Metropolitan Local Council of the Greater Johannesburg Metropolitan Council [2000] 1 SA 451 (W)

Stockdale – Stockdale and another v Stockdale [2003] 3 All SA 358 (C)

Praesidium – Praesidium Capital Management (Pty) Limited v Charles Stuart MacKay-Davidson (17332/2010) [2010] ZAWCHC 531

Trinity – Trinity Asset Management (Pty) Ltd v Grindstone Investments 132 (Pty) Ltd 2017 (12) BCLR 1562 (CC)

Chapter 1: Introduction

1.1. Background

A taxpayer who needs to obtain finance for their operating or investment activities, may have various available options, including selling assets, borrowing funds, or issuing equity shares. When deciding on the options to make use of, the taxpayer requires certainty as to their resulting tax consequences.

In the carrying on of a trade, expenses incurred in the production of 'income' as defined in section 1, may generally be deducted, provided that the requirements of the applicable deduction section are met (all references to sections in this dissertation are references to the ITA, unless otherwise indicated).

In the context of the financing decision to be made, it should be noted that interest paid may qualify for deduction, should the taxpayer be able to prove that the funds were obtained to yield taxable income (such as income generated by its operating activities), as opposed to merely being invested in dividend yielding instruments. Should a taxpayer obtain funds through the issuing of shares, the dividends paid to shareholders will not rank for deduction, as they are merely distributions of income that have already been earned. It is therefore clear that the tax consequences of the financing option will be very pertinent to the taxpayer's decision.

Interest on an 'instrument' incurred in the production of income is generally deductible by the issuer (borrower) in terms of section 24J, while the receipt of the interest is generally included in the gross income of the lender, in terms of that same section.

A group of companies may be tempted to abuse tax legislation to artificially classify a certain financing transaction. In the absence of anti-avoidance measures, an intergroup issuing company would deduct the interest on the intercompany instrument from their taxable income (provided all requirements are met) in the determination of their normal tax payable, while the interest would be included as gross income in the hands of the intergroup holding company (National Treasury, 2013:27). Dividends, however, are not deductible by the issuer and may or may not be subject to tax (such as dividends tax) in the hands of the issuer or holder (National Treasury, 2013:27; Van

Der Zwan, 2014:50).

This poses a risk to the fiscus because intergroup companies are driven to choose interest deductions on payments to holders as opposed to non-deductible payments of dividends as a result of the tax benefit (National Treasury, 2013:28). This is especially applicable in relation to exempt or non-taxed persons and is negative for the fiscus as the interest deduction is not matched to an income inclusion (National Treasury, 2013:28).

Consequently, section 8F was introduced as an anti-avoidance provision (Bosman, 2017:41). The recharacterisation rules of this section came into effect in the case of amounts incurred or accrued on or after 1 April 2014 (National Treasury, 2013:31).

As per these recharacterisation rules, section 8F(2) states that the yield from an interest bearing instrument that becomes a hybrid debt instrument will be deemed to be a dividend *in specie* in respect of a share that accrues and is declared and paid to that company on the last day of its year of assessment. Furthermore, the interest on this instrument will not be deductible.

It is evident from the ambits of section 8F(2) that certain definitions are critical in understanding these recharacterisation rules. These definitions are contained in section 8F(1) and will be discussed in-depth in a subsequent chapter of this dissertation. For the purposes of this background, the definitions of “hybrid debt instrument”, “arrangement” and “connected persons” will be briefly considered.

A “hybrid debt instrument” is defined in part (c) of section 8F(1) as an instrument whereby a company owes an amount to a connected person in terms of an arrangement, as defined in section 80L, and is not obliged to redeem the instrument within 30 years from the date of issue of that instrument, excluding any instrument *payable on demand*.

The definition of “arrangement” in section 80L is very wide (Loof, 2013:9). An agreement where a company owes an amount to a connected person would be included within the definition of “arrangement.” Furthermore, companies are “connected persons” to one another if they are part of the same group of companies

(Sonnenbergs, 2011). However, instruments that are *payable on demand* are specifically excluded from the 30-year rule contained in the definition of a "hybrid debt instrument" (Van Der Zwan, 2014:52). The 30 year time period does offer a solution to companies who then only need to revisit contracts every 30 years and consider renewal. This, however, poses its own risk as someone will have to remember over that time period to revisit this issue. This also brings into question whether or not SARS will be able to attack it based on general anti-avoidance rules, etc, if it is renewed at that point.

Where the intercompany instrument is neither *payable on demand* nor redeemable within 30 years, the applicable interest will be deemed to be a dividend *in specie* declared and paid by the intergroup issuing company (National Treasury, 2013:29; Bosman, 2017:41), that is, the intergroup company borrowing the amount. This dividend *in specie* will be deemed to be declared and paid by the intergroup issuing company on the last day of the applicable year of assessment of the intergroup holding company, that is, the intergroup company lending the amount, and deemed to accrue to this intergroup holding company (National Treasury, 2013:29; Bosman, 2017:41). Furthermore, the intergroup issuing company's interest deduction will be denied (National Treasury, 2013:29; Bosman, 2017:41).

The intergroup issuing company may also be subjected to an understatement penalty on the understatement of their taxable income together with interest on the unpaid tax debt that has arisen as a result of the difference between their income tax return and the assessment by the South African Revenue Service (hereafter referred to as the 'SARS'). The understatement penalty is governed by part A of chapter 16, that is, sections 221 to 224, of the Tax Administration Act, No. 28 of 2011 (hereafter referred to as the 'TAA'). The interest is governed by section 89 of the ITA. Interest is charged at the prescribed rate. In addition to this, this issuer may be liable for dividends tax on the deemed dividend *in specie*. As a result, the recharacterisation rules of section 8F could pose a risk for intergroup companies with intercompany instruments (Van Der Zwan, 2014:50).

Consequently, SARS could levy an understatement penalty using the understatement penalty percentage table in terms of section 223 of the TAA, as follows:

1	2	3	4	5	6
Item	*Behaviour*	*Standard case*	*If obstructive, or if it is a 'repeat case'*	*Voluntary disclosure after notification of audit or criminal investigation*	*Voluntary disclosure before notification of audit or criminal investigation*
(i)	'Substantial understatement'	10%	20%	5%	0%
(ii)	Reasonable care not taken in completing return	25%	50%	15%	0%
(iii)	No reasonable grounds for 'tax position' taken	50%	75%	25%	0%
(iv)	'Impermissible avoidance arrangement'	75%	100%	35%	0%
(v)	Gross negligence	100%	125%	50%	5%
(vi)	Intentional tax evasion	150%	200%	75%	10%

Which specific 'behaviour', and subsequent corresponding relevant percentage, that SARS will levy in terms of this understatement penalty will only be determined when they take action against an intergroup company.

Due to the reclassification risk of the anti-avoidance provisions of section 8F, as discussed above, Van Der Zwan (2014:50) is of the opinion that it is a critical time for intergroup companies with intercompany instruments to carefully consider the terms of those instruments. In considering those terms, the redemption period and whether or not those instruments are *payable on demand* would mean the difference between being subject to or excluded from the provisions of section 8F.

This problem persists and the issue is still relevant today. Although SARS has not initiated legal action against any intergroup companies, changes have been made to the legislation. The first major change was promulgated when it became evident that the provisions of section 8F created opportunities for tax arbitrage (National Treasury, 2016:22). The second significant change was promulgated when it came to Government's attention that the provisions of section 8F led to economic double taxation (National Treasury, 2022:27). Although there have been changes to the section none have impacted the focus of this study and therefore these changes will not be discussed in any more detail in this dissertation. This dissertation will focus on the below problem statement, research question and research objective.

1.2. Problem statement

The main research problem is that there are many different possible interpretations of the phrase *payable on demand* in relation to intercompany instruments and section 8F.

As a result of this, *payable on demand* together with the relevant provisions of section 8F are open to interpretation. This leads to possible exposure for intergroup companies and their intercompany instruments as previously discussed.

1.3. Research question

The main research problem gives rise to the following research question:

What is the meaning of *payable on demand* in relation to intercompany instruments and section 8F?

1.4. Research objective

The overall research objective is as follows:

To explain the meaning of *payable on demand* in relation to intercompany instruments in order to understand why these instruments are excluded from the anti-avoidance provisions of section 8F.

This overall research objective can be broken down into the following sub-objectives:

- i To consider the principles of interpreting tax legislation;
- ii To apply general interpretation principles to the specific issue of *payable on demand*;
- iii To summarise the guidelines provided by the courts in interpreting this issue of *payable on demand*;

iv To consider and evaluate individual court cases against the ruling authoritative cases on interpreting legislation;
v To suggest recommendations following from the conclusions; and
vi To consider areas for future research.

1.5. Literature review

The literature review comprises a review of the academic literature on the meaning of *payable on demand* and is performed with reference to the relevant academic literature and case law available.

Payable on demand

Various case law has dealt with the phrase *payable on demand*. Herewith a brief overview of some of the case law, together with their findings, that will be considered in this dissertation:

Fluxman Appellant v Brittain Respondent 1941 AD 273 (hereafter referred to as '*Fluxman'*)

Held that where a loan does not have repayment terms, then the context and circumstances need to be considered in deciding when the amount becomes due and payable (Tindall, J.A. at page 294).

Standard Bank of SA Ltd v Oneanate Investments (Pty) Ltd [1995] 4 All SA 128 (C) (hereafter referred to as '*Oneanate'*)

Held that a loan that is *payable on demand* should be regarded as repayable from the date of the agreement. No repayment demand is required in order to render the debt as due and payable. Prescription begins immediately. The exception to this occurs in a situation where the parties agree otherwise (Selekowitz, J at pages 160, 161, 164 and 165).

Phasha v Southern Metropolitan Local Council of the Greater Johannesburg Metropolitan Council [2000] 1 SA 451 (W) (hereafter referred to as '*Phasha'*)

Held that a loan with no repayment terms should be repayable within a reasonable time period (Satchwell, J at pages 458 and 462).

Stockdale and another v Stockdale [2003] 3 All SA 358 (C) (hereafter referred to as '*Stockdale'*)

Held that the circumstances of the particular case must be considered in determining obligation to make repayment where no such repayment terms have been stipulated (Traverso AJP at paras 15 and 18).

Praesidium Capital Management (Pty) Limited v Charles Stuart MacKay-Davidson (17332/2010) [2010] ZAWCHC 531 (hereafter referred to as '*Praesidium'*)

Held that where the parties to a loan have not agreed on repayment terms, that loan must be *payable on demand*. Prescription is therefore deemed to commence as soon as the loan was concluded, that is, when the debt is incurred (Davis, J at page 11).

Trinity Asset Management (Pty) Ltd v Grindstone Investments 132 (Pty) Ltd 2017 (12) BCLR 1562 (CC) (hereafter referred to as '*Trinity'*)

Held that a loan that is *payable on demand* should be considered as immediately repayable from the date of the agreement. In this case, prescription would also commence immediately (Cameron, J at paras 102 and 127).

These principles indicate the importance with which the context and circumstances of the intergroup companies and intercompany instruments must be considered. In-depth discussion will follow in a dedicated chapter in this dissertation.

1.6. Research methodology

This dissertation will make use of a historical qualitative research approach to achieve the aforementioned research objective. This research approach will take the form of a review of literature and relevant South African and foreign jurisprudence. Non-empirical data will be collected, predominantly in the form of academic articles and case law. More specifically, it will make use of doctrinal research.

Doctrinal research is explained as a traditional approach to study which focuses on reading and analysis. This approach is epitomised “by the systematic process of identifying, analysing, organising and synthesising statutes, judicial decisions and commentary” (McKerchar, 2008:18).

<u>Methodological approach</u>

The doctrinal research approach is based on solving a specific legal problem using steps that include the following (Kharel, 2018:10):

- Research will be collected, in order to gain an understanding of the different interpretations of the undefined term *payable on demand*;
- Background material will be read, including journal articles, papers, textbooks, etc.;
- Primary material will be gathered, including legislation, explanatory memoranda, case law etc.;
- Legal issues will be identified, based on the intensive, scholarly research and reading that was performed;
- These issues will be analysed, in order to make sense of the differing interpretations;
- Findings will be brought together, in order to arrive at an interpretation or at the very least a narrower interpretation; and
- Conclusions will be researched, together with suggested recommendations and areas for future research.

1.7. Scope limitations

This dissertation is limited to instruments as defined in paragraph (c) of the definition of “hybrid debt instrument” of section 8F(1), excluding any instruments with conversion or exchange rights. Furthermore, the term connected person in this definition is going to be limited to intergroup companies.

1.8. Structure of the dissertation

Chapter 2: The approach to statutory interpretation

The correct method of statutory interpretation will be discussed, that is, explaining the general principles of interpretation of legislation. This will set the scene for how the interpretation of *payable on demand* will be approached.

Chapter 3: Section 8F

The general rules of interpretation will be extrapolated and applied to the content of section 8F. In other words, the general principles of chapter 2 will be applied to interpret section 8F's *payable on demand* component. The explanations provided in the explanatory memoranda in respect of section 8F will also be analysed. The explanatory memoranda are prepared by National Treasury and "provide background on proposed new legislation, reasons for proposed changes to existing legislation and further explanations or examples where necessary" (SARS, n.d.).

Chapter 4: The meaning of *payable on demand*

The meaning of *payable on demand* in relation to intercompany instruments will be explained in order to understand why these instruments are not subject to the anti-avoidance provisions of section 8F. Individual court cases that dealt with this issue will be considered and evaluated against the ruling authoritative general interpretation case, namely *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13, 2012 (4) SA 593 (SCA). Whether or not these courts necessarily applied the interpretation principles as laid out in this case will also be considered.

Chapter 5: Conclusions, recommendations and areas for future research

A conclusion will be drawn from the results of the research question and analysis. Recommendations will be suggested following from the conclusions. Areas for future research will consider whether there are follow-up questions that need answering.

Chapter 2: The approach to statutory interpretation

2.1. Tax legislation

The following sources of tax are essential when interpreting tax legislation (Koekemoer, 2023:18-19):

- The taxing statutes – includes primary legislation such as the ITA and TAA.
- Regulations – published in the Government Gazette and have the same power as legislation.
- Double taxation agreements – published in the Government Gazette and have the effect of law.
- Definitions – the main source of definitions is contained in section 1 of the relevant tax act. When considering definitions contained in section 1(1) of the ITA, section 1 of the TAA must also be considered.
- The Interpretation Act No. 33 of 1957 – is used for guidance if a term used in the ITA is not defined in another tax act.
- Undefined terms – where a term is not defined in primary legislation or the Interpretation Act, a dictionary definition may be used. If the meaning is still unclear, reference is made to relevant case law.

The following sources of tax are also useful in providing guidance regarding the interpretation of tax legislation by the commissioner of SARS (Koekemoer, 2023:19):

- Interpretation notes – published by SARS in order to set out its interpretation of various provisions of the act and do not form part of tax legislation. The courts are not bound by interpretation notes when interpreting tax legislation.

- Binding General Rulings – issued by the Advance Tax Ruling system in order to promote clarity, consistency and certainty regarding application or interpretation of tax law. They are issued on matters of general interest or importance.

The explanatory memoranda are prepared by National Treasury and "provide background on proposed new legislation, reasons for proposed changes to existing legislation and further explanations or examples where necessary" (SARS, n.d.).

2.2. Judicial decisions and rules of interpretation

In South Africa, the approach to statutory interpretation is done with purpose (Swanepoel, 2012:2). This means that the courts attempt to understand the purpose or intention behind legislation. The interpretation of this legislation should be based on the context in which it was enacted and includes its purpose as well as the constitutional, economic, political and social values that it seeks to advance (Swanepoel, 2012:2).

The Constitution of South Africa, adopted in 1996, is the supreme law of the land and all other laws must be consistent with it (Swanepoel, 2012:2-4). Therefore, courts, tribunals, forums, etc, have a duty to interpret statutes in a way that is consistent with the Constitution, as well as the Bill of Rights, and to promote the principles and values contained in this legislation (Swanepoel, 2012:3).

The courts in South Africa have a wide discretion when interpreting statutes. In interpreting a statute, the text of the statute, its legislative history, and any relevant case law must be considered (Swanepoel, 2012). The purpose of the statute, the context in which it was enacted, and the consequences of a particular interpretation may also be considered (Swanepoel, 2012). Moreover, the problem that the statute seeks to address or the purpose that it seeks to achieve may also be analysed (Swanepoel, 2012).

Furthermore, the interpretation of statutes is also guided by certain principles and rules (Swanepoel, 2012:1). This includes the following:

- The principle that a statute should be interpreted in a way that is consistent with the Constitution (Swanepoel, 2012:3);
- The rule that a statute should be interpreted in a manner that promotes its purpose and the purpose of the legislation as a whole (Swanepoel, 2012:32); and
- The principle that the words of a statute should be given their ordinary meaning, unless it is clear that the Legislature intended otherwise (Swanepoel, 2012:51).

To summarise, the approach to statutory interpretation in South Africa is done with purpose and is guided by various principles and rules, such as the Constitution and the Bill of Rights. The interpretation of a statute should be based on an understanding of its context and intention, and should be consistent with the principles and values of the legislation.

2.3. Intention and context

As per *Natal Joint Municipal Pension Fund v Endumeni Municipality*, the following was said regarding context at para 18:

> Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document.

This suggests that in approaching statutory interpretation one needs to take an objective viewpoint and focus on factual data. Context is key and the provision and its meaning needs to be interpreted in terms of the entire document and why that document and its provisions were created. The design of that provision needs to be analysed and consideration given to the usage of language. This will all assist in determining a meaning where there are different possible meanings.

Moreover, Lewis JA alluded to the following regarding context and intention at para 27 in *Novartis v Maphil* (Also discussed and reiterated in Case No: IT14434/2019 at para 13):

> This court has consistently held, for many decades, that the interpretative process is one of ascertaining the intention of the parties – what they meant to achieve. And in doing that, the court must consider all the circumstances surrounding the contract to determine what their intention was in concluding it. KPMG, in the passage cited, explains that parol evidence is inadmissible to modify, vary or add to the written terms of the agreement, and that it is the role of the court, and not witnesses, to interpret a document. It adds, importantly, that there is no real distinction between background circumstances, and surrounding circumstances, and that a court should always consider the factual matrix in which the contract is concluded – the context – to determine the parties' intention.

And furthermore at para 28:

> A court must examine all the facts – the context – in order to determine what the parties intended. And it must do that whether or not the words of the contract are ambiguous or lack clarity. Words without context mean nothing.

This proposes that all circumstances need to be considered in interpreting the design of a document and that facts and context are necessary in order to determine intention. Context is everything and that the meaning of words is dependent on these facts and context.

In addition to this, *Commissioner for the South African Revenue Service v United Manganese of Kalahari (Pty) Ltd* at para 8 referenced and reiterated *Natal Joint Municipal Pension Fund v Endumeni Municipality* at para 18 and *Commissioner for the South African Revenue Service v Bosch and another* at para 9 with the following:

> It is an objective unitary process where consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. The approach is as applicable to taxing statutes as to any other statute. The inevitable point of departure is the language used in the provision under consideration.

This again indicates that language, context and intention is of great importance to the interpretation of the provision together with its document. This is not only applicable to statutes of taxation, but also to any other statute under interpretation.

Likewise, *Marshall No and Others v Commissioner for South African Revenue Service 80 SATC 400* stated the following at para 9:

> The rule thus originated in the context of legislative supremacy where statutory interpretation was aimed at ascertaining the intention of the legislature. In that particular context custom could 'tip the balance' in cases of ambiguous legislation. Bosch recognised that the rule had to be adapted to contextual statutory interpretation. The rationale for relying on consistent interpretation by those responsible for the administration of legislation also changed from 'custom' to the assistance that could be gained from their evidence in determining 'the meaning that should reasonably be placed upon those words'.

This explains a shift in statutory interpretation from relying on historical customs to considering the practical interpretations of administrative bodies. This shift aims to place a reasonable and contextually appropriate meaning on legislative words, enhancing the accuracy and relevance of judicial interpretations.

It will therefore be necessary to discuss intention, context, design, language and all applicable facts and circumstances in relation to section 8F. This approach to the statutory interpretation of section 8F will be addressed at a later point in this dissertation.

2.4. Purpose and circumstances

In terms of *Natal Joint Municipal Pension Fund v Endumeni Municipality*, quoting Lord Neuberger MR in *Re Sigma Finance Corp* at para 98, the following was said regarding purpose at para 18:

> Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation. In a contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.

Furthermore at para 21:

> The stress placed in modern statutory construction on the purpose of the statute and identifying the mischief at which it is aimed should dispel such a notion.

Moreover at para 26:

> In resolving the problem the apparent purpose of the provision and the context in which it occurs will be important guides to the correct interpretation. An interpretation will not be given that leads to impractical, unbusinesslike or oppressive consequences or that will stultify the broader operation of the legislation or contract under consideration.

In addition to context, the purpose of the provision is also an important guide to the correct interpretation. Although an 'impractical, unbusinesslike or oppressive' interpretation will not be given, this does not mean that a 'reasonable, sensible or businesslike' interpretation will be substituted for the words of the legislation. There must not be a disconnect between interpretation and legislation. The purpose and background of the document and its provisions must be read in the appropriate context. What is more, section 8F is an anti-avoidance provision. This dissertation focusses on the classification of intercompany instruments and the specific provisions in section 8F that are aimed at managing the mischief resulting from the incorrect classification of these instruments. Identifying and discussing the mischief at which section 8F is aimed will form a large part of this dissertation.

Wallis JA takes the discussion even further by stating the following regarding circumstances at para 12 of *Bothma-Botha Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk*, referencing a statement of Lord Clarke SCJ in *Rainy Sky SA v Kookmin Bank* at para 21:

> While the starting point remains the words of the document, which are the only relevant medium through which the parties have expressed their contractual intentions, the process of interpretation does not stop at a perceived literal meaning of those words, but considers them in the light of all relevant and admissible context, including the circumstances in which the document came into being. The former distinction between permissible background and surrounding circumstances, never very clear, has fallen away. Interpretation is no longer a process that occurs in stages but is "essentially one unitary exercise".

Although provisions do need to be considered in terms of their language, intention and context, it is also important to consider all circumstances surrounding that document. The process of interpretation is not static, but fluid and it is important to consider everything that is available regarding the creation and application of that legislation.

Telkom SA SOC Limited v Commissioner for the South African Revenue Service reinforces the above discussion at para 17, by referencing and reiterating *Natal Joint Municipal Pension Fund v Endumeni Municipality*:

> This approach is echoed in the words of Endumeni at paragraph 18, namely: "The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document."

The wide usage of the *Natal Joint Municipal Pension Fund v Endumeni Municipality* judgement in other court cases reaffirms the usage of its principles in interpreting statutes. These principles will be used throughout this dissertation in interpreting section 8F.

2.5. Constitution and the Bill of Rights

In addition to the above, one cannot forget the importance of the Constitution and the Bill of Rights in interpreting statutes. In terms of section 39(2) of the Constitution of the Republic of South Africa, 1996 (Constitution):

> When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.

When approaching statutory interpretation, this section in the Constitution provides that the principles and values contained in the Bill of Rights need to be promoted and that statutes need to be interpreted consistently with this legislation. This section was also discussed in *First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Services and Another* at para 31.

This provision is further reiterated in *Dawood and Another v Minister of Home Affairs and Others* at para 50:

> The foregoing discussion assists in determining the interpretation of the relevant provisions that would best 'promote the spirit, purport and objects of the Bill of Rights'.

And furthermore at para 54:

> We must not lose sight of the fact that rights enshrined in the Bill of Rights must be protected and may not be unjustifiably infringed. It is for the Legislature to ensure that, when necessary, guidance is provided as to when limitation of rights will be justifiable. It is therefore not ordinarily sufficient for the Legislature merely to say that discretionary powers that may be exercised in a manner that could limit rights should be read in a manner consistent with the Constitution in the light of the constitutional obligations placed on such officials to respect the Constitution. Such an approach would often not promote the spirit, purport and objects of the Bill of Rights.

This further emphasises the fact that the rights contained in the Bill of Rights need to be protected and that the Legislature as well as statutory interpretation can at no point infringe the Bill of Rights nor the Constitution. This would go against the principles and values contained in this legislation.

First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Services and Another goes on to discuss section 39(1) of the Constitution at para 64:

> Yet context goes further and would include the particular international jurisprudential context in which the Constitution came into existence and presently functions. Section 39(1) of the Constitution provides that a court, when interpreting the Bill of Rights, "must consider international law" and "may consider foreign law".

This may be of specific relevance to the discussion around section 8F. International law as well as foreign law will be considered in relation to the statutory interpretation of section 8F at a later point in this dissertation.

2.6. Principles of taxation

The commonly accepted principles of a good tax system generally include the following (Alley & Bently, 2005):

- Equity – tax should be imposed based on one's ability to pay that tax. This principle is based on the concept of fairness and how much a taxpayer can afford to pay in taxes.

  It is suggested that intergroup companies can afford to pay taxes in relation to a section that was introduced in order to curb anti-avoidance.

- Certainty – taxes should be certain in timing, amount and procedures.

  Section 8F was introduced in the 2013 *Explanatory Memorandum on the Taxation Laws Amendment Bill* and came into effect in the case of amounts incurred or accrued on or after 1 April 2014. It is suggested that this would not have provided intergroup companies much time to respond accordingly.

  Furthermore, even in 2023, it is still uncertain which understatement penalty percentage SARS would apply in relation to intergroup companies and their section 8F recharacterised intercompany instruments.

- Convenience – it should be easy for taxpayers to comply with tax legislation and to pay their taxes.

  Whether or not the application of section 8F to intergroup companies and their intercompany instruments will be convenient is yet to be determined. It may become more clear once SARS has taken legal action in this regard.

- Economic efficiency – taxes should not unduly influence a person's economic decision-making.

  It is suggested that section 8F has influenced and will continue to influence the economic decision-making of intergroup companies. It has already been discussed that companies favour deductible interest over non-deductible dividends. It has also already been established that it is a critical time for intergroup companies with intercompany instruments to carefully consider the terms of those instruments. Taxpayers' responses to changes in tax legislation will be further discussed at a later stage in this dissertation.

- Administrative efficiency – a tax system should not impose an unreasonable administrative burden on the taxpayer and the revenue authority.

  It is suggested that section 8F should not create an administrative burden for intergroup companies or SARS, as the intention of the section is to curb anti-avoidance.

- Flexibility – a tax system should be able to change with economic circumstances.

  As previously discussed, two significant changes have already been promulgated in relation to section 8F. It is therefore suggested that the section is able to change as necessary.

- Simplicity – taxes should be easy to understand and apply.

  In relation to this, please see the five diagrams included under <u>Nature of the intercompany instrument: debt versus equity examples.</u> These diagrams have simplified section 8F in relation to intergroup companies and their intercompany instruments. It is therefore suggested that this section can be understood and applied in this context.

2.7. Conclusion

To sum up, in approaching statutory interpretation in South Africa, it is important to consider tax legislation and judicial decisions. In relation to the rules of interpretation, purpose, intention, context, language, circumstances, etc., must be considered. It is a fluid process and merit must be given to all available information and context. Legislation must also be consistent with the Constitution, as well as the Bill of Rights.

Chapter 3: Section 8F

The purpose of this chapter is to follow on from the previous chapter, namely **Chapter 2: The approach to statutory interpretation**, and interpret the meaning of Section 8F: Interest on hybrid debt instruments deemed to be dividends *in specie*. In so doing, this interpretation will be extrapolated, the rationale of the Explanatory Memorandum will be discussed and the issues that need to be taken into account when interpreting will be considered.

3.1. Interpretation of section 8F

In order to commence this interpretation, the terms of section 8F(2) need to be considered, as this is the provision that provides the anti-avoidance and recharacterisation rules within section 8F. Section 8F(2) will be considered first, after which the relevant definitions contained in section 8F(1) will be addressed:

> 8F(2) "Any amount that is incurred by a company or accrues to a person in respect of interest on or after the date that an instrument becomes a hybrid debt instrument is—
>
> > (a) deemed to be a dividend *in specie* in respect of a share that is declared and paid by that company to the person to whom that amount accrued on the last day of the year of assessment of that company during which it was incurred;
> >
> > (b) not deductible; and
> >
> > (c) deemed to be a dividend *in specie* in respect of a share that accrues to that person on the date contemplated in paragraph (a)."

This means that the yield from an interest bearing instrument that becomes a hybrid debt instrument will be deemed to be a dividend *in specie* in respect of a share that accrues and is declared and paid to that company on the last day of its year of assessment. Furthermore, the interest on this instrument will not be deductible.

In order to determine when an instrument becomes a hybrid debt instrument, it is necessary to consider the definition of "hybrid debt instrument" as per section 8F(1). This continues the interpretation process, as discussed above. In keeping with the scope limitations of this dissertation, only part (c) of this definition will be studied as follows, excluding any instruments with conversion or exchange rights:

> "hybrid debt instrument" means any instrument in respect of which a company owes an amount during a year of assessment if in terms of any arrangement as defined in section 80L—
>
> > (c) that company owes the amount to a connected person in relation to that company and is not obliged to redeem the instrument, excluding any instrument payable on demand, within 30 years from the date of issue of that instrument…

In addition to this, the definition of "arrangement" as per section 80L needs to be read together with the above definition as follows:

> "arrangement" means any transaction, operation, scheme, agreement or understanding (whether enforceable or not), including all steps therein or parts thereof, and includes any of the foregoing involving the alienation of property;

It is therefore clear that an interest bearing instrument will be included in terms of this wide definition of "arrangement" and that part (c) of the definition of "hybrid debt instrument" can be analysed further.

Once again, in keeping with the scope limitations of this dissertation, the term connected person in this definition is going to be limited to intergroup companies. The term connected person is defined in s1(1) of the ITA. The focus for the purposes of this dissertation will be on part (d)(i) of this definition, where a company owns more than 50% of the equity shares or voting rights in another company. Any interest bearing instrument in this dissertation will thereby be in reference to intercompany instruments.

Through the application of this definition of "hybrid debt instrument", any transaction, agreement, *et cetera*, between intergroup companies where an amount is owed via an intercompany instrument which is not redeemable within 30 years from its date of issue, would classify as a "hybrid debt instrument" as defined. However, if this intercompany instrument is *payable on demand*, it would be excluded from the application of section 8F. This phrase is of critical importance and the main topic of investigation for this dissertation.

As a result of applying the recharacterisation rules of section 8F specifically to intergroup companies and their intercompany instruments, large groups of companies with large intercompany instruments potentially face significant risk exposure. In determining their normal tax payable, the intergroup issuing company would deduct the interest on the intercompany instrument from their taxable income, provided all requirements are met. With the application of section 8F(2) and the denial of the interest deduction, the taxable income and tax liability of the intergroup issuing company would increase. This intergroup issuing company may therefore be subject to large understatement penalties together with large amounts of interest as a consequence of the underreporting and underpaying of taxes owed. In addition to this, this issuer may be liable for dividends tax on the deemed dividend *in specie*.

This poses a significant risk for large groups of companies where there may be many instruments between the companies within the group. For smaller instruments between smaller groups of companies, these instrument amounts may be small enough that the penalties and interest may be immaterial to their operations. However, where large amounts of money are involved in large groups of companies, these penalties and interest may severely impact cash flow and distributable profits to shareholders. In extremes, it may even lead to bankruptcy for some companies within the group. On top of this, there is the further risk of significant dividend tax consequences.

3.2. Nature of the intercompany instrument: debt versus equity

When determining the debt versus equity nature of an intercompany instrument, “it is widely believed that most of the tax law follows form” (National Treasury, 2013:28). This focus on form could provide intergroup companies with the freedom to choose to label their intercompany instrument as debt or equity based on the tax benefits that they could derive without considering the economic substance of that instrument (National Treasury, 2013:28).

This freedom poses a risk to the fiscus because intergroup companies are driven to choose interest deductions on payments to holders as opposed to non-deductible payments of dividends as a result of the tax benefit (National Treasury, 2013:28). This risk to the fiscus is especially relevant when one of the intergroup companies is an exempt person (National Treasury, 2013:28).

As previously discussed, in terms of paragraph (c) of the definition of “hybrid debt instrument” of section 8F(1), an intercompany instrument will be included within the provisions of section 8F(2) if that intergroup company is not obliged to repay that instrument within 30 years from the date of issue, excluding any instrument that is *payable on demand*.

It is therefore important to establish whether or not the intergroup company is obliged to repay that instrument.

<u>Nature of the intercompany instrument: debt versus equity examples</u>

In order to further illustrate the impact of the nature of an intercompany instrument on the application of section 8F, the following examples have been devised. The examples intend to illustrate the effects of different scenarios and how they would be impacted by substance over form, in effect equity rather than debt.

Repayment terms versus no repayment terms

In this example, an intercompany instrument with repayment terms, including repayments of both capital and interest, is compared to an intercompany instrument with no repayment terms. This could occur where a holding company provides a loan to a subsidiary and there is no requirement or intention to repay the loan or its interest.

An intercompany instrument with repayment obligations is excluded from the provisions of section 8F(2). An intercompany instrument without repayment obligations is excluded from the provisions of section 8F(2) if this instrument is payable on demand. An intercompany instrument without repayment obligations is not excluded from the provisions of section 8F(2) if this instrument is not payable on demand. This is illustrated as follows (Figure 1):

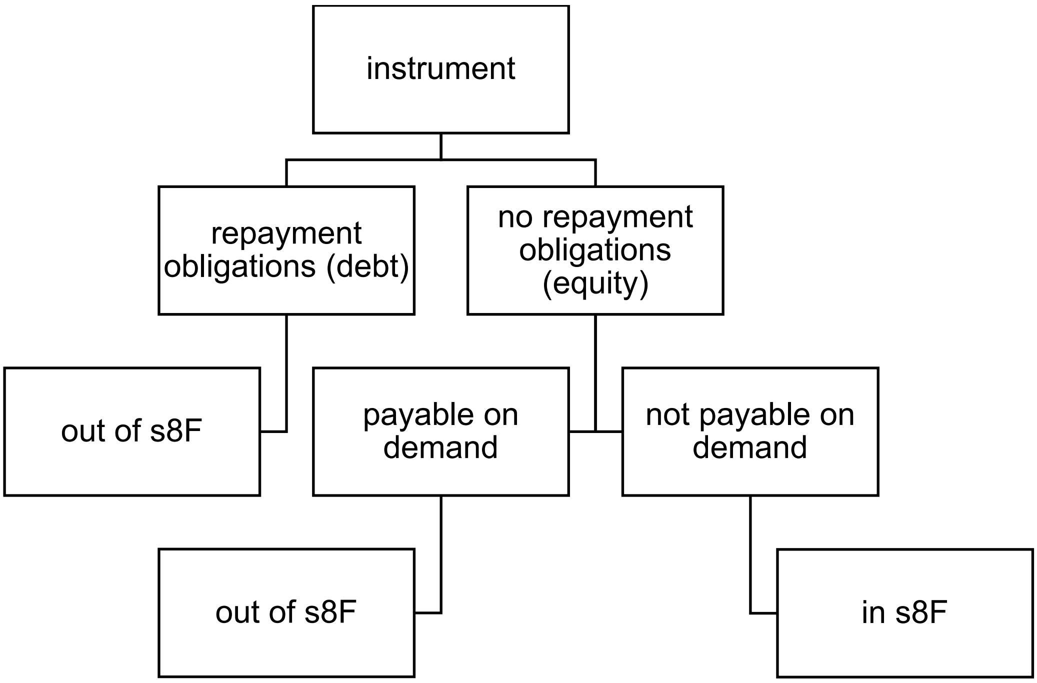

FIGURE 1

Shorter-term versus longer-term

In this example, an intercompany instrument with repayment obligations within 30 years from the date of issue of this instrument, is compared to an intercompany instrument with repayment obligations in excess of 30 years from the date of issue of this instrument. This could occur where a holding company provides a loan to a subsidiary and the subsidiary is financially unable to repay the loan within a period of 30 years.

An intercompany instrument with repayment obligations within 30 years from the date of issue of this instrument is excluded from the provisions of section 8F(2). An intercompany instrument with repayment obligations in excess of 30 years from the date of issue of this instrument is excluded from the provisions of section 8F(2) if this instrument is payable on demand. An intercompany instrument with repayment obligations in excess of 30 years from the date of issue of this instrument is not excluded from the provisions of section 8F(2) if this instrument is not payable on demand. This is illustrated as follows (Figure 2):

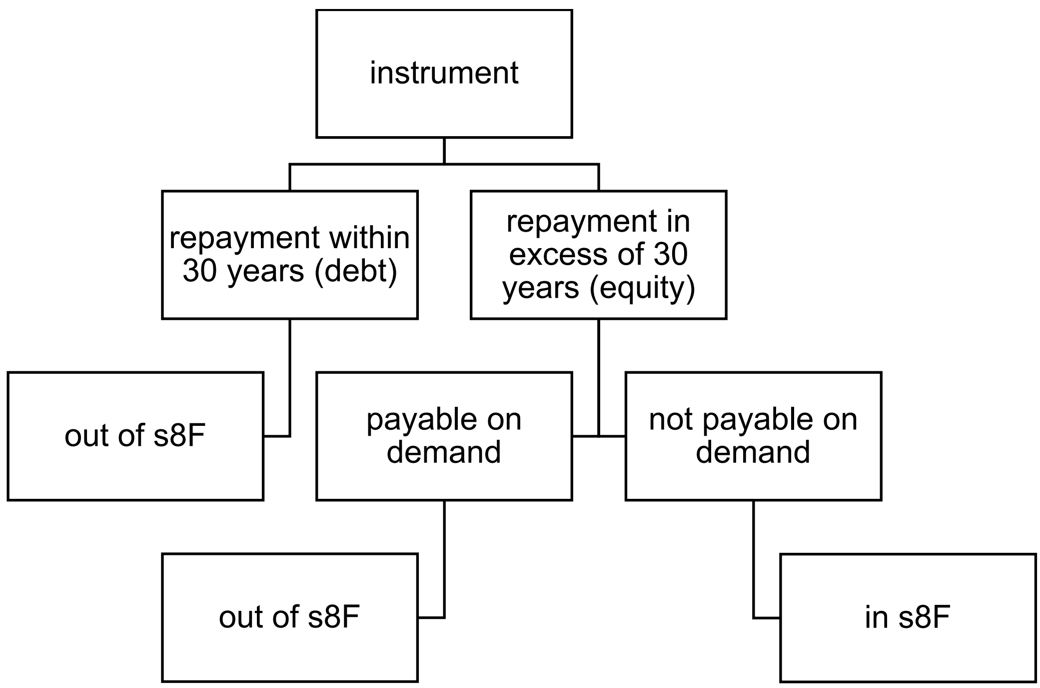

FIGURE 2

Convertible/exchangeable into shares versus not convertible/exchangeable into shares

In this example, an intercompany instrument that is convertible or exchangeable into shares is compared to an intercompany instrument that has no conversion or exchange rights. This could occur where a subsidiary provides a loan to another subsidiary and the former subsidiary has a right or an obligation to convert or exchange this loan into shares of the latter subsidiary.

An intercompany instrument with no right and no obligation to convert or exchange this instrument is excluded from the provisions of section 8F(2). An intercompany instrument with a right or an obligation to convert or exchange this instrument is excluded from the provisions of section 8F(2) if this instrument is payable on demand. An intercompany instrument with a right or an obligation to convert or exchange this instrument is not excluded from the provisions of section 8F(2) if this instrument is not payable on demand. This is illustrated as follows (Figure 3):

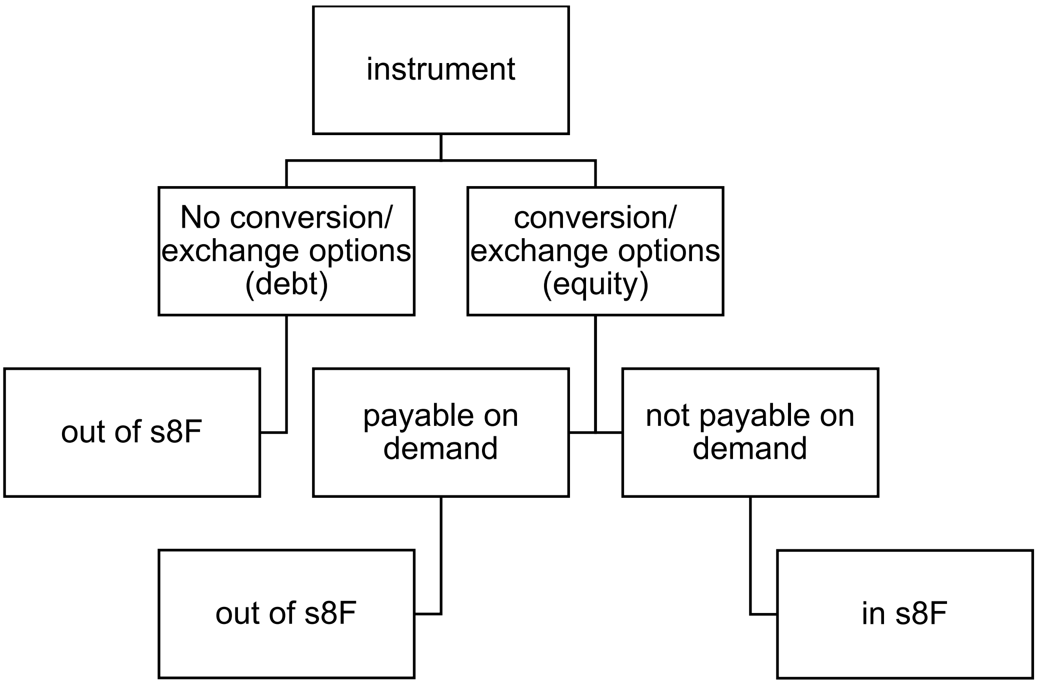

FIGURE 3

Repayment of capital and interest versus repayment of interest only

In this example, an intercompany instrument with repayment terms, including repayments of both capital and interest, is compared to an intercompany instrument with repayments of interest only. This could occur where a holding company provides a loan to a subsidiary and there is no requirement or intention to repay the capital portion of the loan or the subsidiary is only financially able to afford the repayment of the interest.

An intercompany instrument with repayment obligations of both capital and interest is excluded from the provisions of section 8F(2). An intercompany instrument with repayment obligations of interest only is excluded from the provisions of section 8F(2) if this instrument is payable on demand. An intercompany instrument with repayment obligations of interest only is not excluded from the provisions of section 8F(2) if this instrument is not payable on demand. This is illustrated as follows (Figure 4):

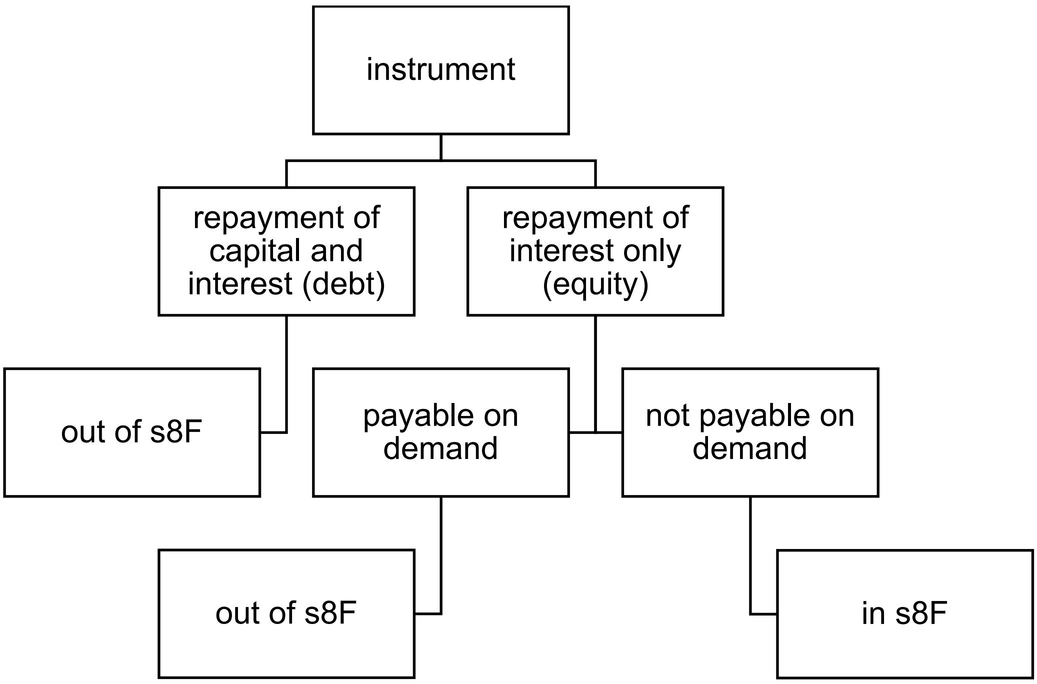

FIGURE 4

Solvency and liquidity requirements met versus not met

In this example, an intergroup company that is solvent and liquid is compared to an intergroup company which is not solvent and/or not liquid. This could occur where a holding company provides a loan to a subsidiary and this subsidiary does not meet the solvency and liquidity requirements, that is, the subsidiary is not liquid and/or not solvent, cannot afford the loan and would be bankrupted by the repayment of that loan. In other words, it is not a loan as it cannot be repaid.

An intercompany instrument where the solvency and liquidity requirements are met is excluded from the provisions of section 8F(2). An intercompany instrument where the solvency and liquidity requirements are not met is not excluded from the provisions of section 8F(2). Where the solvency and liquidity requirements are not met, it would arguably not be possible for the intercompany instrument to be payable on demand. This is illustrated as follows (Figure 5):

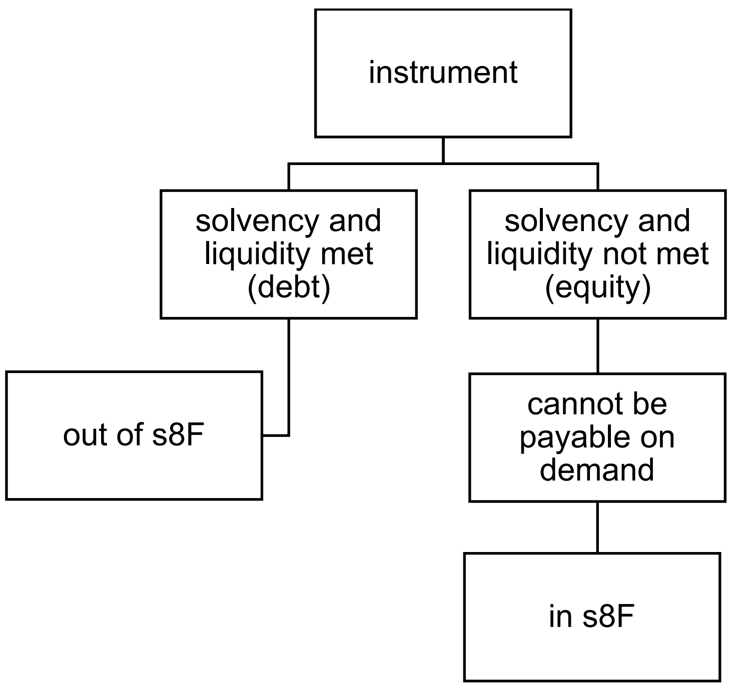

FIGURE 5

The terms debt and equity are not defined in the ITA. In terms of section 29 of the Companies Act, No. 71 of 2008, financial statements must be consistent with the International Financial Reporting Standards. Therefore, this dissertation will make reference to the definitions of liability, that is debt, and equity in terms of the International Financial Reporting Standards.

This concept of repayment obligations can be linked with the nature of the intercompany instrument from an accounting perspective. If the instrument meets the liability definition of the Conceptual Framework for Financial Reporting, it will be debt in nature. If the instrument does not meet this definition, it will be equity in nature.

In terms of the Conceptual Framework for Financial Reporting, a liability is defined as a “present obligation of the entity to transfer an economic resource as a result of past events. An obligation is a duty or responsibility that the entity has no practical ability to avoid” (IFRS, 2018). Equity is defined “as the residual interest in the assets of the entity after deducting all its liabilities” (IFRS, 2018).

As a result of these definitions in the Conceptual Framework for Financial Reporting, an intercompany instrument with fixed repayment terms will meet the definition of a liability. In this case, the intergroup company is obligated to repay the instrument as per the fixed repayment terms of the contractual agreement. However, an intercompany instrument with no fixed repayment terms will meet the definition of equity. In this situation, the intergroup company has the practical ability to avoid repaying the instrument as there is no duty or responsibility to repay this instrument according to the contractual agreement. Therefore, this instrument would classify as a residual interest and thereby equity.

Consequently, an intercompany instrument with repayment obligations will be debt in nature and will be excluded from the provisions of section 8F. An intercompany instrument with no repayment obligations will be equity in nature and whether the instrument will be excluded from the provisions of section 8F will depend on whether it is *payable on demand*.

The investigation of this dissertation into section 8F and *payable on demand* will therefore focus on intercompany instruments that are equity in nature, as discussed above and illustrated within the diagrams.

3.3. Rationale behind the recharacterisation rules

The anti-avoidance rules of section 8F relating to intercompany instruments between intergroup companies focus on instruments which are labelled as debt, but which, in substance, are closer to being equity in nature as it is unlikely that the instrument will be repaid within a reasonable period of time (National Treasury, 2013:28).

"A key feature of debt is the holder's ability to redeem the capital amount loaned within a reasonable period" (National Treasury, 2013:29). Instruments without this key feature are equity in nature and the return on these instruments should rather be treated as equity returns, such as dividends (National Treasury, 2013:29).

This is particularly common between intergroup companies who are indifferent to the repayment of the capital amount, never mind the repayment of interest (National Treasury, 2013:29). In order to avoid the recharacterisation rules, the intercompany instrument must be fully payable within 30 years from the date of issue, specifically excluding instruments which are *payable on demand* (National Treasury, 2013:29). SARS is of the opinion that "the 30 years redemption period is a reasonable indication for equity" (SARS, 2013:9).

This makes sense as the rationale behind the implementation of section 8F is not to target intercompany instruments that have fixed repayment terms and will be repaid in a reasonable time frame, that is less than 30 years. The point of section 8F is to target intercompany instruments without any fixed repayments terms where the intergroup companies are essentially extending equity financing to one another without ever needing to be repaid. This section therefore targets intercompany instruments that in form are debt in nature, but in substance are equity in nature and therefore should not be eligible for interest deductions.

It is therefore of critical importance to further investigate the meaning of *payable on demand* and how this phrase influences the application of section 8F.

3.4. Taxpayers' responses to changes in tax legislation

In considering taxpayers' responses to changes in tax legislation, research was performed in relation to intergroup companies and intercompany instruments, specifically relating to the introduction of thin capitalization legislation and the impact that these rules have had on these intergroup companies on an international scale.

Krishna (2012) defines thin capitalisation as "the ratio of debt to equity. Where a corporation is heavily capitalized by debt claims, it is considered to be thinly capitalized. In certain circumstances, a corporation that is thinly capitalized by non-residents may not be entitled to a full deduction of its interest expense." As a result of the limited "allowable levels of intracompany loans" and restriction of interest deductibility that comes from the thin capitalisation rules (Weichenrieder & Windischbauer, 2008:2), these rules could be compared with the anti-avoidance provisions of section 8F.

In a German study on legislated thin capitalisation rules, Weichenrieder and Windischbauer (2008:3) found that multinational firms "reacted by reducing intracompany loans and increasing equity" as well as increasing third-party debt. Even though the application of the anti-avoidance provisions of section 8F only recharacterise the interest on the instrument and not the instrument itself (National Treasury, 2013:29) the recharacterisation of that interest may prompt a similar reaction for South African intergroup companies as it did for the multinational firms in the German study.

In addition to this, a study performed on foreign subsidiaries located in the Organization for Economic Cooperation and Development (hereafter referred to as the 'OECD') countries in the time period between 1996 and 2004, found that thin capitalisation rules "effectively reduce the incentive to use internal loans for tax planning but result in higher external debt" (Buettner et al., 2012:930). This once again affirms the sentiment that restrictive rules could play a role in the reduction of intercompany instruments and an increase in external instruments.

Besides this reduction in intergroup company instrument funding, Blouin et al. (2014:1) showed that the restriction as a result of thin capitalisation regimes "reduce the firm's aggregate interest expense bill but lower firm valuation." The interest denial provisions of section 8F (National Treasury, 2013:29), could therefore be compared to the reduced interest expense seen in the above study. If this can be compared with South African intergroup companies, it could identify a possible company devaluation where tax legislation changes become too restrictive.

3.5. Conclusion

An intercompany instrument with repayment obligations will be debt in nature and will be excluded from the provisions of section 8F. An intercompany instrument with no repayment obligations will be equity in nature and may be subject to the provisions of section 8F. It is therefore important to establish whether the intergroup company is obliged to repay that instrument. The 30-year rule also needs to be considered in this context.

Moreover, whether the equity in nature instrument will be excluded from the provisions of section 8F will depend on whether it is *payable on demand*. It is therefore of critical importance to further investigate the meaning of *payable on demand* and how this phrase influences the application of section 8F.

Chapter 4: The meaning of payable on demand

4.1. Introduction

The Collins Dictionary (n.d.) defines on demand to mean “available at any time that you want to use it.” Therefore, in the context of an intercompany instrument, the intergroup issuing company could be required to repay this instrument to the intergroup holding company with little or even no notice period.

Furthermore, as section 8F refers to the term instrument, it is also necessary to understand the meaning of this word. In paragraph (a) of its definition, section 8F(1) defines “instrument” as “any form of interest-bearing arrangement or debt issued by– a company that is resident.” The definition further discusses non-resident companies and controlled foreign companies, but these will not be further discussed for the purposes of this dissertation.

Moreover, Holt (2006) defines a financial instrument as “any contract that gives rise to a financial asset of one entity and a financial liability or equity instrument of another entity. The definition is wide and includes cash, deposits in other entities, trade receivables, loans to other entities, investments in debt instruments, investments in shares and other equity instruments.”

In the context of the term instrument, it is likewise important to understand the definition of a loan, as the case law that will be considered for *payable on demand* uses the term loan rather than instrument to which section 8F refers. “A loan is money, property, or other material goods given to another party in exchange for future repayment of the loan value or principal amount, along with interest or finance charges” (Kagan, 2019).

Therefore, it is evident from the above definitions that a loan would be included in the definition of an instrument and that the term loan can be understood within the context of an intercompany instrument and section 8F. Consequently, it is now possible to understand these terms with reference to the available case law.

4.2. *Fluxman*

As an employee of the defendant's business, the plaintiff received remuneration and a share of business profits that were to be reinvested in the venture. It was not a loan. It did not bear interest and the plaintiff was allowed to withdraw reasonable amounts from time to time. The intention of this verbal agreement was that the plaintiff was to invest capital in the business with the idea that one day he would take the business over after the retirement or death of the defendant.

However, the plaintiff resigned as an employee from the defendant's business without notice, thereby committing a breach of contract. The plaintiff left the business on 30 June, delivered the service termination letter on 1 July and demanded their undrawn share of business profits on 11 July. The defendant stated that the plaintiff was only entitled to the undrawn share of business profits upon the defendant's death or retirement from the business, as per their verbal agreement.

The trial Judge ordered that neither the plaintiff nor the defendant put forward sufficient evidence to secure judgment in their favour. It is important to note that the trial Judge ruled that the plaintiff failed to provide sufficient evidence that the agreement did not adequately specify the timing for payment.

One of the questions raised on appeal was the timing for payment of the plaintiff's undrawn share of business profits. When was the amount due by the defendant to the plaintiff payable? Determining the true terms of the agreement was the main difficulty of the case as this arrangement between the parties was verbal. The other issues do not need to be addressed for the purposes of this dissertation.

Counsel for the plaintiff argued that if the undrawn share of business profits was to remain in the business as per the verbal agreement, that undrawn share would either have been *payable on demand*, payable on reasonable notice by the plaintiff or payable on one month's notice of the termination of employment.

Tindall, J.A. stated the following regarding timing for payment at page 294:

> Pothier (Mutuum, Oeuvres, vol. 5, sec. 48), dealing with contracts of loan in which no term is mentioned for repayment, states that the lender ought to grant a time more or less long according to the circumstances, in the discretion of the Judge, for the restitution of the sum lent, and that the borrower has against the demand of the lender, if he sues him before this time, an exception by which he ought to obtain from the judge a delay for the payment.

This suggests that where a loan, or in the context of this case an agreement, does not have repayment terms, then the context and circumstances need to be considered in deciding when the amount becomes due and payable. Furthermore, if the lender demands payment prematurely, then the borrower has a right to obtain a delay in respect of that payment.

4.3. *Oneanate*

Standard Bank of SA Ltd, a commercial banker, sued Oneanate Investments (Pty) Ltd, an investment company, for payment of amounts owing on overdraft. The plaintiff claimed that the defendant had acknowledged its indebtedness to it and had undertaken to liquidate the amount owing of R1 654 889,66.

The defendant alleged that the money that it had borrowed from the bank had all been repaid. It also filed a special plea claiming that certain amounts owing to the bank were prescribed and therefore unrecoverable. This case dealt with a great deal of further issues, but the discussion for the purposes of this dissertation will be limited to prescription and due and payable.

In terms of the context and circumstances of this case, it is important to ask when each debt was due and payable. As the amounts were owing on overdraft, the debt was not subject to any repayment terms and therefore it was critical to determine when prescription began. It is also important to note that this case considered English, Canadian, Australian and New Zealand law in arriving at its judgement.

Selekowitz, J stated the following regarding *payable on demand* on page 160:

> A loan without agreement as to a time for repayment is at common law repayable on demand. Although by no means linguistically clear, the phrase ‘payable on demand’ is used in this context in our law to mean that no specific demand for repayment is necessary and the debt is repayable as soon as it is

> incurred. When suing for repayment there is no need to allege a demand and such a demand is not part of the plaintiff's cause of action.

This suggests that a debt without repayment terms should be considered as immediately repayable from the date of the agreement. *Payable on demand* could therefore mean that the loan is repayable as soon as it is incurred and that no demand notice is required to render that debt due and payable.

Having said this, Selekowitz, J also included a discussion regarding foreign cases on page 160:

> In considering many of the foreign writings, it is clear that they treat the phrase 'payable on demand' as meaning payable after demand.

This might imply that some foreign jurisdictions require a demand notice in order to render a debt as due and payable. As a consequence, *payable on demand* might mean that a loan only becomes repayable from the date that repayment has been requested in those foreign jurisdictions. It might therefore be necessary to consider a couple of foreign cases.

Selekowitz, J, on pages 160 and 161, referenced *Hartland v Jukes* (1863) 32 LJ Ex 162 ((1863) 1 H & C 667):

> …it was contended that the prescriptive period began to run against a banker as soon as the customer incurred an overdraft. It was held, however, that in the absence of an acknowledgement which would normally have occurred had a balance been struck, and no claim having been made by the bank, the debt was not due. It was said that '. . . we think the mere existence of the debt, unaccompanied by any claim from the bank, would not have had the effect of making the statute run from that date'.

This might indicate that prescription does not begin simply as a result of the existence of a debt and that notice is required from the lender in order to render the loan due and payable. This might suggest payable after demand rather than *payable on demand* as implied above.

In contrast to this, Selekowitz, J, on page 161, also referenced *Parr's Banking Co Ltd v Yates* [1898] 2 QB 460:

> An opposite view was taken some years later in, where the Court of Appeal decided that prescription started to run in respect of each item from the date it appeared in the overdrawn account.

Selekowitz, J seems to agree with *Parr's Banking Co Ltd v Yates* even though the judge went on to discuss that some international authors have doubted the ruling and questioned whether or not the case still remains as good in law. From a South Africa perspective at least, the decision that prescription begins immediately seems to be in keeping with the context of our law.

In addition to this, on page 165, Selekowitz, J reiterated the above sentiments regarding prescription and due and payable:

> I find, further, that each such loan is, in the absence of any alternative agreement, repayable from the moment that the advance is made and that no specific demand for repayment need be made by the bank to make the loan due and repayable. The effect of these findings is that prescription begins to run against the bank in respect of moneys loaned on overdraft as soon as the advance is made.

Therefore, the overall summation here is that a loan that is *payable on demand* should be regarded as repayable from the date of the agreement. No repayment demand is required in order to render the debt as due and payable. Prescription begins immediately. The exception to this occurs in a situation where the parties agree otherwise.

However, Selekowitz, J did make the following note in relation to an alternative agreement on page 164:

> I accept that where, for example, a businessman seeks an overdraft from his bank he will often intend to use the overdraft facility to fund his business on an ongoing basis and that it could not be said that he intended the loan to be repayable on demand. It may well be that in such circumstances it can be established that the parties varied the usual role but each such case will have to be decided on its own facts.

Even though the context and circumstances are of critical importance to the facts and merits of each individual case, Selekowitz, J did go on to state that this would be regarded as an exception and that providing notice before requiring repayment cannot be regarded as a general rule.

4.4. *Phasha*

The applicant purchased a right of provisional leasehold over a property and its improvements in Orlando, Soweto from the respondent in 1985. The applicant never made any payment in terms of the agreement and the respondent never registered the right of leasehold. The respondent decided to sell the property to a different party between 1996 and 1997 and put the property on the market in 1998.

Consequently, the applicant tried to stop the respondent from selling the property to a different party. The respondent argued that the applicant's legal claim had prescribed. As a result, the two main issues that had to be determined in terms of this application for an interim interdict were prescription and rights in terms of leasehold or ownership. For the purposes of this dissertation, the focus will be on prescription.

Satchwell, J stated the following regarding performance at page 458:

> Where the contract is silent as to the time for performance "a right to claim performance under a contract ordinarily becomes due according to its terms or, if nothing is said within a reasonable time, which, in appropriate circumstances can be immediately" (Munnikhuis v Melamed NO 1998 (3) SA 873 (W) at 887E). Mr Gautschi submitted that, in the present instance, performance was immediately due by the respondent. To my mind, what may and should be considered a reasonable time for performance by the respondent can only be decided by reference to the nature of the contract entered into between the parties and the interrelationship of the obligations undertaken by both of them.

It is therefore evident that a loan with no repayment terms should be repayable within a reasonable time period. The intention of the parties and their agreement is key in deciding what would classify as a reasonable amount of time. This time period could be immediate, or it could give the parties time to perform their contractual obligations, depending on the situation and the facts at hand.

Moreover, Satchwell, J suggested the following regarding *payable on demand* at page 462:

> It often happens that the creditor has the right to determine when performance shall be made as in the case of a debt payable on demand. Our courts have frequently adverted to the undesirability of the creditor being in a position to defer the running of performance indefinitely by merely refraining from making

> a demand. Such a creditor would “wield a power to regulate the period of performance applicable to his claim, according to his whim or fancy” (Mahomed v Yssel and others 1963 (1) SA 866 (D) at 870 G).

The above considers the opposite side of the concept of *payable on demand*, where a loan without repayment terms is labelled as such and the lender does not demand payment. When does such debt become due and payable? The suggested ability of a lender to be able to manipulate the period of performance implies that a loan that is *payable on demand* is not immediately due and payable, rather that demanding payment is required in order to commence prescription.

4.5. *Stockdale*

The appellants provided a loan to the respondent so that the respondent could settle a bond with a bank. The respondent signed two acknowledgements of debt with the appellants acknowledging the amount owed in terms of that loan. At that time, the respondent was married to the appellants’ son.

Initially, the appellants lodged a claim against the respondent in the magistrate’s court for the repayment of that debt. That magistrate’s court upheld the respondent’s special plea of prescription against that claim. Subsequently, the appellants appealed the magistrate court’s decision and it was necessary to determine whether the respondent’s special plea of prescription was valid and that the appellants’ claim was correctly dismissed on that basis. In other words, that the claims against the respondent had prescribed.

In light of the pertinent facts of this case, it is important to note the following: Firstly, neither the appellants’ son (to whom the actual money was lent) nor the respondent (who was treated as an actual debtor), could afford to repay the loan immediately or within 30 days of any immediate demand. Secondly, based on the evidence, the loan could not be regarded as immediately repayable. The loan would only become due if certain significant changes occurred, such as when the son and the respondent divorced, etc. Recovery of the amount owing would then only occur once notice to repay the loan was received. There was no specific date for demand for repayment nor was there any condition linked to that demand for repayment.

In terms of the context and circumstances of this case, it is therefore important to ask the question of whether the prescription commenced on the debts immediately, that is the signature of the acknowledgements of debt, or whether the prescription commenced when notice was given by the appellants to the respondent.

At para 15, Traverso AJP stated the following:

> It is a general rule of law that in all obligations in which a time for payment has not been agreed the debt is due forthwith. However, it is also clear that this may be qualified in the light of the particular circumstances of the case. *Voet* 12.1.19 says that in the case of a loan for consumption, where no time for repayment has been fixed, the money must be repaid, "not forthwith, but after the passage of a moderate time, so that in the meantime the borrower will have been able to enjoy at least some advantages out of the loan and the use of the money." This sentiment was echoed by Mason J in the case of *MacKay v Naylor* 1917 TPD 533 at 538, where the court held that a reasonable time must be allowed to the borrower to enable him to have some "real benefit from the transaction." The court found that "the same rule is applied in the case of a loan whether of money or articles of consumption."

Moreover, at para 18, Traverso, AJP quoted *Fluxman* with regards to a loan with no repayment terms:

> The lender ought to grant a time more or less according to the circumstances.

It is therefore clear that the circumstances of the particular case must be considered in determining obligation to make repayment where no such repayment terms have been stipulated. Under the circumstances and context of this particular case, the appellants could not reasonably have expected to demand repayment as they were aware of the fact that the respondent could not afford to repay the loan immediately.

Furthermore, where no repayment terms have been stipulated, the debt cannot be immediately repayable. Immediate repayment would not afford the borrower the ability to enjoy the advantages or usage of that loan. The borrower needs to derive some benefit from the transaction and therefore a reasonable period of time is required before the debt becomes due and repayable.

This is a logical principle as debt is raised for the purposes of funding. If the borrower is unable to enjoy the advantages or usage of the loan, what was the purpose of entering into the transaction in the first place.

4.6. *Praesidium*

A series of loans were made by GBS Mutual Bank to Sapphire Finance (Pty) Limited, from June 2004 to June 2006. The case included six acknowledgments of debt, totaling an amount of R5,5 million in aggregate.

In light of the pertinent features of this particular case, it is important to note that neither the plaintiff nor the defendant were a party to the loans. The plaintiff sued as a cessionary of the claims by GBS Mutual Bank. The defendant was sued on the basis of being liable as a surety and co-principal debtor of the debts of Sapphire Finance (Pty) Limited, which was in the process of liquidation.

It must further be noted that the terms of the acknowledgements of the debt did not provide when repayment was due. The defendant also did not have any knowledge of the outstanding balances of each loan, which is a legal requirement.

In terms of the context and circumstances of this case, it is therefore important to ask the question of whether the prescription commenced on the debts immediately, that is the signature of the acknowledgements of debt, regardless of the fact that the acknowledgements did not provide repayment terms and that the defendant was not privy to the outstanding balances of the individual loans.

In this case, Davis, J stated the following regarding prescription at page 11:

> Prescription in respect of the loans underlying an acknowledgement of debt, with one exception, commenced running on the respective dates of the acknowledgement. Mr Blumberg made his submission on the basis that five of the six acknowledgements of debt, to which reference has been made, did not provide a time for the repayment of the loan. Where there is no agreement as to the time for the repayment of the loan, the loan must be considered at common law, to be “repayable on demand”.

It is therefore evident that where the parties to a loan have not agreed on repayment terms, that loan must be *payable on demand*. Prescription is therefore deemed to commence as soon as the loan was concluded, that is, when the debt is incurred. Or in the context and circumstances of this particular case, prescription of the individual loans was deemed to commence with the corresponding acknowledgements of debt.

In connection with this, Davis, J quoted Selekowitz, J in *Oneanate*. In that case, it was suggested that *payable on demand* means that the debt is repayable as soon as it is incurred and that no specific demand for repayment is necessary.

This principle of *payable on demand* delivered by *Oneanate* is therefore confirmed in *Praesidium*. The debts were repayable as soon as the acknowledgements of debt were signed, regardless of the fact that those acknowledgements did not provide any repayment terms. No specific demand for the repayment of those debts was necessary in order to render them due and payable.

Moreover, Davis, J also suggested that this approach was correctly followed in *Stockdale*. Where payments terms have not been agreed upon by the parties, the debt is due immediately. However, the stark difference in this case being that the circumstances of the particular situation must be considered in determining obligation to make repayment where no such repayment terms have been stipulated.

This thinking is consistent with this dissertation as it has already been established that context, circumstances, intention and purpose are of key importance and that each case should be judged on its own merits.

4.7. ***Trinity***

The applicant lent R3 050 000 to the respondent in terms of a loan agreement in September 2007. This loan agreement stipulated that the debt was due and payable within thirty days of the applicant demanding repayment. The loan capital was paid to the respondent in three tranches in February 2008, five months after the loan agreement had been signed. The applicant and the respondent corresponded regarding repayment during September 2013, but the respondent made no such repayment. The applicant served the respondent with a letter of demand requiring repayment of the debt in December 2013, but the respondent denied the debt.

Consequently, the applicant applied for the liquidation of the respondent, on the basis that it was unable to settle its liabilities, in July 2014.

The respondent argued that the applicant's claim for repayment of the loan had prescribed in February 2011 as debt prescribes after three years. The respondent further argued that debt which is *payable on demand* is immediately repayable and that demand for repayment is therefore unnecessary. Moreover, the respondent also argued that a lender cannot delay the commencement of prescription by failing to demand repayment.

In light of the pertinent facts of this case, it was important to ask three questions. Firstly, was the respondent's argument of prescription valid? Secondly, did the contractual agreement intend to delay prescription by deferring when the debt become due and payable? Thirdly, had Trinity's claim prescribed?

Mojapelo, AJ, in the minority judgement, stated the following regarding *payable on demand* at para 41:

> A further principle has been developed, based on policy considerations, which provides that a creditor should not by his or her own inaction delay the running of prescription. This policy-based principle appears to have influenced courts to accept as a general rule that all debts payable on demand are immediately enforceable on the conclusion of the contract, and that it is at this point that prescription begins to run.

This suggests that a loan that is *payable on demand* should be considered as immediately repayable form the date of the agreement. In this case, prescription would also commence immediately.

However, Mojapelo, AJ suggested the following regarding a demand condition at para 43:

> However, the parties to an agreement may intend that demand be a condition precedent to the enforcement of the debt, and consequently, the debt will be "due" only when demand is made in terms of the agreement. This sound principle of contracts has been accommodated by the courts as an exception to the general rule stated above.

As a result, even though it is generally accepted that *payable on demand* is considered to mean that the debt is immediately due and payable, parties can specifically agree to include a demand condition within the contractual agreement. In this case, the loan will only be due and payable once the lender has demanded repayment, that is, payable on the demand of the lender.

On the other hand, Mojapelo, AJ stated the following regarding the other side of *payable on demand* at para 48:

> What of the creditor who fails to exercise the right to make a demand for a prolonged or even indefinite period? Firstly, the latter. It is within the creditor's discretion to enforce or not to enforce the debtor's obligation to repay. Secondly, as for the creditor who makes demand after a prolonged delay, the court would interpret the agreement to discern the intentions of the parties and read in that such a right must be exercised by the creditor within a reasonable period. What is reasonable will depend on the facts of each case. This formulation would honour the parties' intentions while giving effect to the purposes of prescription.

Where a demand condition is a provision of the loan agreement, the lender cannot delay prescription or defer due and payable by not demanding payment. The payment demand would have to be made within a reasonable period. What constitutes a reasonable period would depend on the context and circumstances of the specific case.

Moreover, Mojapelo, AJ posed the following regarding "due" at para 62:

> In actual fact, however, the loan capital was only paid to the debtor in three tranches in February 2008, more than five months later. An interpretation that holds that the repayment of the debt was "due" immediately would lead to an absurdity in that the debt would then be held to have been due (repayable) even before the capital had been paid to the debtor. It is the kind of absurdity that *Endumeni* urges us to avoid.

In the context and circumstances of this particular case, the debt could not have been immediately repayable from the date of the loan agreement as the capital was only paid to the respondent five months after the contractual agreement had been signed. A loan cannot be repayable before the capital has been received. Therefore, regardless of the general rule regarding of *payable on demand*, it is submitted that the facts at hand need to be considered so that parties can reach logical conclusions.

Additionally, Mojapelo, AJ suggested the following regarding the term of a loan at para 58:

> Furthermore, it appears that the parties intended the loan to be a long term one, repayable after a long period, certainly long after the date on which the loan was advanced. They did not anticipate the creditor taking steps to enforce repayment immediately after advancing the loan capital.

Once again, considering the specific facts of this particular case, it was evident from the parties that the debt was intended to be long term. As previously stated, this is a logical principle as debt is raised for the purposes of funding. If the borrower is unable to enjoy the advantages or usage of the loan, what was the purpose of entering into the transaction in the first place. It therefore resubmitted that a reasonable period of time is required before a debt can become due and repayable so that the borrower can derive some benefit from the transaction.

Cameron, J, in the majority judgement, referenced *Oneanate* at para 102:

> *Oneanate* is instructive…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.

It is therefore evident that Cameron, J and concurring other judges agree with *Oneanate* with regards to the following: Firstly, that a loan that is *payable on demand* should be regarded as repayable from the date of the agreement. Secondly, that no repayment demand is required in order to render this debt as due and payable. Thirdly, that prescription begins immediately. Fourthly, that the exception to this occurs only in a situation where the parties agree otherwise. It must also be noted that Mojapelo, AJ cited *Oneanate* in the minority judgement at para 42, agreeing with these same principles.

Furthermore, Cameron, J quoted *Stockdale* at 127:

> The Court reinforced the general principle: "in all obligations in which a time for payment has not been agreed the debt is due forthwith. However, it is also clear that this may be qualified in the light of the particular circumstances of the case."

Even though Cameron, J held that a loan that is *payable on demand* should be regarded as repayable from the date of the agreement, the judge agrees with *Stockdale*. The circumstances of the particular case must be considered in determining obligation to make repayment where no such repayment terms have been stipulated. Context and circumstances are therefore a key part of the decision-making process in determining the meaning of *payable on demand* in relation to the facts of a particular case.

4.8. Conclusion

From the above analysis it is evident that *Oneanate*, *Praesidium* and *Trinity* are in agreement that a loan without repayment terms should be deemed to be *payable on demand*. That is, the debt should be regarded as repayable from the date of the agreement. No repayment demand is required in order to render the debt as due and payable. Prescription begins immediately. The exception to this occurs in a situation where the parties agree otherwise, but that the lender should not take advantage of any such demand condition. *Praesidium* and *Trinity* both cited *Oneanate*.

On the other hand, *Fluxman*, *Phasha* and *Stockdale* agree that the context, circumstances, intention and purpose need to be considered in deciding when a debt without repayment terms becomes due and payable. *Phasha* goes on to state that a reasonable time period is required before the loan can become due and payable and that this reasonable time period would depend on the situation and the facts at hand. The case also suggested that a demand notice is required in order to render the debt as due and payable. *Stockdale* agreed with this concept of a reasonable time period and that the borrower needs to derive some benefit from the loan agreement and enjoy the advantages and usage of such debt. *Stockdale* also cited *Fluxman*.

Although *Oneanate* did agree that context, intention and purpose were of some importance to the facts and merits of each individual case, only in exceptional circumstances would this overthrow the general rule of *payable on demand* as discussed above.

Furthermore, *Praesidium* and *Trinity* did also agree with the judgement brought down in *Stockdale*. Even though *payable on demand* should be interpreted to mean that the debt is due immediately, context, circumstances, intention and purpose could also be considered. *Trinity* also suggested that a reasonable time period should be considered.

<u>Application to intercompany instruments</u>

Applying the general rule of *payable on demand,* as discussed above, would suggest that as soon as the intergroup companies have concluded a loan agreement without specific repayment terms, this intercompany instrument would be inherently classified as *payable on demand* and would therefore not be subject to the provisions of section 8F. This would be irrespective of the fact that an intercompany instrument without specific repayment terms has no repayment obligation from a tax perspective nor would it meet the Conceptual Framework for Financial Reporting's definition of a liability and would therefore be equity in nature, as discussed in the section 8F chapter. This would suggest that all equity in nature intercompany instruments without repayment terms would automatically classify as *payable on demand* and would therefore be excluded from the provisions of section 8F.

This seems counterintuitive considering the intention behind the introduction of the anti-avoidance provisions of section 8F. With no repayment obligations in place, the intention of the legislation is to recharacterise the instrument, deny the interest deduction and possibly levy dividends tax. However, if all intercompany instruments are automatically classified as *payable on demand* regardless of the lack of repayment terms or obligation, this could potentially mean that an intercompany instrument would never be subjected to the provisions of section 8F.

It therefore seems more logical to include considerations of context, circumstances, intention and purpose in the meaning and interpretation of *payable on demand*. Some considerations that substantiate this thinking are as follows:

Firstly, similar to *Stockdale*, if the intergroup issuing company is unable to repay the intercompany instrument without repayment terms on demand, then that instrument cannot be automatically classified as *payable on demand*. If the intergroup holding company is aware of this fact, then repayment cannot be demanded and the debt cannot be immediately due and payable.

Secondly, once again in reference to *Stockdale*, intergroup companies should have the advantages and usage of the intercompany instrument. Debt is raised for the purposes of funding and if a loan without repayment terms is automatically repayable without a demand notice then this defeats the purposes of having raised the funds via debt in the first place. The intergroup issuing company requires at least a reasonable time period to benefit from the transaction before the debt becomes due and payable.

Thirdly, *Fluxman* and *Phasha* also made strong cases for the consideration of context and circumstances and *Phasha* held that a reasonable period of time was appropriate for loan without repayment terms given the intention of the parties and purpose of the agreement.

Fourthly, *Oneanate*, *Praesidium* and *Trinity*, did concede that circumstances, context, intention and purpose could be considered in determining when a loan without repayment terms is due and payable. This is regardless of the general rule of *payable on demand*. *Oneanate* did however note that this would only occur in exceptional circumstances.

It is therefore evident that additional considerations such as context, circumstance, intention and purpose need to be considered in determining the meaning of *payable on demand* based on the facts and merits of each individual case.

Chapter 5: Conclusions, recommendations and areas for future research

5.1. Conclusions

The many different possible interpretations of the phrase *payable on demand* have been investigated and summarised. *Payable on demand* together with the relevant provisions of section 8F have been interpreted. The meaning of *payable on demand* and section 8F in relation to intercompany instruments has been determined. It has also been shown that it is important to consider purpose, intention, context, language, circumstances, etc, in relation to the meaning of *payable on demand* and section 8F and its application to intercompany instruments. The research problem, questions and objectives have therefore been met.

The general rule that has been established is that a loan without repayment terms should be deemed to be *payable on demand*. That is, the debt should be regarded as repayable from the date of the agreement. No repayment demand is required in order to render the debt as due and payable. Prescription begins immediately.

However, regardless of this general rule, it has also been established that context, circumstances, intention and purpose must also be considered in the meaning and interpretation of *payable on demand*. It has been presented that intergroup companies should have the advantages of the usage of the intercompany instrument. It has been further presented that if the intergroup issuing company is unable to repay the loan immediately, then that company is unable to perform on demand. Overall, a reasonable amount of time is required in order to render the debt as due and payable, which is dependent on the facts and merits of each individual case.

5.2. Recommendations

Where intercompany instruments do not specify repayment terms, it is recommended that intergroup companies include a demand condition in these agreements. This demand condition will result in those intercompany instruments being payable after demand, instead of *payable on demand*. This can help to ensure that SARS will not be able to successfully argue the general rule of *payable on demand* based on the relevant case law, as discussed above.

Where SARS is able to successfully argue the general rule of *payable on demand*, those intercompany instruments would be rendered immediately due and payable. If SARS can further prove that the intergroup issuing company is not solvent and/or not liquid enough to repay that intercompany instrument immediately, they could prove that the intercompany instrument is not payable on demand and should therefore be subject to the provisions of section 8F. This would allow SARS to levy understatement penalties and interest, causing significant recharacterisation risk to the intergroup companies as previously discussed.

If intergroup companies are able to successfully insert a demand condition into their agreements, this should afford them the opportunity to enjoy the advantages and benefits of the intercompany instrument and provide them with a reasonable amount of time in which to repay the debt.

5.3. Areas for future research

Areas for potential future research include, but are not limited to the following:

Firstly, a financial statement analysis could be performed for a sample of intergroup companies. This could identify whether or not intergroup companies are labelling their intercompany instruments as *payable on demand* in the notes to their financial statements. In this case, the loan liabilities note for the intergroup issuing company would need to be scrutinised, including both the non-current and current portions of these instruments.

Secondly, instruments with conversion or exchange rights could be included in the scope of the research. These instruments were specifically excluded from the scope of this dissertation. However, the background reading and research identified that many publications and sources focus on the more complex aspects of section 8F, such as conversion and exchange rights. Further research could therefore be performed in this regard.

Thirdly, the scope of the research could be widened to include the entire connected person definition. In this dissertation, the scope of this definition was limited to intergroup companies. Further research could also be performed in relation to other persons included in the definition of connected persons.

Fourthly, further research could be performed in relation to the potential understatement penalty that SARS could levy on intergroup companies. That is, research could be performed to determine which ‘behaviour’ and corresponding understatement penalty percentage SARS could levy on these intergroup companies.

Fifthly, further research could be performed in relation to the 30-years rule contained within the provisions of section 8F. In other words, research could be performed to determine why SARS justifies that this 30-years rule is a reasonable indication for equity.

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