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MORA DEBITORIS AND THE PRINCIPLE OF STRICT LIABILITY: *SCOIN TRADING (PTY) LTD V BERNSTEIN* 2011 2 SA 118 (SCA)

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1 Introduction

Parties generally enter into contractual relations with the sincere intention to fulfil all the obligations created in terms of their contract. However, for various reasons, parties sometimes do not comply with the terms of their contract. Where a party fails to perform at the agreed date and time or after receiving a demand from the creditor, the debtor commits breach of contract in the form of *mora debitoris*.[1] The question then arises whether or not a debtor would also commit breach in the form of *mora debitoris* if the delay in performance cannot be attributed to wilful disregard of the contract or a negligent failure to perform on time. This was the question which the court had to determine in *Scoin Trading (Pty) Ltd v Bernstein*.[2]

2 Facts

The case of *Scoin Trading (Pty) Ltd v Bernstein*[3] dealt with a claim for payment of *mora* interest. The respondent was the executor of a deceased estate. The deceased was a coin collector and on various occasions had bought various valuable coins from the appellant. During August 2007 the appellant obtained a rare double-stamped one Pound gold coin from the *Zuid-Afrikaansche Republiek* and offered it for sale to the deceased. The deceased agreed to purchase the coin from the appellant for a price of R 1.95 million. The deceased paid a deposit of R 200,000 and agreed to pay the balance of the purchase price by the end of that year.

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1 *Victoria Falls and Transvaal Power Co Ltd v Consolidated Langlaagte Mines Ltd* 1915 AD 1; *West Rand Estates Ltd v New Zealand Insurance Co Ltd* 1926 AD 173; *Fluxman v Brittain* 1941 AD 273; *Microuticos v Swart* 1949 3 SA 715 (A); *Linton v Corser* 1952 3 SA 685 (A); *Union Government v Jackson* 1956 2 SA 398 (A); *Standard Finance Corporation of South Africa Ltd v Langeberg Ko-operasie Bpk* 1967 4 SA 686 (A); *Nel v Cloete* 1972 2 SA 150 (A); *Van der Merwe v Reynolds* 1972 3 SA 740 (A); *Ver Elst v Sabena Belgian World Airlines* 1983 3 SA 637 (A); *Chrysafis v Katsapas* 1988 4 SA 818 (A).

2 *Scoin Trading (Pty) Ltd v Bernstein* 2011 2 SA 118 (SCA).

Unfortunately, the deceased passed away in November 2007 before the balance could be paid. The respondent was appointed executor of his estate and he acknowledged liability for payment of the balance of the purchase price but denied liability for interest. As a result, the appellant instituted action in the KwaZulu-Natal High Court for payment of the balance of the purchase price plus interest at the prescribed rate of 15.5% per annum.

The respondent argued that the deceased was not at fault in failing to pay the balance due to his untimely demise and therefore was not in *mora* and could not be liable for *mora* interest. Secondly, the respondent argued that the passing away of the deceased rendered performance impossible.

3 Judgment

The KwaZulu-Natal High Court granted judgment for the capital sum, but dismissed the claim for interest. The court held that to be in *mora*, failure to perform had to be due to fault on the part of the debtor. Since the deceased had no fault in the failure to perform, there could be no *mora* and consequently no *mora* interest.

The court rejected the second argument and indicated that unless the contract expressly stipulated otherwise or the transaction involved a *delectus personae*, the death of a debtor did not amount to impossibility as the duty devolved on the estate of the deceased.

The matter then went on appeal to the Supreme Court of Appeal to determine if the estate was liable to pay interest on the balance of the purchase price. In a unanimous judgment, Pillay AJA indicated that *mora* interest is a form of contractual damages and does not depend on fault. To claim *mora* interest, a creditor must only prove that a debtor is in *mora* in the sense that payment was not made at the specified time. It is not necessary to prove any fault on the part of the debtor.

3 *Scoin Trading (Pty) Ltd v Bernstein* 2011 2 SA 118 (SCA).

4 Discussion

This judgment seems to fly in the face of conventional wisdom. *LAWSA*[4] explains that

> *[m]ora debitoris* is culpable failure on the part of a debtor to perform timeously in a case where performance still remains possible in spite of such failure.

Literature on the law of contract in South Africa have over the years tended to hold that fault is indeed an element of *mora debitoris*.[5] In one of the first textbooks on the law of contract in South Africa, Wessels[6] explains that

> [b]efore there can be *mora* (1) there must be a valid and enforceable claim; (2) the debtor must have failed to perform at the time when he should have done so; and (3) the failure or delay must have been due to the *culpa* of the debtor ...

and adds[7] that "before the delay amounts to *mora*, it must be culpable". Joubert[8] also argues that

> [t]he default must be due to the fault (culpa) of the debtor. The law readily accepts that there can be no *mora debitoris* when the default of the debtor is due to the fault of the creditor. Irrespective of whether the creditor is in *mora creditors* or not, the debtor is also excused because there is no fault on his part. We can therefore conclude that fault is indeed a requirement for *mora debitoris*. ... [P]ractice does not require the creditor to plead fault on the part of the debtor, nor to advance proof of fault specifically, this is so because mere delay leads to the inference of fault. The debtor should be allowed to put any absence of fault on his part in issue. He will be excused if there is no fault unless he undertook the risk of the particular cause which delayed performance upon himself ...

De Wet and Van Wyk[9] echoe this view and state that the delay must be due to fault on the part of the debtor or someone for whose conduct the debtor is liable. Van Jaarsveld *et al*[10] agree and mention that while fault is an element of *mora debitoris,*

4 Joubert and Faris (eds) *LAWSA* para 461.
5 Joubert and Faris (eds) *LAWSA* para 461; Zimmerman and Visser *Southern Cross* 307; Hutchinson and Pretorius (eds) *Contract* 277 (table 12.1), 278, 282; Van der Merwe *et al Contract* 293; Van der Merwe and Du Plessis *Introduction* 261 *et seq*; Lubbe and Van der Merwe 1999 *Stell LR* 151.
6 Wessels *Contract* 777.
7 Wessels *Contract* 778.
8 Joubert *Contract* 205.
9 De Wet and Van Wyk *Kontraktereg en Handelsreg* 162.
10 Van Jaarsveld, Boraine and Oosthuizen *Handelsreg* 162.

the creditor does not have to prove that the delay is due to the fault of the debtor. However, the debtor may raise absence of fault as a defence against a claim based on *mora debitoris*.

Zimmermann and Visser[11] explain that

> *mora debitoris* is defined as culpable delay on the part of the debtor in performing an obligation that is due and enforceable, and that remains capable of performance in spite of such delay.

Zimmermann, Visser and Reid[12] also note that

> in respect of many, if not most forms of breach the absence of fault on the part of the alleged contract-breaker will usually afford a good defence.

In a footnote, they add that

> [t]his seems to be so in regard to both forms of *mora*, to prevention of performance and, to a large extent, also to positive malperformance; the position in respect of repudiation is more complex.

Hutchinson and Pretorius[13] define *mora debitoris* as

> the culpable failure of the debtor to make timeous performance of a positive obligation that is due and enforceable and still capable of performance in spite of such failure.

They add[14] that

> [t]he delay must be due to the fault of the debtor or of persons for whom he or she is responsible. … The onus is apparently on the debtor to show that the delay was not due to his or her fault.

Christie[15] indicates that "it is not necessary to show that … default is willful or negligent". However, it is not clear whether Christie completely disregards fault as an

11 Zimmerman and Visser *Southern Cross* 306.
12 Zimmermann, Visser and Reid (eds) *Mixed Legal Systems* 306.
13 Hutchinson and Pretorius (eds) *Contract* 278.
14 Hutchinson and Pretorius (eds) *Contract* 282-283.
15 Christie *Contract* 519, 530.

element of *mora debitoris*, or whether he merely reiterates the view that the creditor does not have to prove that the delay is due to the fault of the debtor while the debtor could still raise absence of fault as a defence.

Kerr[16] indicates in this regard that

> failure to perform at the time when, or during the period within which, performance is due is, in the absence of a lawful excuse, a breach of contract because it is failure to do what one has contracted to do

and defines[17] *mora debitoris* as

> delay in performance, without lawful excuse, by the debtor; and the "debtor" is the party on whom the primary obligation to perform rests.

He does not explain what exactly would constitute a lawful excuse. Kerr does mention in a footnote, though, that "the point of view that fault may be a requirement is not supported".[18] However, this statement is made in respect of *mora creditoris* and not *mora debitoris*. Kerr[19] seems to view *mora* as a "breach of the time factor for performance"[20] and apparently views *mora debitoris* and *mora creditoris* as manifestations of the same form of breach.[21] This may mean that Kerr does not view fault as an element of *mora debitoris*. He certainly never mentions fault in any form as an element of *mora debitoris*.

If the performance amounts to payment of a liquidated debt, interest is payable from the date on which the letter of demand is received or the date on which summons is served.[22]

The judgement in *Scoin Trading (Pty) Ltd v Bernstein*[23] seems to be at odds with most of the literature on the law of contract, and there is apparently also a difference

16 Kerr *Contract* 607.
17 Kerr *Contract* 615.
18 Kerr *Contract* 615 n 282.
19 Kerr *Contract* 614 *et seq*.
20 Kerr *Contract* 614.
21 Kerr *Contract* 615-616.
22 Kerr *Contract* 616.
23 *Scoin Trading (Pty) Ltd v Bernstein* 2011 2 SA 118 (SCA).

of opinion relating to the requirement of fault in the case of *mora debitoris* among some leading authors. Consequently, one should first of all consider the historical sources from which our law pertaining to *mora debitoris* is derived to determine if there is any historical foundation for the view that fault is an element of *mora debitoris*.

5 Historical development

Poste and Whittuck[24] indicate that in Roman law

> *[m]ora* ... does not arise before one of two events; either the expiration of the term prefixed for payment, or the debtor's refusal to comply with the creditor's demand..[25]

Kaser[26] elaborates on this and explains that

> *[m]ora debitoris* required a debt in respect of a performance which was actionable and due as well as still possible and which the debtor had delayed owing to circumstances under his control ... This was understood to mean groundless delay in strict *certum* debts ... and intentional non-performance (*dolo malo*) in other obligations.

He seems to suggest that fault was not required for instances of non-performance where the quality, quantity and kind of performance was specifically stipulated, but fault in the form of *dolus* or intent was indeed required for instances of non-performance where the quality, quantity and kind of performance was not specifically stipulated. Kaser[27] bases this assertion on a passage of Julianus cited in the *Digest of Justinian*.[28] In the particular passage, Julianus indicated that whosoever, without fraudulent intent, went to trial was not regarded as being in *mora*[29] if performance was delayed as a result. But Julianus was clearly referring to civil proceedings and when he referred to "fraudulent intent" he was referring to the *bona fides* of a party

24 Poste and Whittuck *Institutes* para 110.
25 See also *D* 22 1 32.
26 Kaser *Roman Private Law* 194.
27 Kaser *Roman Private Law* 194.
28 *D* 50 17 63.
29 *D* 50 17 63: *Qui sine dolo malo ad iudicium provocat, non videtur moram facere*.

instituting or defending a claim, rather than the culpability of the debtor at the time of default. In this regard Poste and Whittuck[30] explain that

> [a] further condition of Mora is the absence of all doubt and dispute, at least of all dispute that is not frivolous and vexatious, as to the existence and amount of the debt. *Qui sine dolo malo ad judicem provocat non videtur moram facere,* Dig. 50, 17, 63. 'An honest appeal to a judge is not deemed a mode of Delay.'

Kaser's[31] reference to "intentional non-performance" is therefore questionable.

Van Zyl[32] similarly indicates that a debtor was generally judged to have committed *mora debitoris* in Roman law only if he wilfully delayed performance. He cites two passages[33] from the *Digest of Justinian* in support of this assertion. However, in the one instance[34] the passage indicates that one cannot be held in *mora* if there is no demand,[35] confirming the rule that the creditor had to demand performance if the date for performance was not stipulated. The other passage[36] is completely unrelated to breach of contract and deals with the freeing of slaves.[37] Certainly, neither passage supports the contention that only wilful delay of performance constituted *mora debitoris* in Roman law. Elsewhere, Van Zyl[38] reiterates the view that fault was an element of *mora debitoris* in Roman law. However, the principal citation[39] offered[40] in support of this view does not refer to fault in the sense of intent (*dolus*) or negligence (*culpa*) at all.[41] The supplementary references[42] which Van Zyl

30 Poste and Whittuck *Institutes* para 280.
31 Kaser *Roman Private Law* 194.
32 Van Zyl *Romeinse Privaatreg* 270.
33 *D* 50 17 88; *D* 40 5 26 1.
34 *D* 50 17 88.
35 *Nulla intellegitur mora ibi fieri, ubi nulla petitio est*.
36 *D* 40 5 26 1.
37 *Apparet igitur subventum fideicommissis libertatibus, ut in re mora facta esse his videatur et ex die quidem, quo libertas peti potuit, matri traderentur manumittendi causa, ex die vero, quo petita est, ingenui nascantur. Plerumque enim per ignaviam vel per timiditatem eorum, quibus relinquitur libertas fideicommissa, vel ignorantiam iuris sui vel per auctoritatem et dignitatem eorum, a quibus relicta est, vel serius petitur vel in totum non petitur fideicommissa libertas: quae res obesse libertati non debet*. ...
38 Van Zyl *Romeinse Privaatreg* 271.
39 *D* 22 1 32.
40 Van Zyl *Romeinse Privaatreg* 271 n 90.
41 *Mora fieri intellegitur non ex re, sed ex persona, id est, si interpellatus oportuno loco non solverit: quod apud iudicem examinabitur: nam, ut et Pomponius libro duodecimo epistularum scripsit, difficilis est huius rei definitio. Divus quoque Pius Tullio Balbo rescripsit, an mora facta intellegatur, neque constitutione ulla neque iuris auctorum quaestione decidi posse, cum sit magis facti quam iuris*.
42 *D* 44 7 45; *D* 45 1 91 3.

cites[43] deal with instances of supervening impossibility,[44] the perpetuation of an obligation[45] and the curing of *mora debitoris* by subsequently tendering performance.[46] Again, the cited passages do not provide any support for the contention that fault was an element of *mora debitoris* in Roman law.

Buckland[47] indicates that failure to discharge a legal obligation had to be wilful to constitute *mora* and cites a passage of Pomponius[48] in this regard. In the passage, Pomponius indicates that a debtor who is prevented from delivering performance when the object of performance is lost due to some wilful act by the debtor shall bear the loss.[49] This is clearly a reference to another form of breach – rendering performance impossible – and not to *mora debitoris,* so that Buckland's conclusion with regard to fault as an element of *mora debitoris* in Roman law is invalid.[50]

Interestingly, Kaser[51] explains that in the case of *mora creditoris*

> the failure of performance had to be due to the creditor's conduct ...; but he was in default, even if he was innocently unable to accept performance or to collect the object of the performance.

Since both *mora debitoris* and *mora creditoris* relate to delay of performance and both constitute negative malperformance, it would have been strange indeed if the creditor was held to adhere strictly to the contract, while the debtor was liable only for intentional breach.

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43 Van Zyl *Romeinse Privaatreg* 271 n 90.

44 *Is, qui ex stipulatu Stichum debeat, si eum ante moram manumiserit et is, priusquam super eo promissor conveniretur, decesserit, non tenetur: non enim per eum stetisse videtur, quo minus eum praestaret*.

45 *Sequitur videre de eo, quod veteres constituerunt, quotiens culpa intervenit debitoris, perpetuari obligationem, quemadmodum intellegendum sit*. ...

46 *... Et Celsus adulescens scribit eum, qui moram fecit in solvendo Sticho quem promiserat, posse emendare eam moram postea offerendo: esse enim hanc quaestionem de bono et aequo: in quo genere plerumque sub auctoritate iuris scientiae perniciose, inquit, erratur*. ...

47 Buckland *Roman Law* 336.

48 *D* 12 1 5.

49 *Quod te mihi dare oporteat si id postea perierit, quam per te factum erit quominus id mihi dares, tuum fore id detrimentum constat. Sed cum quaeratur, an per te factum sit, animadverti debebit, non solum in potestate tua fuerit id nec ne aut dolo malo feceris quominus esset vel fuerit nec ne, sed etiam si aliqua iusta causa sit, propter quam intellegere deberes te dare oportere.*

50 See also Thomas *Roman Law* 254 n 38, who cites *D* 12 1 5 (dealing with rendering performance impossible and not *mora debitoris*); *D* 16 3 1 22 (which deals with a failure to act on demand); *D* 19 1 3 9 (there is no such passage – *D* 19 1 3 has only four subparagraphs).

51 *Kaser Roman Private Law* 195. See also Van Zyl *Romeinse Privaatreg* 272.

Clearly, the current views that fault (and more particularly intent or *dolus*) was an element of *mora debitoris* in Roman law, are derived from at most tenuous sources and cannot be sustained. But what did the Roman jurists themselves have to say about the matter?

It was an accepted principle of Roman law that a debtor was considered to be in *mora* from the very moment when he delayed payment, and this rule applied in respect of all *bona fide* contracts.[52] Paul[53] explained that a debtor was in *mora* if he did not deliver performance to the creditor or to someone directed to receive performance on behalf of the creditor. Ulpian[54] indicated that an action could be instituted as soon as the promisor was in default, as the time fixed for performance of the obligation had elapsed. Marcianus[55] stated that interest became due through *mora* and Ulpian added[56] that interest was calculated from the date of default.[57] None of them noted any further requirements, such as fault on the part of the debtor, that had to be satisfied before a debtor would be in *mora* and therefore liable for *mora* interest.[58]

In fact, there is some indication that fault was not an element of *mora debitoris* in Roman law. Proculus[59] explained that where it was stipulated that a penalty would apply if the debtor did not perform by a specified date, the debtor who failed to perform by that date would be in *mora* and therefore liable for payment of the penalty, even if it was clear that the work could not be completed on time and even if the stipulator allowed an extension of the time for performance. The mere fact that the debtor failed to perform by the stipulated date constituted *mora*.

Ulpian[60] warned, though, that not every delay in performance amounted to *mora*. Where a debtor required some friends or his sureties to be present at the time when

52 *C* 2 41 3.
53 *D* 22 1 24 2.
54 *D* 45 1 72 2.
55 *D* 22 1 32.
56 *D* 17 1 10 3.
57 See also *C* 4 34 2.
58 ... *sed ubi iam coepit mora faciendae insulae fieri, tunc agetur diesque obligationi cedit*.
59 *D* 45 1 113.
60 *D* 22 1 21.

the debt was paid, the debtor was not in *mora* if payment was postponed as a result. The presence of the friends or sureties was probably required to witness the payment and may have fulfilled a function similar to the function of a receipt in modern commerce.[61] If the debtor intended to raise some lawful exception, any delay occasioned similarly did not amount to *mora*.[62] If the creditor caused the delay the debtor was not liable for being in *mora.*[63] Pomponius[64] suggested that *mora* occurred only if the debtor was not prevented by hardship from delivering that which he had always been able to deliver. Ulpian[65] shared this view and indicated that a debtor who was suddenly compelled to be absent on public business was not held to be in *mora*. The same applied where the debtor was held captive by the enemy.[66] Scaevola[67] added that a debtor was not in *mora* where the creditor waived his claim. Papinianus[68] also referred to the case where there was no-one to whom the money could be paid after the death of the creditor, so that the debtor was not in *mora* during that time. In the case of at least some of the excuses dealt with by the various Roman jurists, such as the raising of an exception or the calling of witnesses or sureties, the debtor would intentionally delay performance. As a result, these excuses cannot be said to exclude fault, but rather seem to amount to grounds of justification that would exclude the wrongfulness of the delay.

What becomes apparent if one reads through the various Roman texts dealing with *mora debitoris* is that none of the Roman jurists explicitly mentioned fault as an element of *mora*,[69] but there is some indication that fault was not required.[70] Because of this it can be concluded that *mora* in Roman law was not a *culpable* default in delivering performance, but rather a *wrongful* default.

61 *D* 22 1 21.
62 *D* 22 1 21, 22.
63 *D* 45 1 43. See also the similar views of Marcellus in *D* 46 3 72.
64 *D* 19 1 3 4.
65 *D* 22 1 23.
66 *D* 22 1 23.
67 *D* 2 14 54.
68 *D* 22 1 9 1.
69 See Paul *Sententiae* 2 12 7, 2 13 1, 3 8 4; *D* 2 14 54; *D* 18 4 21; *D* 18 6 17; *D* 18 6 19; *D* 19 1 3 3-4; *D* 19 1 47; *D* 19 1 49 1; *D* 19 1 51; *D* 19 1 54; *D* 21 2 69 4; *D* 22 1 8; *D* 22 1 9 1; *D* 22 1 12; *D* 22 1 14; *D* 22 1 17 3; *D* 22 1 21; *D* 45 1 113; *D* 45 1 127.
70 *D* 45 1 113.

The Roman law principles relating to *mora debitoris* were received into Roman-Dutch law. Voet[71] discussed *mora* at some length and defined[72] it as the wanton delay in delivering or accepting performance which is mostly committed by the debtor, but sometimes also by the creditor. *Mora ex re* occurs if there is delay where the date for performance is stipulated,[73] while *mora ex persona* occurs where a demand has been made and the debtor does not perform at the proper place and time.[74]

There is no indication that Voet viewed fault on the part of the defaulting party as an element of *mora*. De Groot[75] also failed to consider fault and indicated that mere default rendered the debtor liable. Similarly, Pothier[76] did not mention fault when he indicated that an improper delay in performance would render the debtor answerable to the creditor and liable for interest and damages.[77] However, Pothier did state[78] that a debtor would be liable for consequential damages in the case of wilful default, but generally not otherwise.

Voet[79] indicated that not every delay of performance amounted to *mora* as some instances of delay could be excused. In this regard Voet essentially reiterated the Roman law along the same lines as those set out by the Roman jurists. He also indicated that delay could be excused where a supervening event (*casus interveniens*) made timely performance extremely difficult, provided that the difficulty was not attributable to the negligence of the debtor or was not already present at the time when the contract was concluded.[80] Pothier also indicated that where a debtor was prevented from delivering performance through *casus fortuitus* or *force majeure*, he would not be liable for the delay,[81] but the debtor was obliged to inform the creditor of the circumstances which prevented performance.[82]

71 Voet *Commentarius ad Pandectas* 22 1 24 *et seq*.
72 Voet *Commentarius ad Pandectas* 22 1 24.
73 Voet *Commentarius ad Pandectas* 22 1 26.
74 Voet *Commentarius ad Pandectas* 22 1 25.
75 De Groot *Inleidinge tot de Hollandsche Rechts-Geleerdheid* 3 19 11.
76 Pothier *Traité des Obligations* paras 143, 146, 147.
77 Pothier *Traité des Obligations* para 159 *et seq*.
78 Pothier *Traité des Obligations* para 164.
79 Voet *Commentarius ad Pandectas* 22 1 29.
80 Voet *Commentarius ad Pandectas* 22 1 29.
81 Pothier *Traité des Obligations* para 148.
82 Pothier *Traité des Obligations* para 149.

As was the case under Roman law, it seems that Roman-Dutch law also viewed *mora* as a wrongful default rather than a culpable default, so that fault was not an element of *mora*.

At the same time the English Common law of contract was also developing its own rules relating to breach of contract and default in performance. In *Paradine v Jane*[83] the King's Bench established the principle of absolute liability in the English law of contract.[84] The plaintiff owned land which he rented to the defendant. During the English Civil War, Royalist forces took possession of the land and held it for three years until the Royalist forces collapsed in 1646. The plaintiff sued the defendant for breach of contract and payment of rent that was three years in arrears. The court held that

> when a party by his own contract creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract.

As a result, the defendant remained liable for the rent.

This principle of absolute liability was observed by English courts until the second half of the nineteenth century when the doctrine of impossibility was introduced. In *Taylor v Caldwell*[85] the respondents owned the Surrey Gardens and Music Hall, which they rented out to the plaintiffs on several dates commencing on 17 June 1861. On 11 June 1861 a fire reduced the music hall to ashes and the plaintiffs sued the defendants for failing to provide the music hall as stipulated in the contract. The Queen's Bench held per Blackburn J that when the existence of a particular thing, such as the music hall, is essential to a contract and the thing is destroyed through no fault of either party, the parties are released from their obligations in terms of the contract.

83 *Paradine v Jane* 1647 4 (KB).
84 Draetta 1996 *Int Business LJ* 548.
85 *Taylor v Caldwell* 122 ER 309.

The various historical sources of the various legal systems which shaped our modern South African law, and in particular the law of contract and our law relating to breach of contract, therefore do not lend support to the contention that fault is an element of *mora debitoris*.

6 Comparative analysis

If there is no solid historical foundation for the contention that fault is an element of *mora debitoris*, how did the authors of the various textbooks on the law of contract in South Africa come to include it in their respective works? Perhaps the principle was derived from a similar rule in some foreign law relating to breach of contract? Some guidance can then be provided by considering the laws relating to breach of contract in other jurisdictions, which could have influenced our modern law relating to *mora debitoris*.

Scots law in respect of negative malperformance is essentially based on Roman law and a debtor is in *mora* if the debtor wrongfully withholds performance.[86] In *Persimmon Homes Ltd v Bellway Homes Ltd*[87] Lord Drummond Young explained[88] that

> if a party to a contract is unable to perform his obligations, the reason for that failure is irrelevant. In particular, it is immaterial that he is unable to perform because he cannot obtain requisite funds ... Thus if a party who has undertaken to sell an area of land is unable to obtain the land, the reason for the inability is irrelevant; there is still an inability to comply with the ultimatum notice. This can be regarded as an example of the fundamental principle that contractual obligations normally involve strict liability.

In Scots law, interest on a contractual debt generally begins to run only once a judicial demand is made, and interest is calculated from the date of citation to the date of payment.[89]

86 *Wilson v Dunbar Bank Plc* 2008 SC 457 para 23 *et seq*.
87 *Persimmon Homes Ltd v Bellway Homes Ltd* 2012 CSOH 60.
88 *Persimmon Homes Ltd v Bellway Homes Ltd* 2012 CSOH 60 para 12.
89 *Persimmon Homes Ltd v Bellway Homes Ltd* 2012 CSOH 60 para 12.

Although the English law of contract and breach of contract is not derived from Roman law, contractual obligations in English law also generally impose a strict duty on the debtor to perform.[90] This, in turn, means that breach of contract is based on strict liability and fault is not an element of breach of contract in English law.[91]

A further implication of this principle of strict liability is that a claim for damages arising from breach of contract cannot at common law be apportioned on the basis of contributory negligence. Since fault is not an element of breach, contributory fault is irrelevant.[92]

The *Restatement (Second) of the Law of Contracts* in the United States provides in §235 (2) that any non-performance, when performance under a contract is due, is a breach.[93] The *Restatement* contains no provision which would suggest that fault is an element of breach. But if there is an uncured material failure by the other party to render performance which was due at an earlier time, the debtor may be excused for withholding performance.[94] The parties will be released from performance in the event of supervening impracticability where subsequent events, without the fault of the debtor, render the performance impracticable.[95] The same applies where supervening events frustrate the purpose of the contract, unless the parties agreed otherwise.[96]

Article 6:81 of the new Dutch *Burgelijk Wetboek* provides that the debtor is in default during the time that performance remains undelivered after it has become due, unless the delay is not attributable to the debtor. Delay in performance is not

90 *British and Commonwealth Holdings Plc v Quadrex Holdings Inc* 1989 1 QB 842 859; *Barclays Bank Plc v Fairclough Building Ltd* 1994 CLC 529 (QB) 542 *et seq*; *Aegean Sea Traders Corp v Repsol Petroleo SA (The Aegean Sea)* 1998 CLC 1090 (QB) 1106; *CTI Group Inc v Transclear SA (The Mary Nour)* 2007 2 CLC 530 (QB) 534.

91 *Forsikringsaktieselskapet Vesta v Butcher* 1989 AC 852 (HL) 879; *Tenant Radiant Heat Ltd v Warrington Development Corp* 1988 1 EGLR 41 (CA); *Barclays Bank Plc v Fairclough Building Ltd* 1994 CLC 529 (QB) 542 *et seq*.

92 *Forsikringsaktieselskapet Vesta v Butcher* 1989 AC 852 (HL) 879; *Tenant Radiant Heat Ltd v Warrington Development Corp* 1988 1 EGLR 41 (CA); *Barclays Bank Plc v Fairclough Building Ltd* 1994 CLC 529 (QB) 542 *et seq*.

93 See also §243 *Restatement (Second) of the Law of Contracts*, which deals with claims for damages for total breach.

94 §237 *Restatement (Second) of the Law of Contracts*.

95 §261 *Restatement (Second) of the Law of Contracts*.

96 §265 *Restatement (Second) of the Law of Contracts*.

attributable to the debtor if the debtor is not at fault, nor by law, juristic act or trade practice liable for the delay.[97] At first glance, breach of contract in Dutch law is then based on fault in terms of this provision. But since a contract is a juristic act, a debtor liable to perform an obligation in terms of a contract is generally in terms of that contract liable for any delay in the performance.[98] De Jong[99] indicates that the juristic act from which the obligation arises is decisive in determining whether or not the debtor should be liable for the delay, even though it may not be attributable to the fault of the debtor.[100] Delay in performance of a contractual obligation is therefore excused under article 6:75 only if the debtor is impeded through *force majeure* from performing.[101] The onus is then on the debtor to prove *force majeure* or other circumstances which would excuse the delay in performance.[102]

German law on breach of contract is somewhat different and more complex as it is based on the *Verschuldensprinzip* or fault principle.[103] Article 286(1) of the *Bürgerliches Gesetzbuch* (*BGB*) provides for *Verzug* or default if a debtor (*Schuldner*) fails to perform after receiving a notice from the creditor (*Gläubiger*) that performance is due[104] (or a specific time for performance has been specified and the debtor fails to perform on time).[105] Article 286(4) of the *BGB*, however, provides that the debtor is not in default for as long as default is the result of circumstances for which the debtor is not responsible. Some of the circumstances for which the debtor is not responsible can be derived from article 276 of the *BGB*. Article 276 provides in general that a debtor is responsible for intention and negligence, the implication being that the debtor is generally not liable in the absence of intention or negligence.[106] But since article 286(4), read with article 276 of the *BGB,* constitutes an exception to the rule relating to liability on the grounds of *Verzug* set out in article

97 Art 6:75 *Burgelijk Wetboek (BW)*.
98 Hartkamp, Tillema and Ter Heide *Contract Law* 132; Nieuwenhuis *et al Vermogensrecht* 552-553; Hartkamp *Compendium* 261.
99 De Jong *Verbintenissen* 18.
100 "... *kan de* rechtshandeling *waaruit de verbintenis voortspruit, de doorslag geven bij e beantwoording van de vraag of de tekortkoming al dan niet aan de debiteur moet worden toegerekend, hoewel zij niet aan zijn schuld te wijten is*".
101 Hartkamp, Tillema and Ter Heide *Contract Law* 132; Brahn and Reehuis *Vermogensrecht* 297, 309.
102 De Jong *Verbintenissen* 8.
103 Schwartze *Leistungsstörungen* 421.
104 Art 286(1) *Bürgerliches Gesetzbuch* (*BGB)*.
105 Art 286(2) *BGB*.
106 Schwartze *Leistungsstörungen* 421.

286(1) of the *BGB*, the party who relies on the exception must prove that exception. The burden of proof is therefore reversed and the debtor bears the onus to prove absence of fault – it is not necessary for the creditor to prove fault on the part of the defaulting debtor.[107] In addition, article 323 of the *BGB* provides that, in the case of a reciprocal contract, a creditor may rescind the contract if the debtor does not perform in accordance with the contract and fails to perform after an additional period for performance has been specified. Article 323(6) excludes rescission only if the creditor is solely or predominantly responsible for the circumstances which would allow for rescission, or if the circumstance for which the debtor is not responsible occurs at a time when the creditor has defaulted in acceptance of the performance. The implication, as Lorenz[108] explains, is that "fault is no prerequisite for terminating a contract if the debtor fails to comply with a duty incumbent upon him under the contract".[109] As a result, the German approach is not a strictly fault-based approach and lies halfway between fault liability and strict liability.[110]

Clearly then, it is highly unlikely that the view in terms of which, in the South African law of contract, *mora debitoris* is the *culpable* delay of performance by the debtor, is derived from any other major legal system.

7 South African law

In view of the historical development and comparative analysis set out above, I now return to the various textbooks on the South African law of contract that identify fault as an element of *mora debitoris*. *LAWSA*[111] does not refer to any authority to substantiate the view that fault is an element of *mora debitoris,* and that impairs its credibility in this regard.

Wessels[112] and De Wet and Van Wyk[113] base their assertion that fault is an element of *mora debitoris* on the reference that Steyn[114] makes to the requirement of

107 Lorenz 1997 *Edinburgh LR* 328.
108 Lorenz 1997 *Edinburgh LR* 329.
109 See also Zimmermann 2002 *Edinburgh LR* 271 278.
110 Lorenz 1997 *Edinburgh LR* 317 328.
111 Joubert and Faris (eds) *LAWSA* para 461.
112 Wessels *Contract* 778.

culpa.[115] However, they seem to have overlooked or ignored Steyn's[116] explanation of what he means with the word "*culpa*". Steyn[117] indicates that the debtor can avoid liability based on *mora debitoris* if the debtor can raise an *excusatio a mora*. One such *excusatio* arises if the debtor could or should not have been aware of the obligation to perform, as well as the time for and nature of the performance.[118] Another *excusatio* would be supervening impossibility.[119] In other words, Steyn[120] thinks of *culpa* not in the strict sense of "negligence" but rather in the broader sense of "blameworthiness". As a result, reliance on Steyn[121] for the proposition that fault is an element of *mora debitoris* is based on a misinterpretation of what Steyn[122] is actually stating.[123]

De Wet and Van Wyk[124] further refer to some case law in support of the view that fault is an element of *mora debitoris*. However, all of the cases[125] to which they refer deal with situations where the creditor was responsible for the delay. Since the respective debtors were not the ones delaying performance, there could be no *mora debitoris*. This means that De Wet and Van Wyk[126] are incorrectly equating wrongful conduct on the part of the creditor with culpability or the lack thereof on the part of the debtor.

Van Jaarsveld *et al*[127] also cite some of the cases[128] on which De Wet and Van Wyk rely[129] and therefore also err by confusing the issues of wrongful conduct by the

113 De Wet and Van Wyk *Kontraktereg en Handelsreg* 162.
114 Steyn *Mora Debitoris* 42.
115 See also *Repinz v Dacombe* 1994 3 SA 756 (E) 760.
116 Steyn *Mora Debitoris* 42.
117 Steyn *Mora Debitoris* 42 *et seq*.
118 Steyn *Mora Debitoris* 42.
119 Steyn *Mora Debitoris* 45.
120 Steyn *Mora Debitoris* 45.
121 Steyn *Mora Debitoris* 45.
122 Steyn *Mora Debitoris* 42 *et seq*.
123 *Legogote Development Co (Pty) Ltd v Delta Trust & Finance Co* 1970 1 SA 584 (T) 587.
124 De Wet and Van Wyk *Kontraktereg en Handelsreg* 162 n 35.
125 *Machanick v Simon* 1920 CPD 333; *Lloyd v Malcolmess & Co* 1921 EDL 50; *Leviseur v Frankfort Boere Ko-Operatiewe Vereeniging* 1921 OPD 80; *Van Loggerenberg v Sachs* 1940 WLD 253; *Hanekom v Amod* 1950 4 SA 412 (C); *Wehr v Botha* 1965 3 SA 46 (A).
126 De Wet and Van Wyk *Kontraktereg en Handelsreg* 162 n 35.
127 Van Jaarsveld, Boraine and Oosthuizen *Handelsreg* 162 n 30.
128 *Hanekom v Amod* 1950 4 SA 412 (C); *Wehr v Botha* 1965 3 SA 46 (A).
129 De Wet and Van Wyk *Kontraktereg en Handelsreg* 162 n 35.

creditor with the culpability of the debtor. In addition, Van Jaarsveld *et al*[130] state that the courts have been inconsistent in their approach relating to fault as an element of *mora debitoris*. Of the cases they cite, one[131] deals with a contractual term which made delivery subject to "contingencies, unavoidable or beyond our control" so that the question was not one of fault, but rather if delay caused due to war fell within the scope of the clause concerned. Another[132] involved a claim which the plaintiff failed to prove so that there was also no payment due in respect of which the defendant could be in *mora debitoris*. As a result, the issue of fault did not even arise. However, the third case[133] which they cite is interesting and is worth further elaboration. In *Legogote Development Co (Pty) Ltd v Delta Trust & Finance Co*[134] Viljoen J explained[135] that

> [t]he plaintiff relied on a term of the agreement in which a date for performance had been fixed, and it would have been sufficient to allege that the defendant had not performed before or on that day, and that the plaintiff suffered damages as a result. In expressing this view I have not lost sight of the statement by Wessels, *Law of Contract*, 2nd ed., para. 2858, that, before there can be *mora*, the failure or delay must have been due to the *culpa* of the debtor, but Steyn, *Mora Debitoris* (to whom *Wessels* refers) makes it clear at p. 42 what type of *culpa* he postulates, namely, that the debtor must or should have been aware of his obligation to perform timeously and of the nature of the performance. … Apart from the so-called *excusatio a mora* that he did not know and could not know the nature of his duty or obligation, the defence of impossibility of performance would always be open to a debtor, but the creditor need not allege or prove, in a case such as the present where a date for performance had been fixed, that the debtor was wilful or negligent in not performing timeously.

This is the only case to which Van Jaarsveld *et al*[136] refer, which deals expressly with the issue of fault as an element of *mora debitoris*. The court highlights the incorrect interpretation of Steyn,[137] as I explain above, and concludes that fault is not an element of *mora debitoris*. The last case which Van Jaarsveld *et al*[138] cite deals with the effect of temporary supervening impossibility and also does not relate to fault.

130 Van Jaarsveld, Boraine and Oosthuizen *Handelsreg* 162 n 30.
131 *Algoa Milling Co Ltd v Arkell and Douglas* 1918 AD 145.
132 *Sher v Frenkel & Co* 1927 TPD 375.
133 *Legogote Development Co (Pty) Ltd v Delta Trust & Finance Co* 1970 1 SA 584 (T).
134 *Legogote Development Co (Pty) Ltd v Delta Trust & Finance Co* 1970 1 SA 584 (T).
135 *Legogote Development Co (Pty) Ltd v Delta Trust & Finance Co* 1970 1 SA 584 (T) 587.
136 Van Jaarsveld, Boraine and Oosthuizen *Handelsreg* 162 n 30.
137 Steyn *Mora Debitoris* 42.
138 Van Jaarsveld, Boraine and Oosthuizen *Handelsreg* 162 n 30.

Zimmermann and Visser[139] base their view that fault is an element of *mora debitoris* on the case of *Victoria Falls and Transvaal Power Company Co Ltd v Consolidated Langlaagte Mines Ltd*,[140] where Innes CJ explained[141] that

> generally, the liability of a debtor for interest under the civil law depended (apart from the agreement) upon whether he was in *mora. Mora* is a wrongful default in making (or accepting) payment or delivery.

This case seems to indicate the exact opposite of what is contained in the main body of the text. In the other case which they cite,[142] Solomon AR explained[143] that a debtor had a duty to perform and "on failure to do so he places himself *in mora*". No mention is made of fault as an element of *mora debitoris*.

Still, in *Landau v City Auction Mart*[144] Watermeyer JA defined[145] *mora debitoris* as "culpable delay in delivery". However, firstly, this case dealt with a refusal to perform, rather than a mere delay, so that any discussion of *mora debitoris* is merely *obiter*. Secondly, the defendant in effect sought to raise the *exceptio non adimpleti contractus* by submitting that his duty to deliver the *merx* was subject to the prior payment of certain charges by the plaintiff.[146] As such, the use of the expression "culpable delay" may have been misplaced, as the question was not the fault of the defendant but the lawfulness of his refusal to perform.

There seem to be no clear precedents in South Africa which postulate fault as an element of *mora debitoris*, but there is a whole range of cases in which the courts address *mora debitoris* without referring to culpability or fault.[147] Much of the

139 Zimmermann and Visser *Southern Cross* 307 n 19.
140 *Victoria Falls and Transvaal Power Company Co Ltd v Consolidated Langlaagte Mines Ltd* 1915 AD 1.
141 *Victoria Falls and Transvaal Power Company Co Ltd v Consolidated Langlaagte Mines Ltd* 1915 AD 1 31.
142 *West Rand Estates Ltd v New Zealand Insurance Co Ltd* 1926 AD 173.
143 *West Rand Estates Ltd v New Zealand Insurance Co Ltd* 1926 AD 173 182-183.
144 *Landau v City Auction Mart* 1940 AD 284.
145 *Landau v City Auction Mart* 1940 AD 284 292.
146 *Landau v City Auction Mart* 1940 AD 284 291.
147 See *Victoria Falls and Transvaal Power Co Ltd v Consolidated Langlaagte Mines Ltd* 1915 AD 1; *West Rand Estates Ltd v New Zealand Insurance Co Ltd* 1926 AD 173; *Fluxman v Brittain* 1941 AD 273; *Microuticos v Swart* 1949 3 SA 715 (A); *Linton v Corser* 1952 3 SA 685 (A); *Union Government v Jackson* 1956 2 SA 398 (A); *Standard Finance Corporation of South Africa Ltd v Langeberg Ko-operasie Bpk* 1967 4 SA 686 (A); *Nel v Cloete* 1972 2 SA 150 (A); *Van der Merwe v Reynolds* 1972 3 SA 740 (A); *Ver Elst v Sabena Belgian World Airlines* 1983 3 SA 637 (A);

confusion relates to a misinterpretation of the reference which Steyn[148] makes to the requirement of *culpa*, to the effect that Steyn's explanation of what *culpa* entails is overlooked. Furthermore, the authorities which the various textbooks cite in support of the contention that fault is an element of *mora debitoris* invariably fall into the categories of unliquidated claims, cases were the creditor is the one causing the delay, cases where the date for performance was not determined and *interpellation* was required, or cases of *vis major* or *casus fortuitus*. These cases clearly do not deal with an absence of fault, but rather with the lawfulness of the delay.

8 Conclusion

In so far as existing literature suggests that fault is an element of *mora debitoris*, it is clearly wrong. No clear support for such a requirement can be found in Roman law or Roman-Dutch law and there is no clear precedent in South Africa which establishes that fault is indeed an element of *mora debitoris*. Furthermore, the principle that contracts impose strict liability to deliver performance is in conformity with the position in many other legal systems.

In final analysis, *mora debitoris* can be defined as the wrongful delay by the debtor of performance which is due and enforceable.[149] A debtor who is in default can avoid liability based on *mora debitoris* on the basis of certain grounds that would exclude unlawfulness. These include situations where the creditor is responsible for the delay. They also include instances where the debtor does not and cannot know that a particular debt is due, what the nature and extent of the debt is, or when the debt is due. They also include compelling circumstances such as *vis major* or *casus fortuitous*. Lastly, if a debtor can raise a valid exception against a claim for delivery of performance, that could also have the effect that the delay would not amount to *mora debitoris*.

Chrysafis v Katsapas 1988 4 SA 818 (A).

148 Steyn *Mora Debitoris* 42.

149 Van der Merwe *et al Contract* 293.

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List of abbreviations

BGB	*Bürgerliches Gesetzbuch*
BW	*Burgelijk Wetboek*
C	*Codex Justinianus*
D	*Digesta Justiniani*
Edinburgh LR	Edinburgh Law Review
Int Business LJ	International Business Law Journal
Stell LR	Stellenbosch Law Review