IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

Cases No: 5108/03
5105/03
5107/03
8588/04

In the matters between:

THE SOCIETY OF LLOYD'S	Plaintiff
and	
MARIANDL LIESELOTTE ROMAHN	Defendant
THE SOCIETY OF LLOYD'S	Plaintiff
and	
HANSJÖRG ILSE	Defendant
THE SOCIETY OF LLOYD'S	Plaintiff
and	
MARIANNE ILSE	Defendant
THE SOCIETY OF LLOYD'S	Plaintiff
and	
FRIEDRICH GEORG ILSE	Defendant

JUDGMENT: 03 MARCH 2006

VAN ZYL J:

INTRODUCTION

[1] In the four matters under consideration the plaintiff seeks provisional sentence against the defendants ("M Romahn", "H Ilse", "M Ilse" and "F Ilse" respectively) on the basis of judgments obtained against them in the High Court of Justice (Queen's Bench Division, Commercial Court), London, England ("the English Court"). H Ilse is the son of F Ilse and his wife, M Ilse. All the matters arise from substantially the same background facts and they all raise the same legal issues, save that in the matter

of F Ilse the defence of prescription has not been raised. The parties have hence agreed that the matters should, for the sake of convenience, be heard together.

[2] Mr A Thompson SC, assisted by Mr J E Joyner, appeared for the plaintiff in all four matters, while Mr M Seligson SC, with Mr E Fagan, appeared for the defendants. The court expresses its appreciation to them for their particularly useful presentations on behalf of the respective parties.

[3] The judgments against each of the defendants were, respectively, the following:

a) M Romahn: the amount of £277,013.79 and £500.00 costs, granted on 22 December 1999 under 1999 folio no. 1194;

b) H Ilse: the amount of £272,001.67 and £500.00 costs, granted on 22 December 1999 under 1999 folio no. 1192;

c) M Ilse: the amount of £435,747.73 and £55,588,54 interest, together with agreed or taxed costs, granted on 11 March 1998 under 1997 folio no. 1295;

d) F Ilse: the amount of £521,370.72 and £292,646,10 interest, together with costs summarily assessed in the amount of £6,000.00, granted on 13 May 2004 under 2002 folio no. 868.

[4] In its provisional sentence summons, the plaintiff averred that the defendants had submitted themselves to the jurisdiction of the English Court in terms of a "general undertaking" given by each to the plaintiff. This had occurred on 13 November 1986 (M Romahn), 3 November 1986 (H Ilse), and 23 October 1986 (M and F Ilse) respectively. In terms of clause 2.1 thereof, their rights and obligations arising from membership of the plaintiff, the underwriting of insurance, or any other matter referred to in the undertaking, would "be governed by and construed in

accordance with the laws of England". By virtue of clause 2.2 they irrevocably agreed that the courts of England would have the exclusive jurisdiction to entertain any dispute or controversy arising from or relating to their membership of the plaintiff or the underwriting of insurance business. They also agreed that a judgment in any proceedings brought in English courts would be "conclusive and binding upon each party and may be enforced in the courts of any other jurisdiction".

[5] In supporting affidavits in all four matters, one N P Demery, a solicitor of the High Court of England and Wales currently employed in the "legal and compliance department" of the plaintiff, stated that the respective judgments were "final and conclusive" in favour of the plaintiff. Although the judgments could be taken on appeal, the appeal procedure had been exhausted or the time for noting an appeal had lapsed. In terms of the *Judgments Act* of 1838, he added, interest on a "judgment debt" ran at the rate of 8% *per annum*.

[6] In their affidavits opposing provisional sentence, the defendants explained that they were underwriting members of the plaintiff, commonly referred to as "names". They admitted having entered into the "general undertaking" agreement containing the cited clauses. They also admitted not having paid the plaintiff the amounts claimed from them. They denied, however, that the plaintiff was entitled to payment of such amounts. In this regard they relied on a number of defences, three of which are still relevant. The first was that the claims in three of the four matters (excluding the claim against F Ilse) had prescribed in terms of South African law. The second was that the recognition and enforcement of the judgments would be contrary to public policy (*contra bonos mores*) in South African law, inasmuch as the defendants were precluded from raising fraud on the part of the plaintiff as a defence in English

courts. The third was likewise that enforcement of the judgments would be against public policy in South African law, in that the plaintiff was entitled, in English courts, to rely on a "conclusive proof" provision regarding the calculation of the amounts allegedly owing by the defendants.

[7] The defence of prescription was recently considered, under similar circumstances, in *Society of Lloyd's v Price; Society of Lloyd's v Lee.*[1] In those matters, to which I shall refer collectively as "the *Price* case", Mynhardt J held that the claims in question had indeed prescribed. Although this court is not bound by the reasoning of the learned judge, it is, of course, of strong persuasive value and authority. I shall return to it in due course.

BACKGROUND

[8] The background facts and circumstances giving rise to the present disputes have been set forth in the opposing affidavits of the defendants, with special reference to the case of *Society of Lloyd's v Fraser and Others.*[2] They were likewise dealt with in some detail in the replying affidavits of the plaintiff, deposed to by Mr Demery aforesaid. He professed to have had some twenty-five years of experience as a solicitor and to have been intimately involved in the plaintiff's litigation over the past decade. For purposes of dealing with the defences raised by the defendants, he provided an overview of the plaintiff's operations and the background to what is known as the Equitas reinsurance contract. I shall deal only with what I regard as the most salient aspects thereof for purposes of considering the relevant issues.

[9] Although the plaintiff may trace its origins to the seventeenth century, it was

1 2005 (3) SA 549 (T) (also cited as *Society of Lloyd's v Price; In re Society of Lloyd's v Lee* [2005] 2 All SA 302 (T)).
2 [1998] CLC 1630 (also in [1999] 3 Lloyd's LR 156 (CA)).

formally established only by *Deed of Association* in 1811 and was thereafter regulated by the *Lloyd's Act* of 1871, as amended on various occasions prior to its substitution by the current *Lloyd's Act* of 1982. Over the years it became a very powerful and influential financial institution in the world of insurance, both in the United Kingdom and elsewhere in the world of commerce, including the United States of America and Canada. It also provided investment opportunities, attracting a large number of investors who chose to become underwriting members or, as they have come to be known, "names".

[10] The increase in the number of names became particularly prominent during the 1980s, when the plaintiff's insurance market experienced an under-capacity arising, for the most part, from asbestosis claims emanating from the United States of America. It thereupon recruited a considerable number of new underwriting members through the good offices of members' and managing agents, who would advise them as to the syndicate or syndicates they should join for purposes of underwriting. Many of these syndicates and their members, however, soon found themselves in serious financial difficulties. Inasmuch as the plaintiff's relationship with them was not that of insurer and reinsurer, the liability in respect of the underwritten policies would fall squarely on the members of the syndicate which had underwritten the policy in question.

[11] To counter the inevitable losses facing them, groups of members took action and successfully instituted claims for damages against members' or managing agents and even against auditors who had attracted liability by their conduct. With a view to averting an anticipated avalanche of litigation, the plaintiff developed, by means of its bye-law 22 of 1995, a "reconstruction and renewal scheme" ("R&R scheme"). This

was directed at settling claims, by and against its members, by virtue of a mutual waiver of claims arising before the end of 1992. In effect it was a "compulsory reinsurance and run-off scheme" by which members were required to "run-off" their outstanding liabilities and to reinsure them with a newly formed insurance body known as Equitas Reinsurance Limited ("Equitas"). Those who accepted the scheme received the benefit of having their liabilities discounted by means of various debt credits. Those who refused to accept it, while forfeiting these benefits, were still compelled to reinsure with Equitas and to pay premiums in respect thereof.

[12] The plaintiff's power to make bye-laws emanates from section 6(2)(a) of the *Lloyd's Act* 1982. This authorises the plaintiff's council to "make such bye-laws as from time to time seem requisite or expedient for the proper and better execution of Lloyd's Acts 1871 to1982 and for the furtherance of the objects of the Society". In accordance with this power the council made bye-law 20 of 1983, which empowered it to appoint a "substitute agent" to take over, wholly or partially, a member's underwriting business. Pursuant hereto the council appointed Additional Underwriting Agencies (No 9) ("AUA9"), a company in the Lloyd's stable, as a substitute agent to take over all non-life insurance business of its members transacted before the end of 1992. It was in fact required to give effect to the R&R scheme by concluding with Equitas, on behalf of each member, a reinsurance and run-off contract effective from 3 September 1996. On 2 October 1996 Equitas duly assigned to the plaintiff its right to receive premiums payable in terms thereof.

[13] The obligation of the names to comply with the plaintiff's bye-laws, including bye-law 22 of 1995 and, pursuant thereto, the R&R scheme, arises from the previously cited provisions of the general undertaking[3] given by each of the names on

3 See par [4] above.

becoming members of the plaintiff. Of some significance in the present matter are clauses 5.5 and 5.10 of the R&R scheme, which read as follows:

5.5 Each Name shall be obliged to and shall pay his Name's Premium in all respects free and clear from any set-off, counterclaim or other deduction on any account whatsoever including in each case, without prejudice to the generality of the foregoing, in respect of any claim against ERL [Equitas], the Substitute Agent, any Managing Agent, his Member's Agent, Lloyd's or any other person whatsoever, and:

a) in connection with any proceedings which may be brought to enforce the Name's obligation to pay his Name's Premium, the Name hereby waives any claim to any stay of execution and consents to the immediate enforcement of any judgment obtained;

b) the Name shall not be entitled to issue proceedings and no cause of action shall arise or accrue in connection with his obligation to pay his Name's Premium unless the liability for his Name's Premium has been discharged in full; and

c) the Name shall not seek injunctive or any other relief for the purpose, or which would have the result, of preventing ERL, or any assignee of ERL, from enforcing the Name's obligation to pay his Name's Premium.

5.10 For the purposes of calculating the amount of any Name's Premium as set out in clause 5.1(b) and the amount of any Name's Premium discharged by the transfer of assets or the amount realised through the liquidation of Funds at Lloyd's for application in or towards any Name's Premium, the records of and calculations performed by the CSU [a division or arm of the plaintiff] shall be conclusive evidence as between the Name and ERL, in the absence of any manifest error.

LLOYD'S LITIGATION IN ENGLISH COURTS

[14] There has been a spate of litigation in the English courts arising from actions by the plaintiff, as assignee of Equitas, against names who have failed to pay their reinsurance premiums. These actions have been defended on a number of grounds, including that clause 5.5 of the R&R scheme is not enforceable in that it obliges members to pay the premiums despite allegations of fraud levelled against the plaintiff. The English courts have consistently held against the names for failure to pay such premiums on the basis that the said clause 5.5 is enforceable and that fraud

may be raised as a separate claim against the plaintiff, but not as a defence.

[15] Thus in two hearings before Colman J in the case of *Society of Lloyd's v Leighs and Others*,[4] the learned judge held, *inter alia*, that allegations of fraud on the part of the plaintiff in inducing individuals to become names, could not justify rescission of their agreement with the plaintiff. Clause 5.5, the "pay now sue later" clause, was hence valid and binding. An attempt, on appeal, to argue a point not raised before Colman J, namely that clause 5.5 had been introduced in bad faith with the "dominant purpose" of allowing the plaintiff to escape the consequences of its earlier fraud, was rejected.[5]

[16] In a subsequent case, *Society of Lloyd's v Fraser and Others*,[6] Tuckey J held that it would be an abuse of process for names to raise the bad faith allegation as a defence directed at setting aside the R&R scheme. This, he stated, was in essence the issue already disposed of by the Court of Appeal in the *Leighs* case. In refusing leave to appeal against this decision, the Court of Appeal (*per* Hobhouse LJ)[7] held that clause 5.5 of the R&R scheme was enforceable despite the allegations of fraud by the names. The bad faith argument was without merit in that it provided no basis for distinguishing the previous decisions. In the absence of some persuasive evidence to the contrary, no inference of a "dominant purpose" to defeat potential claims of fraud against the plaintiff could possibly be justified.

[17] Just as the attack by the names on clause 5.5 of the R&R scheme met with outright rejection by the English courts, so also was the attempt to invalidate clause 5.10 doomed to failure. In *Society of Lloyd's v Fraser and Others*[8] Tuckey J dealt with

4 [1997] CLC 759 and [1997] CLC 1012.
5 See *Society of Lloyd's v Leighs and Others* [1997] CLC 1398.
6 [1998] CLC 127.
7 In *Society of Lloyd's v Fraser and Others* (n 2 above).
8 An unreported judgment given in the Commercial Court on 4 March 1998.

the provisions of this clause in some depth and stated:[9]

The words mean what they say: the records and calculations are to be conclusive evidence (that is to say the only evidence) unless there is a manifest error on the face of those records.

With reference to clause 5.5 the learned judge continued:[10]

My conclusion about the effect of clause 5.5 underlines that what that clause and clause 5.10 were intended to achieve was cash flow. Clause 5.10 does not determine what CLSF ["combined litigation settlement funds"] or PSL ["personal stop loss"] recoveries a name is entitled to or what his FAL ["funds at Lloyd's"] are. It is only dealing with appropriation of those assets in discharge of the obligation to pay premium. The records and calculations of MSU ["members' services unit"] are conclusive as to what assets have been appropriated but not as to what those assets are. A name may still assert his right to those assets in the same way he may assert any other claim despite clause 5.5.

[18] Although the various challenges directed by names at escaping their obligation to pay the Equitas premiums were systematically and consistently rejected by the English courts, it did not deter them from instituting counterclaims ("cross-claims") founded on alleged fraudulent misrepresentation by the plaintiff. The main action in which this allegation was raised, was the "Jaffray proceedings", brought by Sir William Jaffray and other names, and directed at resolving, as a preliminary issue, what was known as "the threshold fraud issue". This related to whether the plaintiff had made false misrepresentations to the names with a view to inducing them to become, or remain, members of the plaintiff, while it knew that such misrepresentations were false, or while it was reckless, careless or unconcerned as to whether they were true or false.

[19] The Jaffray proceedings were initiated by an "order for directions" issued on 29 October 1999 by Cresswell J in the Commercial Court.[11] Paragraph 8 thereof provided that any present or former names who wished "to reserve the right to

9 At typed page 5 of the judgment.
10 At typed page 6 of the judgment.
11 1996 folio no 2032.

advance allegations that they were fraudulently induced to become or remain underwriting members of the Lloyd's market by reason of Lloyd's failure to disclose the nature and extent of the market's liability for asbestos-related claims", should give written notice to the plaintiff's solicitors "confirming that they wish to become parties to the litigation". Should they fail to do so they would be precluded from advancing such allegations without the leave of the Commercial Court.

[20] The Jaffray hearing on the threshold fraud issue commenced before Cresswell J on 4 March 2000 and lasted for some three months, judgment being handed down on 3 November 2000. Although the learned judge allowed a further issue to be added, namely that relating to alleged negligent misrepresentation by the plaintiff prior to 5 January 1983, it was not considered in the judgment in terms of which the claims based on fraudulent misrepresentation (the "tort of deceit") were dismissed. Leave to appeal was refused.

[21] The Court of Appeal subsequently granted leave to appeal on limited grounds. The appeal, however, likewise failed. At the end of their lengthy and extremely comprehensive judgment, Lord Justices Waller, Robert Walker and Clarke summarised their conclusion, in what they called "this difficult and worrying case", in the following terms:[12]

There was a representation in the 1981 brochure that there was in place a rigorous system of auditing which involved the making of a reasonable estimate of outstanding liabilities including unknown and unnoted losses. (Paragraph 321)

i) Subsequent brochures contained essentially the same representation, even though the word 'rigorous' no longer appeared. (Paragraph 323)
ii) The 1981 brochure also contained a representation that Lloyd's believed that such a system was in place. So did subsequent brochures. (Paragraphs 321 and 323)
iii) The globals [global reports and accounts / aggregate results] contained no relevant representations. (Paragraphs 326 to 343)
iv) The representations in i) and ii) were, during the relevant period, untrue.

12 *Jaffray and Others v Society of Lloyd's* [2002] EWCA Civ 1101par 587.

(Paragraphs 375 and 376)

v) The names have however failed to prove that Lloyd's did not believe the representations to be true or that they either knew that they were or became untrue or were reckless as to whether they were true or untrue. (Section VII)

vi) It follows that the judge was right to determine the threshold fraud issue in favour of Lloyd's and to hold that Lloyd's is not liable to the names in the tort of deceit. It further follows that the appeal on the merits, which the names had permission to bring, fails and must be dismissed.

[22] The plaintiff was hereafter allowed to enforce the judgments it had obtained against the names, while the names were given the opportunity to consider, if appropriate, raising negligent misrepresentation claims by way of amendments in the *Jaffray* proceedings. When they did so, the plaintiff opposed the amendments on the basis of the immunity bestowed on it by section 14(3) of the *Lloyd's Act* 1982, such immunity being operative from the date of the Royal assent to the Act, namely 23 July 1982. In addition it averred that any such amended claims would be time-barred in terms of the relevant provisions of the *Limitation Act* 1980.

[23] In *The Society of Lloyd's v Laws and Others*,[13] Cooke J considered the applications for amendment and held that the majority of names (also known as category 1 names) should not be granted permission to amend. He granted leave in principle, however, to a smaller group of names (category 2 names) to do so. This was subject to their filing properly particularised claims for consideration by the Commercial Court, and was subject also to whether or not they escaped being time-barred by virtue of their falling within the provisions of section 14A of the *Limitation Act* 1980. This section did not apply to "statutory misrepresentation" and any claim based on a negligent or statutory misrepresentation causing loss after 23 July 1982, when the *Lloyd's Act* 1982 became operative, was barred by the immunity provision contained in section 14(3) thereof. In addition the *Human Rights Act* 1998 could not

13 [2003] EWHC 873.

affect vested rights by being accorded retrospective effect in interpreting the 1982 Act.

[24] Cooke J's ruling meant that those names in category 2 who were able to overcome the "particularisation hurdle", would be left with severely limited counterclaims. In effect such counterclaims would relate to damages suffered in the brief window period between the extended time limit under the *Limitation Act* 1980 and the commencement of the plaintiff's immunity under the *Lloyd's Act* 1982. They would probably be worth significantly less than the amounts claimed in the relevant statutory demands.[14] Cooke J then wrapped up the issue of leave to amend by granting such leave to only seven names (Messrs Allard, Garrow, Hardman, Ranald, Remillard, Wilkinson and Woyka) and refusing it to all the others.[15]

THE PRESCRIPTION ISSUE

General Observations

[25] It is common cause that the plaintiff took judgment in English courts against the defendants, save F Ilse, more than three years but less than six years prior to service on them of the South African provisional sentence summons issued on the strength of such judgments. If English law should apply, as submitted by the plaintiff, the claims on the judgments would not have prescribed or become statutorily limited. In the event that South African law should apply, however, as submitted by the defendants, the claims would have prescribed, unless the judgments should be regarded as "judgment debts", in which event they would not have prescribed.

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14 See *Everard and Others v The Society of Lloyd's* [2003] EWHC 1890 (Ch) par 19. An appeal against Cooke J's judgment failed on all counts. See *Laws and Others v The Society of Lloyd's* [2003] EWCA Civ 1887. See also *The Society of Lloyd's v Janet Anne Bowman and Others* [2003] EWCA Civ 1886, in which the appeal against the order granted by Laddie J in the *Everard* matter (*supra*) was allowed in part. For present purposes it is unnecessary to deal with it.

15 See *The Society of Lloyd's v Laws and Others* [2004] EWHC 71.

[26] At the outset it should be pointed out that, in terms of South African law, foreign judgments, such as those in the present matter, may be enforced by its courts provided there is compliance with certain prerequisites. This appears from the well known *dictum* of Corbett J in *Jones v Krok*:[16]

… [T]he present position in South Africa is that a foreign judgment is not directly enforceable, but constitutes a cause of action and will be enforced by our Courts provided (i) that the Court which pronounced the judgment had jurisdiction to entertain the case according to the principles recognised by our law with reference to the jurisdiction of foreign courts (sometimes referred to as 'international jurisdiction or competence'); (ii) that the judgment is final and conclusive in its effect and has not become superannuated; (iii) that the recognition and enforcement of the judgment by our Courts would not be contrary to public policy; (iv) that the judgment was not obtained by fraudulent means; (v) that the judgment does not involve the enforcement of a penal or revenue law of the foreign State; and (vi) that enforcement of the judgment is not precluded by the provisions of the Protection of Businesses Act 99 of 1978, as amended…Apart from this, the Courts will not go into the merits of the case adjudicated upon by the foreign court and will not attempt to review or set aside its findings of fact or law …

[27] The learned Chief Justice then pointed out that provisional sentence has long since been a recognised procedure in South African courts for the enforcement of foreign judgments. Although a foreign judgment was not a liquid document in the sense of "a written instrument signed by the defendant or his agent evidencing an unconditional acknowledgement of indebtedness in a fixed sum of money", it was "*prima facie* the clearest possible proof of a debt due by the party condemned and that the latter must be taken in law to have acknowledged his indebtedness in the amount of the judgment …".

[28] On the issue of prescription, it is common cause that, in English law, judgments founded in contract are subject to a six-year limitation period in terms of section 5 of the *Limitation Act* 1980, which reads:

An action founded on simple contract shall not be brought after the expiration of six years from the date on which the cause of action accrued.

16 1996 (1) SA 677 (A) at 685B-E.

The limitation period for an action founded on a judgment is likewise six years, as appears from section 24 of the Act:

1) An action shall not be brought upon any judgment after the expiration of six years from the date on which the judgment became enforceable.
2) No arrears of interest in respect of any judgment debt shall be recovered after the expiration of six years from the date on which the interest became due.

[29] The questions which arise in this regard are, firstly, whether the period of prescription (limitation) should be determined in accordance with English or South African law and, secondly, if South African law should be applicable, whether the prescriptive period is three or thirty years. The response to the second question depends on whether the English judgment should be regarded as "any judgment debt", as referred to in section 11*(a)*(ii) of the South African *Prescription Act* 68 of 1969, in which event the prescriptive period is thirty years. If not, the period is, in terms of section 11*(d)* of the Act, three years.

[30] A related question arising in this regard is whether prescription extinguishes the action or simply bars the institution of an action to enforce it. In South African law it is the former, as appears from section 10(1) of the Act, which reads:

Subject to the provisions of this chapter and of chapter IV, a debt shall be extinguished by prescription after the lapse of the period which in terms of the relevant law applies in respect of the prescription of such debt.

This means that prescription, in South Africa, is a matter of substantive law and is not simply procedural, as was the case under the old *Prescription Act* 18 of 1943, section 3(1) of which rendered a right of action unenforceable without extinguishing it.[17]

[31] English law hence differs from its South African counterpart in that the above cited sections 5 and 24 of the English *Limitation Act* 1980 are indicative of a

17 See *Protea International (Pty) Ltd v Peat Marwick Mitchell & Co* 1990 (2) SA 566 (A) at 568I-569A. At 568I Joubert JA stated unequivocally: "The extinction of a contractual right of action by prescription is accordingly a matter of substantive law and not a procedural matter".

procedural bar on bringing an action rather than of extinguishing such action. It is thus clearly, in English legal context, a matter of procedural rather than substantive law. The English authorities are unequivocal in stating that matters of procedure are governed by the domestic law of the country where the relevant proceedings have been instituted (the *lex fori*). Matters of substance, however, are governed by the law which applies to the underlying cause of action (the *lex causae*). This applies equally to statutes of limitation which bar a remedy as opposed to those which extinguish a right: the former are procedural and the latter substantive. When the remedy is barred, the right continues to exist although it cannot be enforced by action.

[32] In this regard it may be appropriate to refer to the discussion of Rule 17 by Dicey and Morris, in their well known and frequently cited work on international private law.[18] This Rule reads

All matters of procedure are governed by the domestic law of the country to which the court wherein any legal proceedings are taken belongs (*lex fori*).

In their comment on the position at common law,[19] the learned authors point out that the *lex causae* and *lex fori* may differ in respect of their periods of limitation and in the nature of the limitation provisions. They illustrate this with reference to four different situations which may arise, the fourth of which reads:

iv) If the statute of the *lex causae* is procedural and that of the *lex fori* substantive, strict logic might suggest that neither applies, so that the claim remains perpetually enforceable. A notorious decision of the German Supreme Court once actually reached this absurd result. But writers have suggested various ways of escape from this dilemma, and it seems probable that a court would apply one statute or the other.

In this decision,[20] the German Supreme Court (*Reichsgericht*) upheld a claim on a Tennessee bill of exchange which had prescribed under both German law (the *lex*

18 *The Conflict of Laws* vol 1 (13th edition, 2000) 157-181 par 7R-001 at 157.
19 Par 7-042 at 173-174.
20 Reported in (1882) 7 *RGZ* 21.

fori) and the law of Tennessee (the *lex causae*). In doing so the court classified the German rule as substantive and that of Tennessee as procedural. According to Dicey and Morris this decision does not appear to have been followed in more recent German cases dealing with the same issue.

[33] This is clearly no simple matter in the context of the conflict of laws, whether it be approached from the English or South African legal point of view. It would, of course, be a simple exercise to state that, inasmuch as prescription is, in English law, a procedural matter, the *lex fori*, namely South African law, should be applied. But would, and should, that hold true where the *lex fori* itself regards prescription as a matter of substantive law which will have the effect of terminating the action and not just barring it? That is the real question which this court will have to address.

The Kuhne & Nagel Case

[34] In *Kuhne & Nagel AG Zurich v APA Distributors (Pty) Ltd* [21] the plaintiff, a Swiss company, claimed an amount owing in terms of a contract which it had concluded in Switzerland with the defendant, a South African company. It was common cause that Swiss law governed the transaction and that, in terms of article 127 of the Swiss Code of Obligations (*Obligationenrecht*), the claim prescribed after ten years. The defendant pleaded, however, that, in terms of section 11(d) read with sections 10(1) and 12(d) of the South African *Prescription Act* 68 of 1969, the claim had been extinguished within three years after the debt had become due.

[35] In considering the issue arising from this conflict of law, O'Donovan J observed as follows:[22]

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21 1981 (3) SA 536 (W).
22 At 537H-538A.

It is settled law that procedural matters are governed by the law of the place where the action is brought (*lex fori*), whereas matters of substance are governed by the proper law of the transaction (*lex causae*). Statutes of limitation merely barring the remedy are part of the law of procedure … If, however, they not only bar the remedy but extinguish altogether the right of the plaintiff they belong to the substantive law and the *lex causae* applies …

After pointing out that the distinction between the two kinds of limitation of actions was well established, the learned judge proceeded to say:[23]

One of the consequences of the view to which South African law is committed is that, in a case where the statute of limitations of the *lex causae* is substantive but that of the *lex fori* is procedural, the *lex fori* will apply if its limitation period is shorter than that of the *lex causae*.

[36] O'Donovan J was not required to deal with the situation where prescription in terms of the *lex causae* is procedural and in terms of the *lex fori* substantive, as in the present matter. He made it clear,[24] however, that the extinction or creation of a right by prescription was a matter of substantive law, which was not affected by the deeming provision of section 10(3), or by any other provisions, of the Act. These provisions would have to yield to the clear wording of section 10(1).

[37] In the case where the statutes of limitation of both the *lex causae* and the *lex fori* were substantive, as submitted by the plaintiff, the learned judge considered the lack of authority on such issue and observed:[25]

Strict logic would suggest that in the case now postulated substantive statutes of limitation of the *lex causae* should be applied. Their application would also be in conformity with the trend of contemporary academic writing, which has become increasingly critical of the failure of Courts following Anglo-American conflict rules to protect rights still in existence in a foreign country.

On this basis O'Donovan J held[26] that the prescriptive period of the *lex causae*, and not that of the *lex fori*, should apply to the plaintiff's claim. The special plea of

23 At 538B.
24 At 538D-539A.
25 At 539C-D.
26 At 539E.

prescription hence failed.

[38] The question inevitably arises whether, on this approach, a court may not be confronted with the dilemma that the prescription rules of neither the *lex causae* nor the *lex fori* may be applicable. This is known as the "gap" problem, with its associated problem of "cumulation". It arises when two or more conflicting rules from different legal systems apply to the same aspect of a case, and yet none of such rules, after undergoing the normal characterisation process, is applicable thereto. This was pointed out by Forsyth in his discussion of the *Kuhne & Nagel* case.[27] He repeated it in his discussion of the *Laconian* matter, where he suggested that the problem arising in this matter was not "an idle academic puzzle", but was in fact a prospect that South African courts would have to face whenever the *lex causae* had procedural, and not substantive, prescription rules.[28] This could lead to the absurd situation that a solution might be sought which avoids the issue altogether, namely by formulating an *ad hoc* rule when the established rules of international private law fail to provide a solution.[29]

The Laconian Case

[39] This brings me to the decision of Booysen J in *Laconian Maritime Enterprises Ltd v Agromar Lineas Ltd*.[30] The applicant in that matter was a Greek ship-owning and operating company and the respondent a Colombian charterer. The respondent's New York brokers and the applicant's London brokers negotiated by telex for a voyage charterparty, in respect of a ship owned by the applicant, for the carriage of grain from Buenos Aires to Barranquilla in Colombia. The charterparty was drawn up

27 C F Forsyth "Extinctive Prescription and the Lex Fori: A New Direction?" in *SALJ* 99 (1982) 16-22.
28 Christopher Forsyth "Enforcement of Arbitral Awards, Choice of Law in Contract, Characterisation and a New Attitude to Private International Law" in *SALJ* 104 (1987) 4-16 at 12-13.
29 See further T W Bennett “Cumulation and Gap: Are they Systemic Defects in the Conflict of Laws?” in *SALJ* 105 (1988) 444-456.
30 1986 (3) SA 509 (D).

in New York and was signed and stamped by the respective brokers in New York and London. It provided for payment to be made in US dollars to a London bank and for disputes to be referred to arbitration in London. A dispute arose and an arbitration award was duly made. The applicant filed an action to enforce the award in the United States District Court for the Southern District of Alabama. The court held that the action was time-barred and fell to be dismissed. The applicant subsequently sought that the award be made an order of the South African court in terms of the *Recognition and Enforcement of Foreign Arbitral Awards Act* 40 of 1977. The respondent raised two special defences, namely prescription and the *exceptio rei iudicatae*. The latter was based on the fact that the United States court aforesaid had already given a judgment on the issue.

[40] After considering the "theoretical basis" of the rules pertaining to the conflict of law, the learned judge stated at the outset[31] that the first step a court should take, in attempting to resolve disputes arising in private international law, was to characterise, classify or qualify the relevant rules. The characterisation generally took place in accordance with the *lex fori*, although certain academic writers appear to have favoured a *via media* or an "enlightened *lex fori* approach", in the sense that the *lex causae* should also be given consideration.[32] This led the learned judge to conclude:[33]

> It must be accepted that it is rules of law which are characterised.
> It must be stressed that the characterisation is but a tool in the process of reasoning in terms of which those rules are interpreted.
> Characterisation cannot be regarded as an independent means of establishing the proper choice of law and one must beware of indulging in "dishonest characterisation" in an attempt to make it so.

31 At 517G-518I.

32 See M M Loubser *Extinctive Prescription* (1996) 213 on the extent to which a South African court should take account of a different approach in the foreign legal system when carrying out the process of characterisation. He suggests that in such a case the *lex fori* should not be "rigidly applied" and that "a more flexible approach" should be followed, with reference to the classification of the rule under the *lex causae* and to factors such as uniformity of decision, applicable interests and existing rights.

33 At 519I-520A.

Characterisation is part of the process of interpretation and all interpretation, unless regulated by rules of construction, be it of instruments or laws, is always that of the interpreter, the forum.
It is thus not surprising that, in all cases but one in our Courts, categorisation has taken place according to the *lex fori*.

[41] Booysen J was satisfied[34] that there was no reason for him to depart from what he termed "the general rule of South African private international law", namely that classification is done in terms of the *lex fori*. He did not, however, deem it necessary "to state the rule and its qualifications". Yet he was unequivocal in his viewpoint[35] that the classification of competing rules of prescription, superannuation, time-barring or limitation was no simple matter. In this regard the parties were in agreement that the relevant rules of the United States were substantive while those of England were procedural in character. They were likewise agreed that the rules of Colombia and South Africa were identical, but they disagreed as to the nature and effect thereof. This led the learned judge to say:[36]

Although I propose to classify these rules in terms of the *lex fori* it seems to me that the rules of each of the countries would be classified by each of the other countries in exactly the same way. It seems to be settled law that the statutes of limitation merely barring the remedy are part of the law of procedure whereas they are part of the substantive law if they extinguish altogether the right of the plaintiff … It follows that in this case the *lex fori*'s rules are substantive but that the *lex causae*'s rules are either substantive, if the law of the United States applies, or procedural, if English law applies. If the *lex causae* is that of the United States then it follows that the applicant's claim would be prescribed. If the *lex causae* is English law the matter is not that clear. It would mean if these general rules were to apply that the *lex fori* being substantive would not apply but that the *lex causae* being procedural would also not apply.

[42] Booysen J recognised this as the problem identified by Dicey and Morris,[37] with reference to the "absurd result" achieved by the notorious German decision cited by them, and observed:[38]

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34 At 521A-B.
35 At 523H.
36 At 523I-524C.
37 Par [32] above.
38 At 524E-F.

I certainly have no wish to join the German Court in its notoriety although strict logic might so advise. The reason I will not do so, however, is that it seems to me that in such an event I should apply my own law on the basis that, if I am not enjoined by my own law to apply foreign law, I am enjoined by my oath to apply my country's law. I am, no doubt, influenced to some extent by *Ehrenzweig*'s scepticism and preference for the residual *lex fori* approach where no formulated or non-formulated rule exists which seems to me to accord with good sense.

From this it appears that, in the absence of a rule determining the applicable legal system, Booysen J opted for South African law on the basis that he was enjoined to do so by virtue of his judicial oath to apply such law. In addition he regarded this "residual *lex fori* approach" as being consistent with reasonableness in the form of "good sense". The learned judge found support[39] for this approach in the formulation of Ehrenzweig:[40]

In the absence of a pervasive rationalisation of a general regime of either the *lex fori* or the *lex causae*, and the failure of any "weighing-of-interests" test, forum law remains the starting point.

[43] Booysen J gave consideration[41] to the question whether the proper law of the charterparty should be regarded as United States law, whereas the proper law of the arbitration and award was English law and hence the *lex causae*. The answer, he suggested,[42] was dependent upon whether the award novated the rights of the applicant or not. That would be the case if it created a new right. If, however, it was obtained merely for purposes of enabling the applicant to enforce its contractual right to payment, the law of the contract would be the *lex causae* and not the law of the country where the award was made. On this basis he was satisfied[43] that the *lex causae* of the contract was the governing law.

[44] In what appears to be an *obiter dictum*, Booysen J observed[44] that South

39 At 524G-H
40 A A Ehrenzweig *Private International Law* (1967) 1125.
41 At 524I-525A.
42 At 525C-F
43 At 525F.
44 At 525F-527J.

African law recognised "party autonomy" in establishing the proper law of the contract. Where the parties had hence agreed, expressly, tacitly or by implication, upon the law governing their contract, our courts would give effect to their intention. If they had not so agreed, the court could determine the applicable law by imputing an intention to the parties, on the basis of what they "ought reasonably to have chosen". Alternatively it could establish the system of law with which the transaction in question has "its closest and most real connection". In practice the different approaches would not lead to different conclusions. Although the learned judge preferred the "most real connection theory", he was bound by the "intention theory" as applied in the *Efroiken* case.[45] He pointed out, however, that, although it was not simply a matter of counting the factors in favour of one legal system or the other, "a large number of factors pointing one way is a strong indicator".[46]

[45] On this basis he held that, in the case before him, English law was indicated because it was both the *lex loci contractus* and the *lex loci solutionis*, while London was the place where the arbitration had taken place. The claim for recognition had hence not prescribed by virtue of United States law. It had likewise not prescribed by English law.[47] In any event the rules of English law, being procedural, were not applicable. In these circumstances he proposed to apply the South African law as the *lex fori*. Inasmuch as the debtor had not been in South Africa since the debt became due, the period of prescription had not, in terms of section 13(1)(*d*) of Act 68 of 1969, been completed. The claim had therefore not prescribed.

The Effroiken Case

45 Note 48 below.
46 At 528H.
47 See 530I-531F of the judgment.

[46] It may be convenient at this stage to refer to the case of *Standard Bank of South Africa, Limited v Efroiken and Newman*,[48] by which Booysen J regarded himself as being bound. In his judgment De Villiers JA stated the following:[49]

The rule to be applied is that the *lex loci contractus* governs the nature, the obligations and the interpretation of the contract; the *locus contractus* being the place where the contract was entered into, except where the contract is to be performed elsewhere, in which case the latter place is considered to be the *locus contractus*. That is, broadly speaking, the rule as it has been adopted. At the same time it must not be forgotten that the intention of the parties to the contract is the true criterion to determine by what law its interpretation and effect are to be governed … But that also must not be taken too literally, for, where parties did not give the matter a thought, courts of law have of necessity to fall back upon what ought, reading the contract by the light of the subject-matter and of the surrounding circumstances, to be presumed to have been the intention of the parties.

[47] This approach was confirmed by Trollip J in *Guggenheim v Rosenbaum (2)*:[50]

According to English and our law the proper law of the contract is the law of the country which the parties have agreed or intended or are presumed to have intended shall govern it; and in the case of a contract concluded in one country to be performed in another, then in the absence of an express term or any other indication to the contrary, it can be presumed that the proper law is the law of the latter (*lex loci solutionis*).

The Improvair Case

[48] Booysen J also had regard to *Improvair (Cape)(Pty) Ltd v Establissements NEU*,[51] in which Grosskopf J pointed out that the "traditional" approach of imputing an intention to the parties was no longer followed in English law. Thus in *John Lavington Bonython and Others v Commonwealth of Australia*[52] Lord Simonds stated that "the substance of the obligation must be determined by the proper law of the contract, i.e., the system of law by reference to which the contract was made or that with which the transaction has its closest and most real connexion" (the so-called

48 1924 AD 171.
49 At 185 of the judgment.
50 1961 (4) SA 21 at 31A-B.
51 1983 (2) SA 138 (C) at 145F-H. "Establissements" should read "Établissements".
52 1951 AC 201 at 219.

"*Bonython* formula"). This led Megaw LJ, in *Coast Lines Ltd v Hudig & Veder Chartering NV*,[53] to comment as follows:

I think it is not without significance to note that the connection which has to be sought is expressed to be connection between the *transaction*, ie the transaction contemplated by the contract, and the system of law. That, I believe, indicates that, where the *actual* intention of the parties as to the proper law is not expressed in, and cannot be inferred from, the terms of the contract (so that it is impossible to apply the earlier part of the *Bonython* formula, the system of law 'by reference to which the *contract* was made'), more importance is to be attached to what is to be done under the contract - its substance - than to considerations of the form and formalities of the contract or considerations of what may, without disrespect, be described as lawyers' points as to inferences to be drawn from the terms of the contract.

[49] In this regard Grosskopf J made reference[54] to the discussion of this problem in Van Rooyen's authoritative treatise on contract in South African international private law, in which the learned author stated:[55]

Indien daar geen werklike regskeuse was nie, is dit volgens oordeel van die skrywer onsuiwer om van 'n vermoedelike bedoeling te praat. Afgesien daarvan dat dit 'n *contradictio in terminis* is om 'n objektiewe faktor (vermoede) naas 'n subjektiewe faktor (bedoeling) in een asem te besig, is dit verder onrealisties om van 'n bedoeling te praat as daar geen bedoeling teenwoordig is nie …
Dit word aan die hand gedoen dat daar, by gebrek aan 'n regskeuse, 'n ondersoek van die sosiale funksie van verbandhoudende regsreëls moet plaasvind. Sodra die sosiale funksie bepaal is, moet die feitelike aanknoping van die kontrak met die geldingsgebied van daardie regsreël ondersoek word en alleen só sal bepaal kan word of die kontrak binne die geldingsfeer van een regstelsel, ter uitsluiting van 'n ander, val; steeds moet die engste verbonde regstelsel aldus bepaal word. Mettertyd sal dit dan ook blyk dat die belange-swaartepunt gewoonlik by die een regstelsel (bv. die reg van die verkoper) val. Op hierdie wyse sal die oplossings mettertyd 'n eenheidspatroon aanneem en sal internasionale regsekerheid toeneem. Daar moet dus nie, in navolging van ons ou skrywers, 'n magiese en allesoorheersende betekenis geheg word aan die *locus contractus* of *solutionis* nie. Dit is dan ook te betreur dat ons howe soveel waarde heg aan die *locus solutionis*. Veel meer waarde kan volgens skrywer byvoorbeeld geheg word aan die gemeenskaplike domisilie; die domisiliêre regstelsel het juis die behartiging van die kontraktante se belange ten doel en behoort gevolglik oor die algemeen 'n belangrike rol te speel. Dit is betekenisvol dat ons howe al by geleentheid die sosiale funksie van die moontlik toepaslike regsreël ondersoek het, eerder as om werktuiglik oor te gaan tot 'n toepassing van die *lex rei sitae*, die *lex loci solutionis* of die *lex loci contractus*.
Die *lex causae* is dus die gekose regstelsel of, by gebrek aan 'n keuse, die engste

53 (1972) 1 All ER 451 (CA) at 457-458.
54 At 146D-H.
55 J C W van Rooyen *Die Kontrak in die Suid-Afrikaanse Internasionale Privaatreg* (1972) 217-218.

verbonde regstelsel.

[50] With reference to these authorities Grosskopf J concluded:[56]

The above authorities demonstrate, in my view, that the modern tendency is to adopt an objective approach to the determination of the proper law of contract where the parties did not themselves effect a choice. From a practical point of view the different formulations would however seldom, if ever, lead to different conclusions. The legal system "with which the transaction has its closest and most real connection" (*Bonython*'s case *supra*) or "die engste verbonde regstelsel" (*Van Rooyen* (*supra*)) would in most cases be the one which the Courts would presume to have been intended by the parties. Since I am probably bound by the rules laid down in *Efroiken*'s case *supra* it is comforting to know that application of the *Bonython* formula, which, with respect, I prefer, would not lead to a different result.

The Laurens Case

[51] A refreshingly novel approach to determining the relevant legal system was that adopted by Schutz J in *Laurens NO v Von Höhne*.[57] This was a matter concerning a claim by the plaintiff, in his capacity as liquidator of a company registered and liquidated in Germany, for payment by the defendant of an amount allegedly owed by him in respect of his contribution to the share capital of the company. The defendant's plea was that no amount remained owing. An alternative plea was that the claim had prescribed after three years in terms of section 11(d) of Act 68 of 1969. The plaintiff's response was that section 195 of the German Civil Code (*Bürgerliches Gesetzbuch*) was applicable, in which event the claim prescribed only after thirty years. The court was hence called upon to characterise the issue in order to establish which legal system was applicable thereto.

[52] After stating[58] that "procedural or adjectival questions are ordinarily at least tried according to the *lex fori*", Schutz J went on to say[59] that, in cases involving "a

56 At 146H-147B.
57 1993 (2) SA 104 (W).
58 At 116A.
59 At 116E-F.

multilateral conflict rule", the nature of the issue must be characterised before applying the "connecting factor". Such characterisation, and the determination of the applicable legal system, however, was problematic in that it constituted a "difficult question" on which there was no direct authority.

[53] With reference to some of the authorities dealing with the problem, the learned judge observed[60] that the "traditional rule has been that the *lex fori* characterises according to its own law without looking further". He referred in this regard, however, to Falconbridge,[61] who proposed a *via media* approach in accordance with which the court takes cognisance of both the *lex fori* and the *lex causae* before characterising the issue in question. This means that the conflict rules of the forum should be construed *sub specie orbis*, that is, from "a cosmopolitan or world-wide point of view" which would make it "susceptible of application to foreign domestic rules". The court is hence required to consider the "nature, scope and purpose" of the foreign rule in its foreign legal context. It should then, with reference to the applicable legal systems, make a "provisional characterisation" before deciding on a "final characterisation", which has regard to policy considerations.[62]

[54] Schutz J enunciated his understanding of the *via media* approach in the following words:[63]

The *via media* approach, it is contended, serves a particularly useful purpose where a foreign institution is not known to the *lex fori*. If no regard is had to foreign law, what is likely to ensue is that the nearest analogue of the *lex fori* is laid on a Procrustean bed and subjected to a process of chopping off or stretching ... It is also contended for

60 At 116H-117A.
61 J D Falconbridge *Essays on the Conflict of Laws* (2nd ed 1954).
62 Reference may be made in this regard to C C Turpin "Characterization and Policy in the Conflict of Laws" in *Acta Juridica* (1959) 222-228. He suggests that policy considerations and the needs of the international community should be applied in developing the relevant rules of international private law. See also Kahn's discussion of the *via media* and the concepts of "provisional" and "final" characterisation in Corbett, Hofmeyer and Kahn *The Law of Succession in South Africa* (2nd ed 2001) at 597-599 and 611-612.
63 At 117B-E.

the *via media* that it tends to create international harmony and leads to the decision of cases in the same way regardless of which country's courts decide them. If one does not adopt this approach further evils may ensue, so argues Mr *Du Plessis* [counsel for the plaintiff], namely forum shopping and even a defendant choosing a forum whose laws best suit him. (It is not suggested that the defendant in this case deliberately did that.)
Various of the academic writers, and also Mr *Du Plessis* in his argument, welcome the apparent reception of the *via media* by Booysen J in the *Laconian* case (above), but criticise his judgment for not really having seen the *via media* through by his falling back on a residual *lex fori* approach. It is not necessary for me to go into that. For myself, I accept the *via media* and propose to follow it through wherever it leads. We may not dare to let our law stand still. Against this view it has been argued by Mr *Tuchten* [counsel for the defendant] that I am simply not entitled to adopt the *via media* in that I am bound by earlier decisions. I do not agree and I will say more on this subject below, but must emphasise now that private international law is a developing institution internationally, and that our own South African private international law cannot be allowed to languish in a straightjacket.

[55] The learned judge had no difficulty in disposing of the various arguments raised against the employment of the *via media* approach. He was careful, however, to point out[64] that, even should the *via media* be applied "in a general sense", the authorities were clear that procedural matters should be decided in accordance with the *lex fori* "because there are good reasons for the rule". He added[65] that "not everything that appears in a treatise on the law of evidence has to be classified internationally as adjectival law". In this regard he observed[66] that, in determining characterisation, the court would be deciding a question of law, and not just the facts of the case. In a later case there might in fact be a different characterisation because different foreign rules of law might be proved. The difficulty was that judges were not always conversant with foreign procedure and evidence, leading to the perception that this might be the reason why judges have been led "to relegate adjectival questions to the *lex fori*". The learned judge then concluded[67] that, in applying the *via media* and

64 At 118I-J.
65 At 119I-J.
66 At 120F-H.
67 At 121A.

for the aforesaid reasons, his decision was that, as a matter of policy, the *lex fori* should determine the issue before him.

[56] On the issue of prescription Schutz J stated:[68]

:

Our Prescription Act, as interpreted in *Kuhne*'s case, is classified as substantive so that it is not a matter for the *lex fori*. German law, even although their prescription laws are only remedy-barring, characterises them as substantive. I follow the *via media*. Looking at both the *lex fori* and the *lex causae*, the policy decision is in my view obvious. German law should be applied. In this case there is no conflict between the two systems. The situation differs from that in the *Laconian* case at 530I-J, so that there is not even a temptation to fall back on the residual *lex fori*. I find that the plea of prescription fails.

The Abdul Case

[57] In *Minister of Transport, Transkei v Abdul*,[69] the court had to consider the jurisdictional competence of a counterclaim arising from a motor vehicle collision in the formerly "independent" Transkei, with a view to determining whether or not it had prescribed. The issue was whether the Transkeian legislation relied on constituted "statutes of limitation", which simply barred the remedy if there was non-compliance with certain stated prerequisites, or whether such non-compliance extinguished the right of action. In considering the traditional distinction between substance and procedure, Alexander J stated[70] that the juridical significance of such distinction was that the court in which the action was brought would apply the *lex fori* should the *lex causae* be procedural. By contrast it would apply the *lex causae* should it be substantive.

[58] After discussing the "foreign" (Transkeian) limitation provisions, the learned judge went on to say:[71]

In deciding whether these provisions are substantive or procedural, it would appear

68 At 121D-F.
69 1995 (1) SA 366 (N).
70 At 369B.
71 At 369G-H

that the Court seized of the matter is enjoined to pursue two items of enquiry. First, whether, according to its own principles of interpretation, they would be held procedural. Secondly, whether, according to the foreign law where they have their being, they would be held procedural or substantive …

In view of the clearly procedural nature of the Transkeian provisions, the court held that the *lex fori*, being South African law, should apply, in which event the special plea of prescription fell to be rejected. Significantly Alexander J did not appear to consider the effect of the substantive nature of the currently applicable South African prescription provisions.

The Price Case

[59] In the *Price* case[72] Mynhardt J accepted that the limitation of actions or prescription is procedural in English law and substantive in South African law. The underlying agreement or general undertaking signed by the parties, however, was, in English law, substantive and was hence governed by the *lex causae*. In terms of the *lex causae*, the actions would have become unenforceable after six years and would not have prescribed. If the *lex fori* should apply, however, the actions would have been extinguished, and hence prescribed, after three years.[73]

[60] Counsel for the plaintiff invited Mynhardt J to follow the approach advocated by Schutz J in the *Laurens* case.[74] The basis of the argument was that English law was the proper law of the contract and that the English law relating to limitation should, pursuant to the provisions of the English *Foreign Limitation Periods Act* of 1984, be classified as substantive. Mynhardt J held[75] that the said Act was irrelevant in that it related to foreign limitation provisions. The learned judge then distinguished[76] the

72 Note 1 above.
73 Par {31] to [33] at 559G-560B.
74 Note 57 above.
75 In par [37] at 563D.
76 In par [38] at 563F.

Laurens case on the basis that, in that case, prescription was a matter of substance in both the *lex causae* and *lex fori*. There was hence no conflict between the two legal systems and the "policy decision" made by Schutz J was, therefore, "easy to make".

[61] With this background Mynhardt J then proceeded to say:[77]

> Strictly speaking, and logically, the South African law relating to prescription cannot apply in the present matters because prescription in terms of the *lex fori*, the South African law, is a matter of substance and not procedure. The English law, the *lex causae*, also cannot apply because the *lex causae* regulates only matters of substance and a South African court will not apply foreign rules of procedure in a matter to be adjudicated upon by it. There is, therefore, a gap and possibly no one system of law will apply.

The learned judge then opted for the residual *lex fori* approach followed in the *Laconian* case.[78] namely that he was enjoined by his judicial oath and by "good sense" to apply South African law where no rule determining the applicable legal system existed.

[62] Mynhardt J also found support in the *Abdul* case[79] in which, as he saw it, "the Court was faced with the same problem that this Court is faced with". He then summarised the findings in that case as follows:[80]

> In terms of the *lex fori* the Prescription Act 1969 would not apply because it is a matter of substance and not procedure. In terms of the *lex causae* prescription was a procedural matter. Those rules could therefore not be applied by the South African Court hearing the matter. The Court refused to apply the foreign law relating to prescription or, more correctly put, relating to an expiry period which was also held to be procedural in nature.

[63] This led Mynhardt J to conclude[81] that he should apply South African law, in which event the plaintiff's claim for provisional sentence against the defendants had prescribed. He rejected[82] the plaintiff's suggestion that the defendants had "implicitly

77 In par [38] at 563G-H.
78 Note 30 above. On this approach see par [42] above.
79 Note 69 above.
80 In par [38] at 564A-B.
81 In par [38] at 564C.
82 In par [39] at 564D-H.

waived" the right to rely on South African prescription rules by consenting, in the general undertaking, to the enforcement of an English judgment in a court of any other jurisdiction.

[64] Mynhardt J likewise rejected[83] the plaintiff's contention that the English judgments should be regarded as "judgment debts" which would prescribe after only thirty years. Section 11*(a)*(ii) of Act 68 of 1969 did not, in his view, include a foreign judgment, inasmuch as it merely constituted a cause of action, which was not directly enforceable. Only if it were made an order of a South African court would it be regarded as a judgment debt in terms of the Act.[84]

Submissions on behalf of the Plaintiff

[65] In his argument on behalf of the plaintiff Mr Thompson discussed the aforesaid authorities, both English and South African, fully and submitted that this court should follow the *via media* approach advocated by Schutz J in the *Laurens* case.[85] In doing so it should take into account both the *lex fori* and the *lex causae*, and policy considerations would dictate the application of English limitation law.

[66] Mr Thompson argued further that, after the passing of the English *Foreign Limitation Periods Act* 1984, South African law should classify English limitation provisions as substantive. The limitation provisions of the *Limitation Act* 1980, including section 24 thereof, he submitted, have in fact always been substantive "in the South African sense". Although English law traditionally classified statutes of limitation as procedural, the blurring of the distinction between rights and remedies had changed this. If the *via media* approach should be followed, policy considerations

83 In par [40] at 564I-565E.
84 He relied in this regard on *Primavera Construction SA v Government, North-West Province, and Another* 2003 (3) SA 579 (B) at 604E.
85 Note 57 above.

would once again prompt the application of the English law of limitation.

[67] In the alternative Mr Thompson submitted that, by agreeing, in clause 2.2 of their general undertaking,[86] that a judgment obtained in an English court "may be enforced in the courts of any other jurisdiction", they had "implicitly waived" any right to rely on foreign limitation or prescription rules.

[68] In the further alternative, Mr Thompson argued that, even if the South African prescription rules should indeed apply, the claims of the plaintiff were based on "judgment debts" which prescribed only after thirty years. He relied in this regard on *E A Gani (Pty) Ltd v Francis*,[87] where it was held that a judgment, including that of a foreign court, novated the former debt, thereby creating a new debt on which a suit could be brought. He found further support for this submission in the *MV Ivory Tirupati* case,[88] in which it was held that a judgment not only "reinforced and strengthened" an original cause of action, but could also create "a new and independent cause of action enforceable between the parties in another court". Accordingly, he submitted, the present cause of action was based on a "judgment debt" and not on the underlying cause of action. It had hence not prescribed.

Submissions on behalf of the Defendants

[69] In his argument for the defendants, Mr Seligson likewise dealt fully with the authorities discussed above and submitted that this court should follow the decision of Mynhardt J in the *Price* case.[89] He found further support in the affidavit of Mr L S Kuschke, an advocate of this court and a barrister of England and Wales, who opined that English common law generally classified laws of limitation as procedural rather

86 Par [4] above.
87 1984 (1) SA 462 (T) at 466C-H.
88 *MV Ivory Tirupati: MV Ivory Tiruputi and Another v Badan Urusan Logistik (aka Bulog)* 2003 (3) SA 104 (SCA) par [30]-[33] at 116D-117A.
89 Note 1 above.

than substantive.[90] This was also the way in which South African law, as the *lex fori*, classified the English limitation regime.

[70] The *via media* approach, Mr Seligson submitted, was of no assistance where the *lex fori* and the *lex causae* came to different conclusions regarding classification, because then there was no *via media*. This situation was different from that in the *Laurens* matter[91] since there was in fact no conflict between the applicable systems of law. In any event Schutz J's judgment on the application of the *via media* was *obiter* in regard to conflict situations such as that in the present matter. In this regard he submitted that Booysen J's approach in the *Laconian* matter[92] was, for reasons of policy, the correct one. It was far better, he suggested, for a court to apply the law it knows than that which it does not know. In many instances it would be almost impossible to apply foreign procedural rules, which tended to involve the exercise of an inherent jurisdiction and were not readily ascertainable on the basis of expert evidence. Booysen J was hence justified in falling back on his oath of judicial office, by which he was enjoined to apply South African law on a residual basis.

[71] On the question whether or not any of the foreign judgments in the present matter constituted a "judgment debt" in terms of section 11(*a*)(ii) of the *Prescription Act* 68 of 1969, Mr Seligson submitted that it could not be so. It was the clear intention of the legislature that a "judgment debt" was restricted to a judgment of a South African court and did not include that of a foreign court. A foreign judgment constituted a cause of action for the institution of legal proceedings and was not

90 This is in line with *Yew Bon Tew v Kenderaan Bas Mara* [1982] 3 All ER 833 (PC) at 835*j*-836*a*, where Lord Brightman observed that, in most cases, the *Limitation Act* 1980 "goes only to the conduct of the suit; it leaves the claimant's right otherwise untouched in theory so that, in the case of a debt, if the statute-barred creditor has any means of enforcing his claim other than by action or set-off, the Act does not prevent his recovering by those means".
91 Note 57 above.
92 Note 30 above.

executable in South Africa until it had been confirmed by a judgment of a South African court. It was based on an implied acknowledgement by the defendant of his indebtedness to the plaintiff in the amount of the judgment, which stood only as *prima facie* evidence of such indebtedness. It could be attacked only on certain limited grounds not available to an unsuccessful defendant in respect of a final judgment obtained in a South African court.[93]

[72] Mr Seligson rejected Mr Thompon's argument that the exclusion of a foreign judgment would render the term "judgment debt" otiose. It was, he submitted, based on the assumption that the term could not apply to a South African judgment because the appropriate remedy was enforcement rather than the institution of further proceedings. This assumption was wrong in that it did not take account of the fact that it was possible to sue on a South African judgment. Thus the plaintiff who had failed to obtain satisfaction of a judgment debt by way of issuing a writ of execution, might institute sequestration or contempt of court proceedings. Indeed, section 11(*a*) of the Act gave him thirty years within which to continue his efforts to obtain satisfaction of a judgment debt through the execution process. In this regard, Mr Seligson submitted, a distinction should be made between a judgment debt and a judgment as such. A foreign judgment became a judgment debt only once a South African court had granted provisional sentence in favour of the defendant. Thereafter execution could be levied to recover such judgment debt.[94] For these reasons, Mr Seligson submitted that the plaintiff's claims (save that against F Ilse) had prescribed.

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93 Mr Seligson relied, *inter alia*, on *dicta* appearing in *Joffe v Salmon* 1904 TS 317 at 319, *Joosab v Tayob* 1910 TPD 486 at 489, *National Milling Company Ltd v Mohamed* 1966 (3) SA 22 (R) at 23F, *Jones v Krok* (note 16 above) at 685B and 686A-B and the *MV Ivory Tiraputi* case (note 88 above) at 116D-117B (par [30]-[34] of the judgment).

94 Mr Seligson referred in this regard to *Kilroe-Daley v Barclays National Bank Ltd* 1984 (4) SA 609 (A) at 626C, where Galgut AJA stated: "A judgment debt is the amount or subject-matter of the award in the judgment. Execution can be levied to recover the judgment debt."

Consideration of the Prescription Issues

[73] When the authorities and arguments referred to above are considered, it is clear that there is no straightforward answer to the various issues raised by the parties. Both the applicable statutory provisions and the relevant jurisprudence in English and South African law must be carefully scrutinised with a view to determining the meaning and ambit of the provisions in question. Thereafter the court is required to classify, categorise or characterise such provisions in accordance with existing rules and principles. If the facts and circumstances of the particular case are such, however, that the existing rules and principles do not provide an obvious classification, category or characterisation, a different approach will have to be followed. The court will then have to decide on a policy approach which will achieve a just, fair and reasonable result in the light of all such facts and circumstances.

[74] On the face of it the meaning of section 5 of the English *Limitation Act* 1980[95] is unequivocal. An action based on (simple) contract is time-barred in that it may not be instituted more than six years after conclusion of the contract, being the date on which the relevant cause of action came into existence. The same time limit applies, in terms of section 24 of the Act, to an action based on a judgment. No action may be instituted on such judgment more than six years after it has become enforceable.

[75] I am quite satisfied that, in accordance with the weight of English authority, these time-bars or limitations must be characterised as procedural in that the relevant remedy is blocked, but not extinguished. This is in contrast with the corresponding South African provisions set forth in sections 11(*a*)(ii) and 11(*d*), read with section 10(1), of the *Prescription Act* 68 of 1969. A judgment debt is extinguished by

95 Par [28] above.

prescription after the lapse of thirty years from the date on which it becomes enforceable, whereas all other debts are extinguished after the expiry of three years from the time the relevant cause of action arises. This is a matter of substantive law.

[76] It follows from these findings that this court, as was the court in the *Price* matter, is confronted with a unique situation. Whereas the relevant South African law of prescription, being the applicable domestic law (the *lex fori*), is substantive, the English limitation law, being the law where the underlying contract was concluded (the *lex causae*), is procedural. When the English rule, that all matters of procedure are governed by the *lex fori*,[96] was devised, it was probably not envisaged that, in the *lex fori*, the limitation or prescription of actions might be a matter of substantive law and not of procedure. The compiler or compilers of the rule would probably have been aghast if they had been apprised of the fact that a judgment of the English Commercial Court would be extinguished, and not be simply time-barred, in terms of the *lex fori*. They could not be blamed for assuming that limitation provisions in the *lex fori* would also be procedural, as in English law, in which event the application of the *lex fori* would not be problematic. The question inevitably arises whether, if such a situation had indeed been envisaged, the rule would not have been qualified to read that the *lex fori* would be applicable to procedural matters, provided they are also procedural in such forum. If not, such matters should revert to the *lex causae*.

[77] Inasmuch as no such qualification was effected, it is for this court to decide how it should fill the *lacuna*, void or "gap" arising from the absence of any rule or principle governing the particular situation. Quite clearly it cannot simply be left in limbo, as would eventuate if neither South African nor English law should apply and it should be held that the claim in question is not subject to any form of limitation or

96 Rule 17 discussed by Dicey and Morris (note 18 above). See par [32] above.

prescription. That would give rise to the absurd situation that the claim would remain perpetually enforceable, as appears to have been held in the notorious German decision adverted to previously.[97]

[78] In the *Kuhne & Nagel* case[98] O'Donovan J, in my respectful view, adopted an eminently practical approach in holding that statutes of limitation which extinguish a plaintiff's right altogether belong to substantive law, to which the *lex causae* applies. The learned judge was not required to deal with a situation such as the present, where prescription is a procedural matter in the *lex causae* and a substantive matter in the *lex fori*. His approach to the situation where both the *lex causae* and *lex fori* are substantive, however, would appear to favour the *lex causae* in the present case.

[79] The *Laconian* case[99]was an important step in the right direction but, in my respectful view, Booysen J missed a golden opportunity to develop the existing law in an innovative way. The learned judge took cognisance of academic opinion favouring a *via media*, by virtue of which not only the *lex fori*, but also the *lex causae*, would be given consideration in characterising the relevant rules of law. Yet, rather than follow the *via media*, he held that there was no reason for him to depart from the general rule of South African international private law, namely that classification should be effected in terms of the *lex fori*. This prompted him to adopt an *ad hoc* or "residual *lex fori*" approach, in terms of which he fell back on his judicial oath which enjoined him to apply South African law in the absence of any rule determining the applicable legal system. This, in my respectful view, was a convenient rather than a sensible, reasonable or rational way to fill the gap or void caused by the absence of such rule.

97 Note 20 above. It features in the discussion of Dicey and Morris in par [32] above.
98 Note 21 above. It is discussed in par [34]-[37] above.
99 Note 30 above. See the discussion in par [39]-[45] above.

[80] In his discussion of "the proper law of the contract",[100] Booysen J appears to have accepted that the determination thereof should be made either in accordance with the express or imputed agreement of the parties, or by virtue of establishing the legal system most closely connected with the underlying transaction. Although he expressed a preference for the "most real connection theory", he considered himself bound by the "intention theory" advocated in the *Efroiken* case.[101]

[81] In the *Improvair* matter[102] Grosskopf J found himself in a similar position. Despite referring with approval to the *Bonython* formula and to Van Rooyen's approach to the legal system most closely connected to the transaction in question,[103] the learned judge likewise considered himself bound by the *Efroiken* case. He opined, however, that the most closely connected legal system would, in most cases, be that which the courts would presume to have been intended by the parties.

[82] I respectfully associate myself with the preference expressed by Booysen J, Grosskopf J and Van Rooyen for determining the *lex causae*, as the "proper law of the contract", by establishing which legal system is most closely connected to the transaction in question. This is not only in line with the *Bonython* formula, which appears to have been unequivocally accepted in English law, but it is also logical, realistic and reasonable. It is indeed a contradiction in terms to speak of an "assumed intention", as pointed out by Van Rooyen, in that an assumption is usually determined objectively whereas an intention occurs as a subjective expression of a person's will. The *Efroiken* judgment is, of course, binding on this court, but I am of the respectful view that, if the Supreme Court of Appeal should consider this matter anew, it may

100 See par [44] above.
101 Note 48 and par [46] above. See also the *Guggenheim* case (note 51 and par [47] above).
102 Note 51 and par [48]-[50] above.
103 Note 55 and par [49] above ("die engste verbonde regstelsel").

well be persuaded to follow the *Bonython* approach.

[83] Support for a more enlightened and flexible approach in considering issues of this nature has come with eminent clarity from the innovative and creative judgment of Schutz J in the *Laurens* case.[104] Although he accepted that it was no simple matter, the learned judge had no hesitation in applying a "connecting factor" after characterising the nature of the issue. Despite having little or no precedent to guide him, he fearlessly applied the *via media* as reflecting a universal point of view. This would enable him to take cognisance of the nature, scope and purpose of the foreign rule in its appropriate legal context and with regard to relevant policy considerations. It would, one may add, also avoid artificial attempts to fit the issue into a "pre-fabricated" or preconceived form or structure. In this way he would ensure that private international law, which was experiencing widespread development, would not stagnate or "languish in a straightjacket". For these reasons he followed the *via media* in considering both the *lex fori* and the *lex causae* before coming to a reasoned policy decision.

[84] I respectfully associate myself with Schutz J's approach. In a case like the present it is essential to adopt a *via media* approach. This means that the court must have regard to both the *lex fori* and the *lex causae* in considering whether the South African prescription regime or the English limitation regime should apply to the plaintiff's claims against three of the four defendants. It is clear that English law is the *lex causae* in that it is the legal system with which the underlying transactions between the parties have their closest connection. It follows that the rule relegating matters of procedure to the *lex fori*, being South African law, must be critically examined and appraised before simply applying it to the facts of this case. In this

104 Note 57 and par [51]-[56] above.

regard I accept that limitation in English law is procedural in that it simply bars the enforcement of an action without extinguishing the debt it is seeking to enforce, while prescription in South African law is substantive because it extinguishes the debt on which the action is based.[105]

[85] In the present matter the parties agreed that their rights and obligations would be governed by and construed in accordance with English law.[106] This means that they also agreed that the rule, requiring procedural matters to be dealt with by the *lex fori*, would apply. What they did not agree upon, in that they clearly could not have applied their minds to it, was that, in terms of South African prescription law, their respective claims would be extinguished by the effluxion of time. As mentioned previously,[107] the creators of the English rule were probably blissfully unaware of the fact that a debt, which was time-barred in English limitation law, would be extinguished should the *lex fori* be applied. It can scarcely be imputed to the parties that they intended such a result.

[86] This brings me to the question whether, in such circumstances, the rule might have been qualified to the extent that, if a matter of procedure in the *lex causae* should be a substantive matter in the *lex fori*, it would revert to the *lex causae*. In my view justice, fairness, reasonableness and policy considerations dictate that this question be answered positively. There is, in my respectful view, no room in our law, or in private international law generally, for a convenient *ad hoc* solution such as that held in the *Laconian* and *Price* matters.[108] I am unable to accept that my judicial oath requires me to adopt a "residual *lex fori*" approach when the relevant rules do not provide a ready

105 Se par [75] above.
106 Par [4] above.
107 Par [76] above.
108 Notes 1 and 30 above.

solution to the issue I am required to resolve. It is not, in my respectful view, consonant with legal logic or "good sense".

[87] From these considerations it follows that I must respectfully differ from the approach by Booysen J in the *Laconian* matter and Mynhardt J in the *Price* case. In deciding on an *ad hoc* resolution of the issue, the learned judges failed, in my respectful opinion, to give full consideration to the effect of the substantive nature of the South African prescription regime.

[88] I can likewise not agree with the basis on which Mynhardt J distinguished the *Laurens* case, namely that, because there was no conflict between the opposing legal systems, the policy decision was "easy to make". This did not take account of the *via media* approach followed by Schutz J and the need to develop the "residual *lex fori*" approach in order to make provision for circumstances such as those existing in the present case. More specifically it did not take account of the important fact that the South African prescription regime is substantive, thereby causing the relevant debts to be extinguished rather than simply time-barred, as is the case in the English limitation regime. The *Abdul* case[109] does not, in my respectful view, support Mynhardt J's approach, simply because it did not deal with the effect of the substantive nature and character of the relevant South African prescription provisions.

[89] In view of these considerations I must respectfully conclude that Mynhardt J was wrong, in the *Price* case, to hold that the claims in question had prescribed in accordance with South African law as *lex fori*. Inasmuch as the relevant South African provisions relating to prescription are substantive, South African law, as the *lex fori*, cannot be applicable in the present matter and the issue must accordingly be dealt with in terms of the relevant limitation provisions of English law, as the legal system

109 Note 69 and par [57]-58] above. See Mynhardt J's reference thereto in par [62] above.

most closely connected with the underlying cause of action and hence the *lex causae*. In the event the plea of prescription raised by M Romahn, H Ilse and M Ilse in respect of the plaintiff's claims against them, must fail.

[90] It follows that it is not necessary for me to deal with the effect of the English *Foreign Limitation Periods Act* 1984 on the characterisation of English limitation law, or with the question whether the defendants had "implicitly waived" the right to rely on South African prescription rules. If I should have felt constrained to deal with these matters, however, I would have strongly inclined to associating myself with Mynhardt J's outright rejection of the arguments raised in this regard by counsel for the defendants. There is simply no merit in them.

[91] It is, of course, likewise not necessary to deal with the question whether an English judgment should be regarded as a "judgment debt" for purposes of section 11(*a*)(ii) of Act 68 of 1969. If I should be held to have erred, however, in holding that South African law is not applicable in the present case, I would find myself in respectful disagreement with Mynhardt J's finding that a foreign judgment cannot be regarded as a "judgment debt" for purposes of the said section.

[92] It is quite correct that a foreign judgment is not directly enforceable, although it constitutes a cause of action which will be enforced by our courts provided it complies with the requirements set forth in the case of *Jones v Krok*.[110] It is likewise correct that a judgment may be regarded as having novated the original or underlying debt, thereby creating "a new and independent cause of action", as held in the *Gani* and *MV Ivory Tiraputi* cases.[111] It may be accepted, as argued by Mr Seligson,[112] that a foreign judgment is not executable in South Africa before being confirmed, in

110 Note 16 above. The case is discussed in par [26] and [27] above.
111 Notes 87 and 88 above.
112 Par [71] above.

provisional sentence proceedings, by a judgment of a South African court. That does not, however, make it less a judgment than any judgment emanating from this court. The authorities relied on by Mr Seligson in this regard do not, in my view, support his contention that the concept of "judgment debt" excludes a foreign debt. On the contrary, in the case of *Joosab v Tayob* the position was stated with great clarity by Bristowe J in the following terms:[113]

I do not think it is possible to draw any distinction between the judgment of a foreign court and the judgment of a domestic court. I think that the rule is that the judgment of any court constitutes a debt. It novates the original debt, and substitutes a new one, which may itself, at common law, be made the subject of a new action in another court.

[93] The *Primavera* case[114] does not, I would respectfully suggest, support Mynhardt J's decision in this regard. In that matter it was held[115] that an arbitrator's award acquired the status of a judgment debt only when it was made an order of court. Once that had happened it could be enforced like any other judgment debt. On the strength of this principle Mynhardt J held[116] that there was "no difference in principle between an arbitrator's award and a foreign judgment". This cannot, with respect, be correct. An arbitrator's award differs *toto caelo* from a judgment of a court, whether such judgment emanates from a South African or a foreign court.

[94] In the event I am satisfied that the English judgments in the present matter are judgment debts for purposes of section 11(*a*)(ii) of Act 68 of 1969. The claims in question have hence not prescribed in terms of English or South African law.

THE FRAUD ISSUE

[95] As an alternative to prescription, the defendants raised the defence that

113 Note 93 above, at 489-490. See also the *National Milling Company* case (note 93 above, at 23D-H).
114 Note 84 above.
115 At 604B-D of the judgment of Friedman JP.
116 At 566B-C of his judgment.

enforcement of the English judgments by this court would be unconstitutional and contrary to public policy. This was because the English courts had failed to apply the principle underlying the right of an affected party to be heard in legal proceedings (*audi alteram partem*) by precluding them from raising the defence that the plaintiff had induced them, by fraudulent misrepresentation, to become underwriting names.

[96] In his argument on behalf of the defendants Mr Seligson submitted that, by precluding the defendants from raising fraud as a defence against the claims of the plaintiff, the English courts had effectively allowed the plaintiff to contract out of its own fraudulent conduct. He accepted that this court would not, in general, enter into the merits of the case adjudicated upon by the foreign court, but this would not prevent it from investigating whether or not the recognition and enforcement of the foreign judgment was contrary to public policy or unconstitutional. In this regard he relied on section 34 of the Constitution, which provides:

> Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal.

He relied also on sections 165(1) and (2), which read thus:

> 1) The judicial authority of the Republic is vested in the courts.
> 2) The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.

[97] On the applicability of section 34, Mr Seligson referred to the *De Beer* case[117] in which Yacoob J stated:

> It is a crucial aspect of the rule of law that court orders should not be made without affording the other side a reasonable opportunity to state their case.

This, Mr Seligson submitted, established the link between section 34 and the common law right of *audi alteram partem*, which was the essence of a fair trial. Our courts

117 *De Beer NO v North-Central Local Council and South-Central Local Council and Others (Umhlatuzana Civiv Association Intervening)* 2002 (1) SA 429 (CC) par [11] at 439G 440B.

would not enforce a foreign judgment obtained in contravention of the principles of natural justice, in particular the right to be heard. By preventing the defendants from raising fraud as a defence, he suggested, the English courts had denied them this right and had hence acted in conflict with the principles of natural justice.

[98] Mr Seligson submitted further that, by holding the defendants to the provisions of clause 5.5 of the R&R scheme,[118] the English courts had accorded recognition to "an undertaking by which one of the contracting parties binds himself to condone and submit to the fraudulent conduct of the other".[119] This would be regarded by a South African court "as *contra bonos mores* and so offensive to the interests of society as to render it illegal and hence void".[120]

[99] In his argument on behalf of the plaintiff Mr Thompson submitted that the court should give effect to the intention of the parties as evinced in their agreement. A court would not hold any part thereof as contrary to public policy without taking into account socio-economic considerations relating to freedom of contract and commerce. He referred in this regard to what Smalberger JA said in the *Sasfin* case:[121]

> In grappling with this often difficult problem it must be borne in mind that public policy generally favours the utmost freedom of contract, and requires that commercial transactions should not be unduly untrammelled by restrictions on that freedom.

[100] When considering the requirements of public policy, Mr Thompson suggested, the court should have regard to the balance of justice and convenience. In the context of the conflict of laws the concept of public policy should be narrowly construed for purposes of our internal, domestic law. Only if the enforcement of a foreign judgment should be fundamentally contrary to the principles of our law would a South African

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118 Par [13] above.
119 *Wells v South African Alumenite Company* 1927 AD 69 at 72.
120 *Reeves and Another v Marfield Insurance Brokers CC and Another* 1996 (3) SA 766 (A) at 775D-E.
121 *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A) at 9E.

court refuse to enforce it.[122] None of the issues raised by the defendants, he said, passed muster on this score.

[101] Mr Thompson submitted further that, although the defendants had been precluded from raising fraud as a defence in terms of clause 5.5 of the R&R scheme, they were at liberty to bring a separate or independent counterclaim based on fraud or negligence. A so-called "no set-off" clause was a standard provision in various kinds of contract,[123] its main object being to ensure cash-flow for purposes of settling claims. Bingham MR explained this with eminent clarity in *Arbuthnott v Fagan and Others (No 2)*:[124]

The duty of the name to pay sums required by the agent without prevarication or deduction or delay is stated clearly and unequivocally. That reflects the overriding need, acknowledged on all sides, to ensure that funds are available for the prompt settlement of the claims of those who have insured or reinsured at Lloyd's.

Hoffmann LJ added:[125]

The purpose of clause 9 is clear and uncontroversial. It is designed to insulate the liability of the name to provide whatever funds are necessary for the underwriting business from the state of accounts between himself and the agent. Such insulation is necessary for the purposes of enabling the Lloyd's market to meet its liabilities. Otherwise the flow of funds needed to pay policyholders' claims may be clogged by disputes within Lloyd's between names and their agents, to the detriment of the market as a whole.

[102] Mr Thompson submitted that, inasmuch as these *dicta* pre-dated the R&R scheme, they confirmed that clause 5.5 of such scheme was a usual, valid and essential provision for purposes of ensuring the proper operation and supervision of

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122 On the "balance of justice and convenience" see *Sperling v Sperling* 1975 (3) SA 707 (A) at 722E, cited with approval in the *Laconian* matter (note 30 above, at 519H). See also E Kahn in *Annual Survey of South African Law* (1977) 564 at 570. He states there that the concept of public policy "should be confined to the violation of some fundamental principle of justice or good morals, such as fraud by the successful party". In the *Laurens* case (note 57 above, at 121B-C), Schutz J expressed approval of Kahn's approach where he suggests that a foreign rule should be rejected on the grounds of public policy "only if it flies in the face of some deep-rooted conception of good morals".

123 As stated in *Society of Lloyd's v Fraser and Others* (note 2 above) at 1649C.

124 [1994] 3 Re LR (Lloyd's Law Reports) 168 (CA) at 171(also in [1995] CLC 1396 at 1399).

125 At 173 (also in [1995] CLC 1396 at 1403).

the insurance market. Without it, he suggested, the plaintiff could simply not function properly or effectively.[126] The clause was not intended to protect a wrongdoer and did not affect the right of a name to institute an action for damages in delict (tort), or for any other relevant relief, against such person.

[103] It should not be lost from sight, Mr Thompson stressed, that the defendants had, in their respective general undertakings,[127] agreed that English law would govern all disputes between them and the plaintiff. They could not now be heard to say that the various decisions of the English courts, in respect of the binding effect of clause 5.5 of the R&R scheme, were in conflict with South African public policy.

[104] Significantly, Mr Thompson pointed out, there were similar provisions in South African legislation, such as the limitation provisions of section 40(5) of the *Value Added Tax Act* 89 of 1991. In his judgment in the *Metcash Trading* case,[128] Kriegler J held that such provisions were not in conflict with section 34, read with sevction 36, of the Constitution. He pointed out that the principle of "pay now, argue later" was "accepted as reasonable in open and democratic societies based on freedom, dignity and equality as required by section 36". On this basis, Mr Thompson submitted, the limitation of the rights of the defendants in terms of clause 5.5 of the R&R scheme was reasonable and justifiable, having regard to the useful and legitimate purpose which it served.

[105] Finally Mr Thompson argued that the defendants had all availed themselves of the opportunity to pursue a counterclaim for fraud against the plaintiff. They had been

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126 See *Marchant & Eliot Underwiting Ltd v Higgins* [1996] 2 Lloyd's LR (CA) 31 at 39 (also in [1996] CLC 301 at 355F (*per* Leggatt LJ): "Without some form of 'pay now sue later' obligation, Lloyd's could not function."

127 Par [4] above.

128 *Metcash Trading Limited v Commissioner for the South African Revenue Service and Another* 2001 (1) BCLR 1 (CC) par [60]-[62] at 29D-30D.

unsuccessful parties to the *Jaffray* proceedings, in which the Court of Appeal held that, although there had been a misrepresentation, it had not been fraudulent.[129] It gave that decision, which was final and binding, on 26 July 2002, prior to the plaintiff's instituting provisional sentence proceedings against the defendants in the present matter.

[106] I have considered the arguments for the defendants carefully and have no hesitation in rejecting them outright. It is simply not correct to say that the defendants were deprived of the right to a fair hearing in the sense that they were precluded from raising the plaintiff's alleged fraudulent misrepresentation before the English courts. Although they were not permitted, in terms of their respective agreements with the plaintiff, to raise it as a defence, they were given all opportunity to do so by way of a separately instituted counterclaim. When they subsequently availed themselves of such opportunity, they were unsuccessful.

[107] What the defendants really want now, it would appear, is a second bite at the cherry. On my reading of the relevant English judgments, in which the allegations of fraud have been considered exhaustively, there is little prospect that the defendants would successfully be able to raise this defence, or counterclaim, before our courts. In this regard I accept, of course, that I am not permitted to enter the fray by having regard to the merits of the case which served before the English courts. I am, however, required to consider whether the recognition and enforcement of the English judgments may be contrary to public policy. In doing so I fully realise that I am required to act fairly, independently and impartially, without fear, favour or prejudice.

[108] It is absurd to suggest, as the defendants have done, that by holding the defendants to the terms of clause 5.5 of the R&R scheme, they have allowed the

129 See note 12 and par [21] above.

plaintiff to contract out of its own fraud. Even if the English courts had not held unequivocally that there was no question of fraud on the part of the plaintiff, clause 5.5 merely has the effect of requiring full payment, without set-off or deductions, of the full amount owing by the name in question. It did not prevent such name from bringing a separate action based on alleged fraud or fraudulent misrepresentation. There is hence nothing untoward, unjust, unfair or unreasonable in including such a provision in the plaintiff's agreements with names.

[109] It is indeed essential, in an enterprise such as that operated by the plaintiff, to incorporate a provision of this nature into its agreements with names. It is clearly necessary for purposes of business and commercial efficacy in that it serves to make funds available for the effective functioning of the enterprise, as explained with eminent lucidity by Bingham MR and Hoffmann LJ in the passages quoted above from the *Arbuthnott* decision. It is, in my view, analogous to restrictions of a similar nature in certain kinds of legislation, such as that relating to the payment of income tax or value-added tax, as Kriegler J observed with his customary perspicuity in the *Metcash Trading* case. It is also in line with the need to protect freedom of contract in commercial activities, as set forth in the *Sasfin* case.

[110] It follows that I am quite satisfied that the recognition and enforcement of the judgments in the present matter cannot be regarded as *contra bonos mores*. Even less can it be held to be unconstitutional in terms of sections 34 and 165 or, for that matter, in terms of any other provision of the Constitution. There is no basis on which it can be said to be in conflict with the principles of natural justice, fairness or reasonableness. On the contrary, the English courts have, with respect, achieved an eminently rational and functional balance of justice and convenience in considering

the facts and circumstances underlying the issues they were required to resolve. There are, in my view, no policy considerations prompting this court to refuse to recognise and enforce the judgments of such courts. The fraud issue must therefore be resolved in favour of the plaintiff and the public policy defence on this score must fail.

THE CONCLUSIVE EVIDENCE ISSUE

[111] This issue likewise invokes public policy in regard to the "conclusive proof" provision contained in clause 5.10 of the R&R scheme and relating to the calculation of the amounts allegedly owing by the defendants.[130] The defendants averred that the enforcement of a judgment in which the amount (*quantum*) of the claim was calculated in terms of this provision, would be contrary to public policy. They indicated that they "would have wished to dispute those calculations" on the basis that they had never understood how the amount of their indebtedness to Lloyd's under the reinsurance scheme had been calculated. They were aware of "a considerable number of Names" who had discovered errors in the plaintiff's calculations.

[112] In his argument on behalf of the defendants Mr Seligson placed great reliance on the *Sasfin* case.[131] In that matter it was held that a provision, in terms of which the amount owing would be "deemed to be determined and proved" by a certificate signed by a director of any of the creditors, was contrary to public policy. The effect of this provision was that the certificate purported to oust the Court's jurisdiction to enquire into the validity or accuracy of the certificate, other than on the ground of fraud.[132] In view hereof Mr Seligson submitted that this court should refuse to recognise and enforce the judgments of the English courts on two bases. Firstly, the

130 See par [13] above.
131 Note 121 above, at 14I-15B.
132 See also *Ex Parte Minister of Justice: In Re Nedbank v Abstein Distributors (Pty) Ltd and Others and Donelly v Barclays National Bank Ltd* 1995 (3) SA 1 (A) at 21A-D

"conclusive proof" provision was contrary to public policy and, secondly, it deprived the defendants of their right to defend the plaintiff's claims against them in respect of the *quantum* thereof. This was contrary to the principles of natural justice. It was also in conflict with the provisions of section 34 of the Constitution, in terms of which the defendants were entitled to a fair trial in respect of the *quantum* of the claim.

[113] Mr Seligson found support for his submissions in this regard in the English Court of Appeal's decision in *Adams and Others v Cape Industries plc and Another*.[133] In this matter a United States federal district court granted default judgment against the two defendant companies in favour of 205 plaintiffs. The judgment was for damages arising from personal injuries and consequential loss allegedly suffered by the plaintiffs as a result of their exposure to asbestos fibres. The defendant companies were registered in England and took no part in the proceedings. No hearing was held for purposes of assessing the damages and the judge appears to have made an arbitrary award based on his opinion of what would represent an appropriate average award.

[114] When the plaintiffs sought to enforce the judgment in England, the defendants raised the defence that it would, under the circumstances, be contrary to natural justice to do so. In the Chancery Division, Scott J held that the failure by the United States court to assess the damages judicially offended against English principles of natural (or substantial) justice. Although the award of damages might have been made in accordance with the applicable procedural rules, it was arbitrary, not based on evidence and not related to "the individual entitlements" of the plaintiffs. He hence dismissed the action on the basis that the relevant test was natural justice as perceived by the court in which the plaintiff was seeking enforcement of the foreign judgment.

133 [1991] 1 All ER 929 (ChD and CA).

An appeal to the Court of Appeal was dismissed.

[115] Mr Seligson submitted that the approach of these English courts was "instructive" for purposes of adjudicating the present matter in that, as in that matter, the "conclusive proof" objection was restricted to the quantification of the plaintiff's claim. That in itself was a good reason for refusing to enforce a foreign judgment.

[116] In his argument for the plaintiff Mr Thompson pointed out at the outset that clause 5.10 of the R&R scheme had been considered by the English courts and held to be valid in that its main purpose was to achieve cash flow. It hence precluded, as a defence to the plaintiff's claim against a name, the raising of disputes concerning the calculation of the *quantum* claimed. This was the gist of Tuckey J's judgment in the *Fraser* case when he refused to invalidate clause 5.10.[134]

[117] Mr Thompson conceded that, in terms of the *Sasfin* decision, conclusive evidence clauses, which provide for a certificate of balance to constitute conclusive proof of indebtedness in favour of a creditor, would be *contra bonos mores* in that they precluded rebutting evidence to prove a mistake. If the certificate did not, however, preclude rebutting evidence, it would not be in conflict with public policy.

[118] In the present matter, Mr Thompson submitted, the plaintiff indeed relied on the calculations of the MSU ("Members Services Unit") in determining the amount of the defendants' indebtedness. There was no evidence, however, to suggest that these calculations were wrong or that the plaintiff had invoked the conclusive evidence clause against any of the defendants so as to preclude them from establishing that the calculations were wrong. The defendants simply failed to make out a case that there was any error in the calculation of any of their liabilities. They could hence not be heard to say that clause 5.10 was contrary to public policy. Their attempt to do so was

134 See par [17] above.

nothing more than a red herring.

[119] Mr Thompson emphasised that in the present matter the plaintiff was not seeking to enforce a conclusive evidence clause. It was seeking to enforce judgments of an English court based on English law, to which the defendants had agreed to subject themselves. English law did not, in general, regard conclusive evidence provisions as contrary to natural justice or public policy. On the contrary the defendants were free to object to the calculation of the amount claimed not only on the basis of fraud, as in South African law, but also on the basis of manifest error or irrationality, in the sense of unreasonableness or perversity.[135]

[120] Mr Thompson made it clear that the present matter raised very different policy issues from those considered in the cases relied on by Mr Seligson. Such issues had to be considered with reference to the fact that the defendants had agreed to be bound by English law, which recognises conclusive evidence clauses. It also had to take into account the fact that comity requires a South African court to recognise and enforce a foreign (English) judgment.

[121] I agree with Mr Thompson that the defendants, in raising the conclusive proof point, have merely drawn a red herring across the track and have achieved nothing for their efforts. The arguments put forward by Mr Seligson are interesting and instructive, but have no bearing, I believe, on the facts of the case before this court. The defendants have come nowhere near making out a case that they have had even the slightest difficulty with the computation of the *quantum* in their respective cases, let alone that it was manifestly wrong, fraudulent or irrational. Simply to say that they

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135G Treitel *The Law of Contract* (11th ed 2003) 446-447 states that contracts are contrary to public policy, and hence invalid, "only so far as they purport to exclude the jurisdiction of the courts on a point of law". If the exclusion relates to fact, it may still be challenged "on the ground of unfairness, bad faith or perversity". .

have had difficulty in understanding how the amounts have been calculated raises no issue or dispute at all. That they "would have wished to dispute those calculations", without indicating on what basis they would have liked to do so, is meaningless. This is compounded by the unsupported hearsay allegation that "a considerable number of Names" have discovered errors in the calculations.[136]

[122] To suggest that the mere insertion of clause 5.10 into the R&R scheme constituted a breach of public policy, regardless of whether its provisions were ever invoked against the defendants, must be rejected out of hand. By the same token the defendants cannot be heard to say that they have not been given a fair trial or a fair hearing in terms of section 34 of the Constitution. If, at any stage during the course of the English litigation, they had had a problem relating to the calculation or computation of the amount or interest claimed, they would have had the opportunity to raise it on the basis of its being manifestly wrong, fraudulent or irrational. If they had effected undue payments, they would have had the right to reclaim them. Similarly, if monies had been owing to them, nothing would have prevented them from laying claim thereto in a separate action. They were not, however, entitled to apply set-off in respect thereof, for the simple reason that they had contractually bound themselves not to do so.

[123] The *Adams* case to which Mr Seligson referred does not, in my view, assist the defendants. The facts of that matter differ totally from those in the present matter in that neither of the defendant companies had, in that case, been involved in the proceedings in the United States court. In addition the English court had difficulty with the ostensibly arbitrary way in which the damages had been assessed by the United States court. In the present matter the defendants have at all relevant times

136 See par [111] above.

been fully involved in the proceedings and have never questioned the assessment of damages claimed against them. This last-ditch attempt to raise *quantum* as an issue, in particularly vague and oblique terms, must necessarily bring their good faith and sincerity into question. It smacks of a desperate attempt to stave off the inevitable by clutching at even the most unsubstantial of straws.

[124] It must not be lost from sight that the defendants expressly agreed to the provisions of clause 5.10 and likewise agreed that any dispute arising therefrom would be dealt with in terms of English law. I am, of course, permitted to have regard to the merits of the English case only for purposes of establishing whether it would be contrary to public policy to enforce a judgment ordering payment of an amount calculated in terms of such clause. In doing so I am constrained to remark that the approach of the English courts to this clause is particularly persuasive, namely that the purpose of clause 5.10, as in the case of clause 5.5, is to achieve cash flow.[137] This makes good commercial sense.

[125] In this regard I am of the respectful view that the time may be overdue for the reconsideration, or at least a qualification, of the *Sasfin* rule. It seems logical and rational that account should be taken of business and commercial efficacy in considering a "conclusive proof" provision. It also appears to be just, fair and reasonable that the amount claimed should be subject to attack not only on the ground of fraud, but also on the grounds of manifest error and irrationality, in the sense of unreasonableness or perversity, as is the case in English law.

[126] As for Mr Thompson's argument that comity (*comitas*) requires this court to recognise and enforce foreign judgments, I do not believe that it is necessary, for present purposes, to deal in any depth with this well-known principle of private

137 A stated by Tuckey J in the *Fraser* case (see par [17] above).

international law. Suffice it to say that, since early Roman times, it was expected of a country, which had been victorious in battle, to treat the inhabitants of the defeated country *comiter*, that is to say with affability, benevolence, courtesy, generosity and kindness. This usually entailed that their sovereignty (*maiestas*) and dignity (*dignitas*) would be recognised and respected by the conquerors.[138] The application of comity in this sense was not attributable to some or other legal obligation arising from international law but was, rather, a moral obligation motivated by considerations of humanity (*humanitas*) and equity (*aequitas*). Not surprisingly it appears to have been transferred, as a fundamental value, to Roman-Dutch private international law, as demonstrated by Paul Voet (1619-1667) in his work on the conflict of laws.[139]

[127] Comity has probably, to a large extent, been a key factor in the development of the rules and principles of private international law. There can hence be no objection to applying it to the recognition and enforcement of foreign judgments and orders, provided it is not in conflict with public policy. On the facts and in the circumstances of the present case, however, it is not necessary to fall back on comity in rejecting the contentions of the defendants. There is simply no merit in them at all. It follows that the conclusive evidence issue must also be resolved in favour of the plaintiff. The public policy defence on this basis must hence be dismissed.

CONCLUSION

[128] From the aforesaid considerations it follows that all the defences raised by the defendants must fail and that provisional sentence should be granted against them. The parties have agreed on the dates from which interest is payable by the defendants.

138 See *Digest* 49.15.7.1.

139 Paulus Voet *De statutis, eorum que concursu, liber singularis* (1661) 4.2.17; 4.3.17. See in general J M B Scholten *Comitas in het internationaal privaatrecht van de hollandsche juristenschool der zeventiende eeu* (1952) 35-36 and 81-82 and Van Rooyen (note 55 above) at 15-16.

ORDER

[129] In the event I grant the following order:

1. In case no. 5108/03, M L Romahn is ordered to pay the plaintiff:

   (a) the amount of £277,513.79 (being the principal sum of £277,013.79 plus costs in the agreed amount of £500.00);

   (b) interest on the amount of £277,513.79 at the rate of 8% per annum from 23 December 1999 to date of payment;

2. In case no. 5105/03, H Ilse is ordered to pay the plaintiff:

   (a) the amount of £272,501.67 (being the principal sum of £272,001.67 plus costs in the agreed amount of £500.00);

   (b) interest on the amount of £272,501.67 at the rate of 8% per annum from 23 December 1999 to date of payment;

3. In case no.5107/03, M Ilse is ordered to pay the plaintiff:

   (a) the amount of £489,335.27 (being the principal sum of £435,747.73 plus interest up to 11 March 1998 in the agreed amount of £53,588.54);

   (b) interest on the amount of £435,747.73 at the rate of 8% per annum from 12 March 1998 to date of payment.

4. In case no. 8588/04, F Ilse is ordered to pay the plaintiff:

   (a) the amount of £820,016.82 (being the principal sum of £521,370.72 plus interest up to 13 May 2004 in the agreed amount of £292,646.10 plus assessed costs in the amount of £6,000.00);

   (b) interest on the amount of £527,370.72 (being the principal sum plus assessed costs) at the rate of 8% per annum from 14 May 2004 to date

of payment.

5. The defendants, M Romahn, H Ilse, M Ilse and F Ilse are ordered, jointly and severally, to pay the costs of suit, including the costs of two counsel.

D H VAN ZYL

Judge of the High Court

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