12-a-75

G.P.-S.59968—1970-71—2 500

J 219

1574/75

In the Supreme Court of South Africa
In die Hooggeregshof van Suid-Afrika

(APPELLATE Provincial Division)
(Provinsiale Afdeling)

Appeal in Civil Case
Appèl in Siviele Saak

LIEBENBERG FINANCE (PTY) LTD. *Appellant,*

versus

CORPORACION DE FERROAX AGRICOLA & ORS. *Respondent*

Appellant's Attorney McIntyre & v.d.Post *Respondent's Attorney*
Prokureur vir Appellant *Prokureur vir Respondent* Sutherst & Horsley

Appellant's Advocate J. Sussman QC *Respondent's Advocate* ~~DAVIDSON~~ M(SIM)
Advokaat vir Appelland C. Lachenicht SC 24-5-1976 *Advokaat vir Respondent* J. Browde SC
F.J Bashall

Set down for hearing on
Op die rol geplaas vir verhoor op 24 8 11

~~Coram~~ Rumpff (HK) Jansen, Corbett JARR
et Viljoen, Miller LWARR

Sussman: 9.45–11.05, 11.15–12.22, 4.35–4.40
(O.F.D.) Browde: 12.22–12.45, 2.15–3.40, 11.40–4.42
Lachenicht: 3.40–4.35.

C.A.V.

Bills taxed—Kosterekenings getakseer

Date Datum	Amount Bedrag	Initials Paraaf

Writ issued
Lasbrief uitgereik

Date and initials
Datum en paraaf

IN THE SUPREME COURT OF SOUTH AFRICA.

(APPELLATE DIVISION)

In the appeal of:

LENDALEASE FINANCE (PROPRIETARY) LIMITED .... appellant

versus

CORPORACION DE MERCADEO AGRIGOLA... 1st respondent,

and

ASTRO VENTUROSO COMPANIA NAVIERA SA..2nd respondent,

and

TRAMP SHIPPING LIMITED .....3rd respondent,

and

CAPTAIN GREGORY GREGORIADIS
(in his capacity as the Master
of the Vessel "MARIANNINA") .....4th respondent.

Coram; Rumpff, C.J., Jansen et Corbett, JJ.A., Viljoen et Miller, A.JJ.A.

Date of Hearing: 24 May 1976.

Date of Judgment: 17/8/76.

JUDGMENT/.....

J U D G M E N T

CORBETT, J.A.:

On 5 June 1975 appellant, Lendalease Finance (Proprietary) Limited (hereafter referred to as "Lendalease") made an urgent application to the Cape Provincial Division for the attachment ad fundandam jurisdictionem of a cargo of bulk maize aboard the ship "M.V. MARIANNINA", then in dock at the Cape Town harbour, and, if not already released to the shipper, of the full set of negotiable bills of lading relating to this cargo, together with certain ancillary relief. On 12 June 1975 the Court gave judgment (per DE KOCK, J., BAKER, J., concurring) dismissing the application and, save for some specific matters in respect of which special orders were made, ordering Lendalease to pay the costs. This judgment has been fully reported (see Lendalease Finance Co. (Pty.) Ltd. v Corporacion De Mercadeo Agricola and Others, 1975 (4) SA 397 (C)) and it is, consequently, necessary to repeat only the salient facts and features of the matter.

In/...

In Venezuela maize is the staple food of the people. Large quantities of bread, particularly for persons in low income groups, are made from maize. The annual consumption of maize by the people of Venezuela greatly exceeds the annual production of the country and consequently this commodity is imported on a large scale. In March 1974 a Venezuelan trade mission, consisting of government officials, visited South Africa in order to purchase maize for the State of Venezuela. As a result of this visit a contract for the purchase of approximately 250,000 tons of maize was concluded between the Maize Board of South Africa (hereafter referred to as "the Board") and first respondent, Corporacion De Mercadeo Agricola of Caracas, Venezuela (hereafter referred to as "CMA"). The reason for the purchase of so large a quantity was that there had been a maize crop failure in Venezuela. In October 1974 a second Venezuelan trade mission visited this country with the same objective, and in that month a second contract for the purchase of, this time, 130,000 tons of maize was concluded between the same parties. It is only this second

contract (which I shall call "the maize contract") which is of relevance in this case.

It was provided in the maize contract, inter alia, that the maize was to be shipped f.o.b. by the Board in ten separate cargoes of approximately 13 000 tons each. Two shipments were to take place in March 1975, four in April 1975 and four in May 1975. In each case the port of shipment was stated to be "East London and/or Cape Town". The contract obliged CMA to arrange for the necessary shipping to convey the maize to Venezuela. To this end it was made incumbent upon CMA to present "suitable tonnage" in respect of each cargo at the port of shipment nominated by the Board and to give the Board appropriate notification of the shipping periods in each month, of the actual chartering of freight, of the fitness and readiness of each individual vessel to receive and carry a full cargo of maize in bulk and of the readiness of the vessel to load. The contract further provided for the delivery of the maize in bulk into

the ship's hold at an average rate of not less than 1500 tons per day, or in bags to be provided by the purchaser and for the quantities delivered for shipment to the purchaser to be determined by mass certificates issued by the South African Railways Administration. (The cargo in question was loaded in bulk) The relevant portions of the clauses of the contract relating to delivery and payment read as follows:

"7. DELIVERY: Delivery shall be free on board unstowed and untrimmed the vessel presented by the Buyer .... and Bills of Lading supported by mass certificates... shall be proof of delivery.

10. RISK: All risks after delivery shall be for the account of the Buyer.

11. PAYMENT: (1) The Buyer shall at least 10 days prior to the first day of the shipping period of each cargo furnish the Seller with an irrecovable confirmed Letter of Credit issued by a bank acceptable to the Seller, covering the value of the maize to be shipped calculated at the price mentioned in clause 3, and stipulating that the amount payable by the Buyer in terms of this contract shall be paid in cash on presentation by the

Seller of the following documents duly stamped and signed by a consul of a country which is friendly to Venezuela:

(a) Charter Party Bill of Lading (full set clean on board to "Order" and endorsed in blank) marked "Freight payable as per Charter Party".

.....

(d) Mass certificates issued by the South African Railways Administration.

.....".

Shortly after the conclusion of the maize contract and also in October 1974, CMA concluded an agreement with a corporation known as Leo Raphaely and Sons (Proprietary) Limited (hereafter referred to as "Raphaely"), of Johannesburg, whereby the latter undertook to convey the entire purchase of 130 000 tons of maize from South Africa to Venezuela and generally to take over "all the obligations and functions, rights and duties" of CMA pertaining to the maize contract, except those relating to the cost of the maize and the insurance thereof. This contract (which I shall call "the shipping contract") provided, inter alia, (i) that payment of the agreed freight

was/.....

was to be effected by CMA by the provision of an irrevocable confirmed letter of credit 14 days prior to the month of loading and by payment against one non-negotiable "on board" bill of lading; and (ii) that the "domicile of this contract" should be the city of Caracas, in the Republic of Venezuela, and that both parties accepted the jurisdiction of the Venezuelan courts in that city.

The shipping contract was never implemented. Raphaely made arrangements for the conveyance of the first March shipments but CMA, despite demand, failed to provide the necessary irrevocable letter of credit for these shipments on due date, i.e., 14 February 1975, or indeed at all. During the last week of February a director of Raphaely, Mr Gabriel Cutayar, was informed by Raphaely's representative in Venezuela that CMA was "not happy with" the freight rate fixed by the shipping contract and wished to re-negotiate this aspect of the agreement. Negotiations ensued, but to no effect. Thereafter CMA contracted with another company, Servicios Maritimos Internacionales S.A., of Panama (hereafter

referred to as "Servicios"), to undertake the conveyance of the maize to Venezuela and the performance of its (CMA's) obligations in that regard under the maize contract.

Raphaely claimed - and continues to claim - that CMA unlawfully repudiated the shipping contract and that as a result of such repudiation and breach of contract Raphaely suffered damages in an amount of R1 970 340. In view of CMA's status as a peregrinus in the courts of South Africa, Raphaely found it necessary to obtain an attachment of assets belonging to CMA ad fundandam jurisdictionem in order to pursue an action for damages for breach of contract against CMA in a South African court. During April 1975 attempts were made to effect the attachment of two cargoes of maize, one aboard the "ADAMAS" and the other aboard the "KAPITAN XILAS" but, for reasons which need not be canvassed, neither attempt bore fruit.

Early in June 1975 loading of the last cargo under the maize contract, comprising approximately 13 000 tons of

maize, on board the "MARIANNINA" was commenced in the docks at Cape Town. The "MARIANNINA" is owned by second respondent, Astro Venturoso Compania Naviera SA (hereafter referred to as "Astro "), and was then under a time charter to third respondent, Tramp Shipping Limited (hereafter referred to as "Tramp Shipping"). For the purpose of conveying this cargo from Cape Town to Venezuela in terms of its contract with CMA, Servicios had chartered the "MARIANNINA" from Tramp Shipping under a voyage charter party. On 5 June the aforementioned application was made on notice of motion for the attachment of this cargo to found jurisdiction in respect of the action for damages for breach of the shipping contract. The application was brought not by Raphaely but by Lendalease, to whom Raphaely had on 3 June 1975 ceded and assigned all its right title and interest in its claims against CMA for breach of contract. Only CMA was cited as respondent but during the course of the initial hearing, on 5 and 6 June, Astro, Tramp Shipping and Captain Gregory Gregoriadis, in his capacity

as master of the "MARIANNINA", sought and evidently obtained leave to intervene as additional respondents. Affidavits were filed opposing the application on behalf of all the respondents and they were represented by counsel. After the hearing the Court a quo issued a rule nisi, operating also as an interim interdict upon the ship leaving Cape Town, calling upon CMA and the master of the "MARIANNINA" to show cause on 10 June why the deputy sheriff should not be directed to attach and remove from the vessel the entire cargo of maize then on board. On the return day (10 June) the parties were again fully represented. At this hearing, which appears to have occupied three days (10, 11 and 12 June) the Court heard and dealt with two preliminary applications and then proceeded to the merits of the matter. One of these applications, made on behalf of Astro, Tramp Shipping and the master, was for the dismissal of the application on the ground that the cession of its right of action by Raphaely to Lendalease was not a bona fide one and that, therefore, Lendalease

had/....

had no *locus standi in judicio.* In this connection it was emphasized that the admitted purpose of the cession was to overcome possible jurisdictional problems in regard to an *incola* of the Transvaal obtaining an attachment order in the Cape Provincial Division over property situated within the area of jurisdiction of that Court. This preliminary application, which entailed the hearing of certain oral evidence, was dismissed with costs.

In response to the rule *nisi* and between the granting thereof and the final judgment of the Court *a quo*, further affidavits were filed by the parties. These bring the factual situation up to date. It appears that the loading of the cargo, which was still in progress at the time of the original application, was completed at 9.40 a.m. on 11 June. The vessel was, therefore, then ready to proceed to sea on her voyage to Venezuela, subject to certain clearance and sailing formalities being completed. Shortly after the completion of the loading the agent of the Board approached

the ships agent, acting on behalf of Astro, Tramp Shipping and the master, and asked whether the master would sign the bill of lading in respect of the cargo of maize aboard his vessel. He (the Board's agent) was then informed that the master would do so only after he had claused the bill to record t the possibility of attachment and removal of the cargo by order of the Court. The Board's agent thereupon declined to present the bill for signature. Subsequently, as a result of further communications between the agents, a photostatic copy of the unsigned bill, with the intended clausing placed thereon (annexure Y2), was conveyed to the Board's agent. This was evidently not acceptable to the latter and it would seem that this is how matters rested at the time when the application for attachment was finally adjudicated upon by the Court below.

There is included in the record an affidavit deposed to by Mr H.F.B. Hickley, the general manager of the Board. Although this is not reflected in the record, we were informed by counsel that this affidavit, which was dated 12 June, was

tendered by counsel for the Board who appeared at a late stage in the proceedings and made application to intervene. The Court apparently put it to counsel for the Board that his client would be interested to become involved in the application only if the Court intended granting the application; and, upon counsel affirming this, the Court advised him to await the judgment. Shortly thereafter judgment was delivered dismissing the application.

In the Court a quo the main defence to the application was based upon the contention that by reason of the doctrine of sovereign immunity the Court was precluded from granting an order for the attachment of the maize. Briefly, this contention was based upon the averments that CMA purchased the maize as agent on behalf of the State of Venezuela and that it was at all material times intended to become the property of the State of Venezuela. It was not purchased for purposes of trade in the generally accepted sense but in order to secure an adequate supply of maize for the people of Venezuela. Further, it was claimed that

in/.....

in any event, CMA was a State-controlled buying and distributing body, the sole reason for whose existence was to secure in the national interest a State minimum pricing policy and a supply of agricultural products and implements for the people of Venezuela. Pursuant to these objects CMA acquired agricultural products and implements and sold the same only to the people of Venezuela at prices below the cost thereof to CMA, the consequent loss being absorbed by CMA. It acted only on directions from the Cabinet and in most instances from the President of Venezuela himself. Funds for the carrying out of its functions were supplied by the State. All transactions had to be ratified by the State Comptroller. The CMA was exempt from fiscal legislation and other State charges and levies. Immunity was claimed by Mr H. Gomez, the administrative manager of CMA, on behalf of CMA and, in accordance with authority conferred upon him by the Minister of Agriculture, on behalf of the State of Venezuela broadly on the ground that once ownership of the maize in question passed, it became the property of and subject to the control

of the State of Venezuela and was, accordingly, in law exempt from attachment.

This claim to sovereign immunity was strenuously contested by Lendalease, both on the law and on the facts. Included among the affidavits filed on behalf of Lendalease is one deposed to by Dr Mariano Arcaya, an attorney practising in Venezuela and someone having expert knowledge of Venezuelan law. According to Dr Arcaya CMA is "an autonomous institute" of the Republic of Venezuela and as such is a separate juridical entity, having its own assets and legal existence, separate and distinct from the Government of Venezuela. It was not deemed in law to be an agent acting on behalf of the State, though it might in specific circumstances contract to do so. In the absence of a clear specific contract to that effect, CMA would be deemed to buy and sell produce, such as maize, on its own behalf and to take title to, and dispose of, such produce in its own name and on its own behalf. Dr Arcaya's views (which were further elaborated in certain telex communications, dated 27 May and 6 June 1975

and annexed to a replying affidavit by Lendalease's attorney) were disputed, in various respects, by Gomez, who claims to be fully conversant with the powers and property rights of CMA, by a Dr H.W. Qevedo, the president and legal representative of CMA, who also filed an affidavit on behalf of CMA, and by Mr C.C. Barboza, the Venezuelan Minister of Agriculture, who confirmed the correctness of Dr Qevedo's affidavit. The matters in dispute relate principally to (a) the juridical status of CMA and, more particularly, its relationship to the State of Venezuela; and (b) in whom the ownership in the maize was intended to vest after performance of the maize contract, i.e., whether in CMA or the State of Venezuela, which in turn depends to some extent upon the issues referred to in (a).

The Court a quo did not find it necessary to adjudicate upon many of these issues. It held that it appeared from all the evidence to be common cause that CMA was "a State-owned enterprise". In regard to the ownership

issue/.....

issue the Court stated (at p. 402 B - E):

> "It will be apparent from what I have said so far that there is a dispute on the papers as to the ownership of the maize in respect of which the attachment order is sought. In a matter of this nature it must, I think, be clear that the property sought to be attached belongs to the peregrinus before the Court will grant the order
> .....
> I have some doubt whether it can fairly be said that the applicant has discharged the onus of proving that the maize in question is the property of the respondent. On the evidence submitted by the respondent, C.M.A. concluded the maize contract as agent for and on behalf of the State of Venezuela and it is the State of Venezuela who is the owner of the maize and not C.M.A. But even if I accept that it has been shown that the legal dominium of the maize vests in C.M.A. as a separate juridical entity having its own assets and legal existence distinct from the Government or State of Venezuela, I do not think that an attachment order should be granted in the circumstances of this case. I say this because although C.M.A. may stricto sensu be the legal owner of the maize it seems clear that it is the State of Venezuela and not C.M.A. who has the right of control in respect of the maize, and in these circumstances the maize is, in my view, immune from attachment."

The judgment proceeds to state the reasons for the decision contained in the concluding words of the above-quoted passage. Reference is made to the general principles

relating/....

relating to the doctrine of sovereign immunity and a number of the leading cases in our law and in English law are cited and discussed. Particular reliance is placed on the English case of Baccus S.R.L. v Servicio Nacional de Trigo [1956] 3 All E.R. 715, a decision of the Court of Appeal, the facts of which were said to "show a marked resemblance to the facts of the present case". Despite criticisms of this case, and other decisions to the same general effect, in certain minority judgments in later cases and by writers on international law, and declining the invitation of counsel appearing on behalf of Lendalease to follow this latter line of authority, the Court held (at p 404 E - F) that it —

> "..... sitting as a Court of first instance, should adhere to the traditional view of granting immunity in respect of property which belongs to a sovereign foreign State or of which it is in possession or control."

The order for attachment was accordingly refused and the rule nisi and interim interdict discharged. Lendalease was ordered to pay the costs, including the costs of the intervening parties, but not the costs of the Board.

By a notice dated 2 July 1975 an appeal was noted to this Court against the whole of the judgment and order of the Court a quo, including the order as to costs, "save in so far as the Court ordered the intervenors to pay portion of the appellant's costs." Although this does not appear from the record, it is to be inferred (as was confirmed before us by counsel) that by then the "MARIANNINA" had set forth for Venezuela and that by the time this appeal was heard the maize in question had in all probability been used to feed the people of Venezuela. In this Court it was, accordingly, conceded by counsel for Lendalease that effectively it was an appeal merely against that portion of the order of the Court a quo which ordered Lendalease to pay the respondents' costs but it was submitted that the merits of the application for attachment had to be canvassed in order to determine whether the order for costs had correctly been made. In support of the submission that the Court below erred on the merits, counsel for Lendalease presented a comprehensive and well-documented argument

upon/.....

upon the topic of sovereign immunity. For reasons which will become apparent later, it will not be necessary to make more than passing reference to this argument. At this stage, however, it is appropriate and convenient to consider certain preliminary points which were raised on appeal by counsel for the respondents.

The first point is that, because there is now nothing to be attached, the issue on appeal is, apart from the question of costs, an academic one and should, therefore, not be entertained by this Court; and, as a corrollary to this, the further point was made that, since only costs were really in issue, leave to appeal should have been obtained from the Court a quo. In support of this first point respondents' counsel referred to various decisions to the effect that even in the exercise of its discretionary powers, in terms of section 19 of Act 59 of 1959 (or in terms of the previous statutory provision - section 102 of Act 46 of 1935), to determine, inter alia, contingent rights, the Court refuses to enquire into matters of abstract or in-

tellectual interest only. In this connection counsel referred to Durban City Council v Association of Building Societies, 1942 AD 27; Ex parte van Schalkwyk NO and Hay NO, 1952 (2) SA 407 (AD); and Trustees J.C. Poynton Property Trust v S.I.R., 1970 (2) SA 618 (T). These cases are, however, distinguishable. They all dealt with the situation where the issue presented for decision to the Court of first instance was at that stage of abstract or intellectual interest only. The present case is different for the issue presented to the Court a quo, viz. whether or not to make an order of attachment, was by no means merely abstract or intellectual. On the contrary, it was then a very real, live issue in respect of which no resort to section 19 of Act 59 of 1959 was necessary. It is true that by now no effective order of attachment can be made and the only order asked for on appeal is one relating to costs but that is an inevitable consequence of the Court a quo's refusal of an attachment order. Moreovár, even at this stage

the/.....

the merits of the application are not wholly academic for dependent thereon is an order for what will, I imagine, amount to a substantial bill of costs. This kind of situation, i.e., where, owing to events supervening between the judgment of the court of first instance and the hearing of an appeal, the merits of the dispute, apart from the question of costs, have become academic, is by no means unique yet I know of no authority - and appellant's counsel were unable to refer us to any - for the proposition that in such a case the court of appeal should refuse to entertain an appeal on the merits, aimed at achieving an alteration to the order as to costs. Indeed, the following general remarks of WATERMEYER, CJ, in Pretoria Garrison Institutes v Danish Variety Products (Pty.) Ltd., 1948 (1) SA 839 (AD), at p 863 - a case which admittedly is not completely in pari materia - appear to me to run counter to any such proposition:

> "Now, discarding for the moment the idea of discretion, in an appeal against an order

for/.....

> for costs the Court of appeal does not judge a party's right to his costs in the Court a quo by asking the question was he the successful party in that Court. It asks ought he to have been the successful party in that Court and decides the question of costs accordingly. It may or may not be necessary in such cases to deal with the order which was actually made on the merits; it may even be that no order on the merits was made in the Court a quo because by the time the matter came before that Court the necessity for an order was gone and the sole question was one of costs. This shows that the merits of the dispute in the Court below must be investigated in order to decide whether the order as to costs made in that dispute was properly made or not."

The first preliminary point must, accordingly, be rejected.

With regard to the contention that leave to appeal should have been obtained, respondents' counsel referred to sections 20 (1) (b) and 20 (2) (b) of Act 59 of 1959, which provide, in effect, that no judgment or order "as to costs only which by law are left to the discretion of the court" is subject to appeal to the appellate division unless leave to appeal is obtained from the court

which gave the judgment or made the order. The meaning of the words quoted, in the context of earlier legislation of similar import (viz. section 3 (b) of Act 1 of 1911), has been considered in a number of cases, although the precise point now raised does not appear previously to have been decided. Most of these cases are collected in the judgment of DOWLING, J., in ODT Wholesalers (Pty.) Ltd. v Franklin and Widman (1954 (3) SA 803 (T)). One of the earliest decisions is one of this Court, Kruger Bros. and Wasserman v Ruskin (1918 AD 63). There the trial court had found that the plaintiff had had a good cause of action but that after the commencement of litigation the defendants had discharged their liability to him; it, accordingly, made an order merely awarding plaintiff costs against defendants jointly and severally. This Court held that an appeal against the trial court's order as to costs required leave in terms of section 3(b) of Act 1 of 1911. In the course of his judgment INNES, CJ, stated (at p 69):

> "As already pointed out, the rule of our law is that all costs - unless expressly otherwise enacted-/....

> enacted - are in the discretion of the Judge. His discretion must be judicially exercised; but it cannot be challenged, taken alone and apart from the main order, without his permission. The construction of the Statute has, so far as I know, never been raised up to now before any South African Court; but its effect was taken for granted by Lord DE VILLIERS, C.J., in Oudaille v Lewis (1914, A.D. 174), where he remarked that 'the rule as to appeals on questions of costs is that the leave of the court appealed from must be obtained before the appeal can be heard. If, therefore, this appeal had been only as to costs, or if the appeal had been brought on other points merely in order to raise the question of costs, the appeal could not proceed'."

In the present case the facts are somewhat different. The Court a quo did give a judgment and make an order on the merits of the application, as also on the question of costs. The appellant seeks to attack the judgment on the merits and obtain a reversal of that decision. Such a reversal would automatically call for an alteration to the order as to costs. It is true that, owing to supervening events, no effective order could be made on the merits of the application, if reversal of the Court's judgment

thereon were considered to be appropriate, but that does not alter the fact that it is substantially against the Court's judgment on the merits that the appeal is being prosecuted. The appellant is not seeking to attack the order for costs as a separate exercise of a judicial discretion. The order for costs is not being challenged "taken alone and apart from the main order". The dictum of lord DE VILLIERS cited by INNES, C.J., in the above-quoted passage has reference to the situation where an appellant appeals on the merits merely in order to launch an attack upon the order for costs; in other words where the appeal on the merits is not bona fide (see Oudaille's case, supra, at p. 175 in fine; cf. also Wheeler v Somerfield [1966] 2 All E.R. 305 (CA)). It is, in my view, not applicable here. Generally I am in agreement with the remarks of MILLIN, J., in Delmas Ko-operasie Bpk. v Koen (1952 (1) SA 509 (T)) when he stated, with reference to section 3(b) of Act 1 of 1911 (at p 510 E - F):

> ".... it seems to me the intention of the Legislature was to make the test: what is the appeal against? If you are appealing

on/.....

> on a matter of costs only but in no way appealing against any part of the judgment on the merits of the case, then the Legislature wished to discourage such appeals, and the manner selected for limiting them was to say that the Full Court should not be approached without the leave of the Judge who made the order."

And I consider that they are equally applicable to section 20 (2) (b). In the circumstances of this case I do not think that leave to appeal was necessary.

The second preliminary point taken by respondents' counsel was that the Board ought to have been joined in the proceedings and, in view of the appellant's failure to do so, the appeal should be dismissed or, alternatively, struck off the roll, with costs. The attempt made by the Board to intervene at a late stage in the proceedings has already been described. In his affidavit Mr Hickley stated that the Board's attitude was that up to that date (12 June) it remained the owner of the cargo of maize and, therefore, opposed its attachment. The issue as to the ownership of the maize was also raised in certain other opposing affidavits, as I shall show more fully later. In addition it

will be recalled that the notice of motion claimed also an attachment of the bills of lading, if not already released to the Board. In the circumstances there seems little doubt that the Board had a direct and substantial interest in the original application which required its joinder in the suit. It may be that the initial omission to join was cured by the Board's own attempted intervention but it is not necessary to decide this point because it is clear that at this stage the Board no longer has any interest in the matter. No order is sought on appeal, either as to the merits of the matter or as to the costs, which could prejudicially affect the Board. Its interest now, if any, is purely academic. The point of non-joinder must, therefore, be dismissed.

Thirdly, it was submitted by respondents' counsel that the court would not permit a cessionary in the position of Lendalease to bring such an application for attachment ad fundandam jurisdictionem. This submission was supported by a variety of arguments. Although some of these

arguments may not have been addressed to the Court a quo the point appears in substance to be the same as the one raised by one of the preliminary applications, previously referred to. The application was dismissed by the Court a quo and in the absence of a cross-appeal it is at least open to doubt as to whether it is competent for the respondents to raise the point again in this Court. As this point, however, relates rather to the merits of the application than to the question as to whether this Court should hear the appeal and as there is another more fundamental reason why, in my view, the application was correctly dismissed, I do not propose further to consider this point.

I come now to the merits. It is clear law that an applicant seeking the attachment of his debtor's property ad fundandam jurisdictionem must satisfy the court, on a balance of probabilities, that the property to be attached belongs to the debtor. The onus is upon the applicant to to so. The court will not order the attachment of the

property/.....

property of another for the purpose of founding jurisdiction because to do so would be futile and of no effect. (See Jackson v Parker, 1950 (3) SA 25 (E), at p 27; Bradbury Gretorex Co. Ltd. v Standard Trading Co. Ltd., 1953 (3) SA 529 (W), at p 531). In this case the property which Lendalease sought to have attached was the corporeal asset consisting of the cargo of maize and it was conceded by counsel for Lendalease that if it (Lendalease) had failed to establish on a balance of probabilities that ownership of the maize vested in CMA, no order for attachment could have been made. It was averred by Lendalease, and submitted by its counsel, that ownership in the maize passed to CMA once it was loaded on board the "MARIANNINA". The attitude of respondents, on the other hand, and the general submission of their counsel, was that ownership in the cargo would not pass to CMA until the bill of lading and other documents relating to the cargo had been handed over to the bank acting on behalf of CMA in exchange for the payment of the

price/.....

price in cash; and that until then it remained vested in the seller, the Board. This, incidentally, was also the attitude of the Board itself, as reflected in Hickley's affidavit. As appears from the above-quoted passage from its judgment, the Court a quo adverted to the question of ownership but rather with reference to the issue as to whether CMA or the State of Venezuela would acquire the maize when the transaction was completely implemented.

The maize being the subject-matter of a contract of sale, the answer to this question must be sought in the principles concerning the passing of ownership from a seller (who is owner) to the purchaser under a sale of corporeal movables. Basically those relevant are:

(1) According to our law, unlike certain other legal systems, ownership cannot pass by virtue of the contract of sale alone: there must, in addition, be at least a proper delivery to the purchaser of the contract goods (see Crockett v Lezard, 1903 TS

590, at pp 592-3; Commissioner of Customs and Excise v Randles Bros and Hudson, 1941 AD 369, at p 398; Ambassador Factors Corporation v K. Koppe & Co., 1949 (1) SA 312 (T), at p 318; American Cotton Products v Felt and Tweeds Ltd., 1953 (2) SA 753 (N) at p 756-7). Whether delivery alone will suffice depends in general upon the intention of the parties (see Weeks and Another v Amalgamated Agencies Ltd. 1920 AD 218, at p 230; Eriksen Motors Ltd. v Protea Motors and Another, 1973 (3) SA 685 (AD), at p 694); and in this connection important considerations are (a) whether the contract contains conditions affecting the passing of ownership (see Randles Bros. case, supra, at p 398) and (b) whether the sale is for cash or on credit.

(2) Assuming unconditional contracts, under a cash sale ownership is normally taken to have been intended to pass once there has been, in addition to delivery, due payment of the purchase price; whereas in the

case of a credit sale the fact that credit has been granted by the seller to the purchaser is taken as a strong indication that ownership was intended to pass merely on delivery (see Crockett v Lezard, supra, at pp 592-3; Eriksen Motors Ltd v Protea Motors and Another, supra, at p 694). Usually, delivery alone will also pass ownership where the seller has taken security for the payment of the purchase price, probably because in that event credit is regarded as having been given by implication (Laing v S.A. Milling Co. Ltd., 1921 AD 387, at p 398; Phillips v Hearne &Co., 1937 CPD 61, at pp 63-4).

(3) A cash sale requires payment of the purchase price to be made against delivery of the goods. A credit sale is one in which the time for payment has been postponed for a substantial, i.e., non-negligible, period after delivery (Laing's case, supra, at pp 394-5, 400 - 1; Rex v Salaam, 1933 AD 318, at p 320).

Whether/.....

Whether a sale be for cash or on credit is a matter of agreement between the contracting parties, either expressly or tacitly; and in the latter case must be judged from all the terms of the contract, the surrounding circumstances and the conduct of the parties (Laing's case, supra, at p 400). In the absence of an express term as to the sale being for cash or on credit there is a presumption that it is for cash. This may be rebutted in various ways but the giving of credit cannot be inferred from mere delivery by the seller without receiving the purchase price. (See Laing's case, supra, at pp 394-5, 398-9; Newmark Ltd. v The Cereal Manufacturing Co. Ltd., 1921 CPD 52, 58; Grosvenor Motors (Potchefstroom) Ltd. v Douglas, 1956 (3) SA 420 (AD), at p 424). On the other hand, a sale which was expressly or presumptively for cash may by subsequent agreement, express or tacit, become one on credit (Crockett v Lezard, supra, at p 593).

As/.....

As I have already indicated, the cardinal question is whether at the time when the Court a quo was asked to make an order of attachment, ownership in the cargo of maize was shown by Lendalease to have passed from the seller, the Board, to the purchaser, CMA. Counsel did not address argument to the question as to whether the critical time is when the application is launched or when the Court gives its decision. In a changing situation this may become a matter of some importance but that is not so in the present case. I shall assume, in favour of Lendalease, that it would be sufficient if it were shown that ownership had passed when the Court gave its decision and I shall take the critical date as being 12 June 1975.

Applying the general principles stated above, the basic enquiry is whether it was established by Lendalease that as at 12 June the cargo of maize had been delivered to CMA with the intention of passing the ownership thereof to CMA. Bound up with this enquiry are the further questions

as to whether the contract was unconditional as to the passing of ownership and whether it was a sale for cash or on credit. In this connection an important consideration is the fact that delivery by the Board to CMA necessarily, and by agreement, involved sea transit and a contract of affreightment with a carrier, evidenced by the issue of a bill of lading. In this type of case our law, evolving in conformity with generally accepted mercantile law and custom, has recognised that a bill of lading, itself a product of the law merchant, may have certain special attributes in regard to symbolic delivery and the passing of ownership in goods sold and consigned by bill of lading to the purchaser. This was recognized more than 100 years ago in the case of London and South African Bank v Donald Currie & Co. (1875 Buch 29), wherein DE VILLIERS, C.J., emphasized the role of a bill of lading, taken to the order of the shipper, as being a "symbol of property" which retained for the shipper the right of dealing with the goods put aboard the vessel. Referring to Roman Dutch Law and having said that the views expressed

by/.....

by him (which were based mainly on English decisions) were not inconsistent therewith, the learned Chief Justice proceeded (at p 34):

> "That law clearly recognises the validity of a constructive delivery to pass the property in goods as opposed to an actual delivery. It is laid down, for instance, that the owner of goods may make a good delivery to another person by handing over to him the keys of the warehouse in which the goods are stored (Grotius, 2, 5, 12). The key is the symbol of the property in the goods placed in the warehouse, in the same way as the bill of lading is the symbol of the property in the goods shipped on board."

The bill of lading taken to the order of the shipper figures prominently in the transaction known as a c.i.f. contract. This type of contract for the sale of goods, which today forms one of the corner-stones of sea-borne trade, appears to have been a product of English mercantile law. Our courts have, nevertheless, been able to accommodate it within the principles of our law and give to it an effect which is broadly in conformity with its nature under English law. According to Halsbury the commercial reason

for the evolution of, inter alia, the c.i.f. contract lies in the length of time taken in the carriage of goods by sea. It is to the advantage of neither party to the contract that the goods should remain en dehors commerce while they are in the course of shipment. The object and result of the c.i.f. contract is to enable sellers and buyers to deal with the goods while afloat and to transfer them freely by giving constructive possession thereof. The principal document which has enabled this to be achieved is the bill of lading (see generally Halsbury, 3rd ed., vol. 34, para. 277).

Under the c.i.f. contract, in its usual form, the seller is obliged to ship and insure the contract goods and to invoice them to the purchaser for an amount which includes the price of the goods, the cost of the insurance and the amount payable under the contract of affreightment. As soon as reasonably possible after shipment the seller must tender to the buyer or his agent,

in proper form, the bill of lading, evidencing the contract of affreightment, the policy of insurance and the invoice, these being collectively referred to as "the shipping documents". In the absence of some special agreement, this is all that the buyer can demand of the seller and normally his obligation to pay, or assume liability to pay, the invoice price arises upon such tender. The buyer is covered by the contract of insurance against the risk that at the time of tender, or subsequently, the goods themselves have become, or become, lost or destroyed. As it is put in Halsbury (op. cit. para. 278)

> "The contract is thus in a commercial sense an agreement for the sale of goods to be performed by the delivery of documents....."

The most significant of the shipping documents is the bill of lading. This constitutes an acknowledgement by the master of the ship, on behalf of the shipowner, that goods have been delivered on board and evidences an

undertaking to carry the goods to the stated place of destination. The person in whose name or to whose order the bill of lading is made out may by endorsement and delivery transfer his rights under the bill to another. The holder of the bill, i.e., the person in whose favour it was originally made out or the endorsee thereof, is entitled, to the exclusion of all others, to receive the goods from the ship at the place of destination. He is thus in the same commercial position as if he were in physical possession of the goods. The bill of lading is, accordingly, recognised as a symbol of the goods and the transfer of the bill is regarded as a form of symbolic delivery. It is usual under a c.i.f. contract for the seller to take the bill of lading in his own name, or to his order, and for the bill, duly endorsed, to be tendered, together with the other shipping documents, against payment of the invoice price, either in cash or by the acceptance of a draft. Ownership in the goods normally passes to the purchaser upon transfer of

the bill of lading and concurrent payment. (See generally Lockie Bros v Epstein, 1921 EDL 154; Alli and Another v Daniel Bros and Co Ltd, 1921 AD 292; Thomas and Co Ltd v Whyte and Co Ltd, 1923 NPD 413; Knight Ltd v Lensvelt, 1923 CPD 444; Standard Bank of South Africa Ltd v Efroiken and Newman, 1924 AD 171, at pp 189-90; Frank Wright (Pty) Ltd v Corticas B.C.M. Ltd, 1948 (4) SA 456 (C), at pp 463-5; Garavelli and Figli v Gollach and Gomperts (Pty.) Ltd, 1959 (1) SA 816 (W), at pp 820-1).

In clause 11 of the maize contract (quoted above) provision is made for the furnishing by the purchaser of an irrevocable confirmed letter of credit, which is to stipulate that the purchase price shall be paid in cash on presentation by the seller of, inter alia, "a Charter Party Bill of Lading (full set clean on board to order and endorsed in blank)". Although this procedure is expressed merely as a stipulation to be contained in the letter of credit, it is clearly implicit in clause 11 (which is headed "PAYMENT") that it was to be the agreed modus operandi as regards payment and delivery of the bill of lading.

While/.....

While not wishing (in the absence of a full enquiry) to express any final view on the meaning of clause 11, I am of the opinion that, prima facie at any rate, it would seem to contemplate the seller taking a bill of lading in respect of the cargo in its own name, or at any rate to its order, the seller endorsing that bill in blank in order to make it "negotiable" in the sense that the person to whom it was delivered would then become the holder thereof, entitled to receive the goods at their port of destination, and the seller delivering the bill in that condition to the buyer's bank (i.e., the bank providing the letter of credit) against payment by the latter of the purchase price in cash. It was submitted by appellant's counsel that, on the contrary, the bill of lading was, in terms of clause 11, to be taken out in the buyer's name or to the order of the buyer. I can find no warrant for this submission. It is clear that the bill was to be issued to the seller and retained by it until the purchase price was paid in

cash by the buyer's bank, at which point of time it was to be handed over. If the bill was to be in the buyer's name, it is difficult to understand the purpose of the provision for endorsement in blank. Endorsement by the seller would not be necessary to make the buyer the holder of the bill; nor would it be of any effect since the bill was not in the seller's name. And the idea of endorsement by the buyer, as suggested by appellant's counsel, is equally implausible in that the buyer would not receive the bill until after endoresement and, in any event, endorsement by the buyer would not be necessary if the bill were made out in the name of the buyer. It is, therefore, probable that it was endorsement by the seller that was intended, in which case it would follow that the bill was to be made out to the order of the seller.

If this interpretation of clause 11 be correct, then, in my view, delivery of the maize could not

take/....

take place in terms thereof until the bill of lading was handed over, duly endorsed in blank, by the seller to the buyer's bank. Until this happened the seller, as holder of the bill, would retain control of the maize as effectively as if it were in a warehouse and the seller were in possession of the key. When it happened, the transfer of the bill of lading would symbolically represent delivery of possession of the maize to the buyer, the seller simultaneously divesting himself of control and relinquishing his animus possidendi. It follows, a fortiori, that prior to the issue of a bill of lading there could be no delivery of possession by the seller to the purchaser. It is true that upon the maize being loaded into the ship's hold the seller could be said to surrender custody thereof to the master of the ship but this would be on the understanding that within a reasonable time the master would issue to it a proper bill of lading, which would thereafter symbolize possession and control of the cargo. There would

thus/.....

thus be no surrender at that stage of either corpus or the animus possidendi.

If in terms of the maize contract delivery or transfer of possession of the maize was not to take place until the handing over of the bill of lading by the seller, then prior to that occurring ownership in the maize could not pass to the purchaser, since delivery of possession is a minimum requirement for the passing of ownership. Furthermore, since the contract provided for payment of the purchase price in cash against delivery of the bill of lading, this was in truth a cash sale, with the result that the normal inference would be that the parties did not intend ownership to pass until there had been, in addition, due payment of the purchase price. In my view, there is nothing in the contract to displace this inference. In fact, the insistence upon cash against the bill of lading (and other documents mentioned in clause 11) and the provision for an irrevocable confirmed letter of credit evidence a clear

intention that there should be no transfer of ownership or possession by the seller until it had been paid for the goods. Bearing in mind the general nature of the transaction, and more particularly the fact that the purchaser, CMA, was a foreign institution, a peregrinus in our courts, this seems a probable and sensible attitude for the seller, the Board, to adopt.

The aforegoing analysis is based upon the transaction proceeding in accordance with the contractual arrangements between the parties, as evidenced by the maize contract. It was, of course, open to the parties by subsequent agreement, express or tacit, to alter the position as to delivery or as to the sale being one for cash. In this context appellant's counsel placed some reliance on the fact that, according to annexure Y2 in the papers, the goods were to be delivered at Puerto Cabello in Venezuela to "Banco Industrial De Venezuela for account of Corporation De Mercadeo Agricola". It must, however, be pointed

out that annexure Y2 was simply a photostatic copy of an unsigned bill of lading sent to the Board's agent to indicate the proposed clausing. No bill of lading had in fact been issued at the time when the Court a quo gave its judgment on the application. In the circumstances there can be no question of any tacit alteration of the contractual arrangements between the parties having taken place at that stage.

The main submission by appellant's counsel was that, since the maize contract was upon f.o.b. terms, delivery of the maize took place once it was loaded on board the vessel; that a substantial period of time would necessarily elapse between such delivery and payment of the purchase price; that, therefore, it was a credit sale; and that, consequently, the parties must be taken to have intended ownership to pass with delivery.

The maize contract does admittedly provide for delivery "free on board" but I do not think that it

necessarily/.....

necessarily follows that delivery of possession from seller to buyer would take place when the maize was loaded aboard the vessel. Appellant's counsel relied upon the South African case of Anderson and Coltman Ltd. v Universal Trading Co. (1948 (1) SA 1277 (W)) for the proposition that in an f.o.b. contract the carrier is the agent of the buyer and the ownership passes to the buyer when the goods sold are delivered to the carrier in terms of the contract. In my view, the case does not support so wide a proposition. The facts, briefly, were that goods were sold by an English seller, through its South African agent, to a buyer in South Africa. The agreement provided for confirmation and payment by the buyer's shippers in London and the terms were "F.O.B. U.K. Port". The goods were delivered on the seller's behalf aboard a ship at Southampton and the price was paid. On arrival in South Africa the goods were rejected by the buyer on the ground that certain false representations had been

made in regard thereto. The buyer obtained an order attaching the goods ad fundandam jurisdictionem in a claim for a refund of the price. The seller applied to set aside the attachment on the ground that the goods were not his property. In defining the issues CLAYDEN, J., stated (at pages 1280-1):

> "Since the contract provided for delivery F.O.B. and the price has been paid the goods would have become the property of the buyer when delivered into the ship if the goods were in accordance with the contract. There is an intention of the seller to transfer ownership, there is delivery to the agent of the buyer, and there can be inferred the intention of the buyer to acquire ownership. If delivery of the goods to the buyer's agent is not in accordance with the contract as to time or place ownership does not pass .....".

The learned judge then went on to consider the issue upon which the case turned, viz. whether ownership had failed to pass on the ground that the goods did not conform to the contract. It is important to note that it does not appear from the judgment what form the bill of lading took and that, in any event, at the time of the

attachment proceedings the price had been paid and, presumably, the bill of lading handed over. The decision is in no way relevant to the present case where the contract, although f.o.b., provides for the bill of lading to be taken to the order of the seller and the attachment application is made at a stage prior even to the issue of a bill.

On both sides counsel cited a number of English decisions relating to the passing of property under an f.o.b. contract, and, in particular, some dealing with the situation where the contract provides for payment against the bill of lading. Comparison with English decisions on this topic cannot, however, be undertaken without due recognition of the important differences which here exist between English law and our law. Foremost of these is the acceptance in English law of the principle that in a sale of goods the property, or ownership, may pass without possession of the goods having been delivered by the seller to the buyer. Basically and stated briefly, the relevant rules in English

law/.....

law (which are to be found in the common law and in the Sale of Goods Act of 1893 which codified the common law) are (i) that the intention of the parties, as shown by the terms of the contract, the conduct of the parties and the circumstances of the case, determine the time when the property in the goods is to be transferred; (ii) that in the case of an unconditional sale of specific goods in a deliverable state, unless a different intention appears, the property passes when the contract is made and it is immaterial whether the time of payment or the time of delivery or both is postponed; and (iii) that in the case of a sale of unascertained goods, no property is transferred unless and until the goods are ascertained and then only if the parties have agreed that the property in the goods should pass when ascertained; but, unless a different intention appears, when goods answering the contract description and in a deliverable state are unconditionally appropriated to the contract, either by the

seller with the assent of the buyer or by the buyer with the assent of the seller, the property thereupon passes to the buyer. (See generally Sale of Goods Act of 1893, secs. 16, 17 and 18; Halsbury's Laws of England, 3rd ed., Vol. 34, paras. 86-9, 98 and 99.) Although, in particular circumstances, delivery to the buyer may constitute the appropriation (see Halsbury, para. 91), there may be an appropriation in terms of rule (iii) without delivery having taken place (see the examples quoted by Benjamin on Sale, 8th ed., at pp 329 - 35).

To protect an unpaid seller who has parted with the property in the goods but has remained in possession thereof, English law grants a lieh, entitling him to retain the goods until payment or tender of the purchase price, where they have been sold without any stipulation as to credit or the terms of credit granted has expired or the buyer has become insolvent (section 41 of the Act; Halsbury, para. 198). The concept of such a lien is ren-

dered possible in English law by the rules relating to the passing of ownership which permit of a seller transferring the property in the goods sold without surrendering possession thereof. Since in our law ownership cannot be passed without delivery of possession, there does not appear to be any room for a similar lien in South Africa.

In mercantile contracts involving sea transit (as well as other forms of carriage) and the consignment of goods under bill of lading, English law developed the concept of a "reservation of the right of disposal" by the seller. This concept, in relation to a sale of unascertained goods, was explained by COTTON, L.J. in Mirabita v Imperial Ottoman Bank (1878 3 Exch. D 164, at p 172) as follows:

> "In the case of such a contract the delivery by the vendor to a common carrier, or (unless the effect of the shipment is restricted by terms of the bill of lading) shipment on board a ship of a chattel for the purchaser, is an appropriation sufficient to pass the property. If, however, the vendor, when shipping the articles which he intends to deliver under the contract, takes the bill of lading to his own order, and does so not

> agent, or on behalf of the purchaser, but on his own behalf, it is held that he thereby reserves to himself a power of disposing of the property, and that consequently there is no final appropriation, and the property does not on shipment pass to the purchaser."

(See also Halsbury, paras. 110 and 313). Where a seller takes the bill of lading to his own order in this way, he is merely deemed prima facie to reserve the right of disposal and this inference may be excluded by other circumstances (Halsbury, ~~section~~ para. 313). Such a reservation is evident particularly in c.i.f. contracts. Our law achieves broadly a similar result, without having to resort to the concept of a reservation of the right of disposal, by means of the principles that delivery of possession must take place before ownership can pass and that a seller who takes a bill of lading to his own order is generally regarded as retaining possession of the goods until he transmits the bill, duly endorsed, to the purchaser (see Mackeurtan, Sale of Goods in South Africa, 4th ed. pp 294-5).

Under f.o.b. contracts the position in English

law/.....

law with regard to the passing of property is stated by Halsbury (3rd ed. vol. 34, para. 302) as follows:

> "WHEN PROPERTY PASSES. Prima facie the property passes to the buyer upon shipment but as in a c.i.f. contract the inference may be rebutted and the moment of the passing of the property postponed, as for instance where the seller deals with the bill of lading in such a manner as to show that he did not intend to appropriate the goods to the contract, or that he has reserved a right of disposal until performance of the contract terms of payment, whether they are for payment in cash or by acceptance of a bill of exchange."

In a note to the portion of this paragraph dealing with a reservation of the right of disposal there is a cross-reference to para. 313, part of which reads:

> "RESERVATION OF RIGHT OF DISPOSAL. Where goods are shipped, and by the bill of lading the goods are deliverable to the order of the seller or his agent, the seller is prima facie deemed to reserve the right of disposal but this inference being prima facie only may be excluded by other circumstances."

Halsbury thus appears to draw no fundamental distinction between c.i.f. and f.o.b. contracts in this connection. Moreover, there are English cases where the court has

held, in regard to f.o.b. contracts, that by taking the bill of lading to his own order and contracting for cash against the bill the seller reserves the right of disposal (see Wait v Baker (1848) 2 Exch. 1; Ogg v Shuter (1875) 1 CPD 47). It is true that the correctnesw of these decisions has been called in question by, for example, Carver (Carriage by Sea, 12th Ed., para. 1064-6) mainly on the ground that it is the seller's duty under an f.o.b. contract to pass the property in the goods upon the shipment thereof (see also British Shipping Laws, Vol. 5, paras. 389-92). Nevertheless, in Smyth and Co. v Bailey & Co. ([1940] 3 All E.R. 60), a decision of the House of Lords, Lord WRIGHT, in discussing the principles relating to the reservation of the right of disposal (and the consequent postponement of the passing of property) in c.i.f. contracts quoted Wait v Baker (supra) and Ogg v Shuter (supra), apparently with approval. It is clear from the judgment that Lord WRIGHT had clearly

in mind that these cases dealt with f.o.b. contracts and in fact in regard to Wait v Baker (supra) he stated -

> "..... the sale was f.o.b., but, in the respect now material, the principle is the same."

Further, the views expressed in Carver (op. cit.) do not appear to be shared by certain other writers (see e.g. Schmitthoff, The Export Trade, 5th ed., p 69; Atiyah, Sale of Goods, 4th ed., p 217). The f.o.b. contract has become a flexible instrument (see Pyrene Co. Ltd. v Scindia Navigation Co. Ltd. (1954 (2) Q.B. 402, at p 424) and may in some instances come close to a c.i.f. contract. In The Parchim (1918 AC 157), a Privy Council decision concerning a contract which was a cross between an f.o.b. and c.i.f. contract (see Carver, op. cit., para. 1064), it was pointed out by Lord PARKER of Waddington (at pp 170-1) that in cases where a seller has taken the bill of lading to his own order and deals with the bill only to secure the contract price, the property may pass forthwith (meaning in that case on shipment), subject

to/.....

to the seller's lien or conditionally on performance by the buyer of his part of the contract. His Lordship stated (at pp 170-1) —

> "The prima facie presumption in such a case appears to be that the property is to pass only on the performance by the buyer of his part of the contract and not forthwith subject to the seller's lien. Inasmuch, however, as the object to be attained, namely, securing the contract price, may be attained by the seller merely reserving a lien, the inference that the property is to pass on the performance of a condition only is necessarily somewhat weak, and may be rebutted by the other circumstances of the case."

(See further the explanation of this decision in The Kronprincessan Margareta, 1921 A.C. 486, at pp 515-7.)

I do not propose to delve more deeply into English law. Whatever the true position may be in regard to f.o.b. contracts where the seller has taken the bill of lading to his own order and whether in a particular case the seller be regarded as thereby reserving the right of disposal or merely preserving his lien, the important consideration is that there is, so far as I am aware, no

suggestion in English law that a seller in such circumstances delivers possession of the goods prior to transfering the bill of lading. In so far then as the English decisions may be relevant, they would confirm the view that, according to the principles of our law no ownership would pass upon shipment, despite the fact that it is a contract f.o.b. They would also indicate that, even according to the principles of English law, the passing of ownership under an f.o.b. contract may be postponed by the seller taking the bill of lading to his own order.

Appellant's counsel emphasized the provisions of clause 7 of the maize contract, which states, inter alia, that bills of lading supported by mass certificates "shall be proof of delivery", as being an indication that the parties intended delivery of possession of the goods to the buyer to take place upon shipment. The meaning and significance of this provision must be considered against the background of the contract as a whole and, in particular, the terms

of clause 11. Clause 7 does not specifically state that the delivery referred to is delivery to the buyer. Ostensibly it is delivery to the carrier (the bill of lading constituting proof of what had been shipped) and in terms of the bill contemplated by the contract the carrier would be obliged in turn to deliver the goods at the port of destination to the order of the seller. Consequently, I do not think that clause 7 can be read as displacing the strong prima facie inference to be drawn from the fact that the bill of lading was to be taken to the order of the seller and only transferred against payment of the purchase price.

In my view, therefore, the main submission by appellant's counsel fails at its inception in that it was not established in this case that delivery of the maize to CMA took place immediately that it was loaded aboard the "MARIANNINA". I doubt, also, whether it was properly established that a substantial period of time would necessarily elapse between such shipment and payment of the purchase price, but it is not necessary to pursue this point.

It was also contended by appellant's counsel that the intention underlying the contractual provisions concerning the bill of lading was merely to preserve the seller's security but did not operate to prevent the passing of ownership to the buyer; and that the holding of the bill operated as a quasi-lien. It is not clear what is meant by the term "quasi-lien" in the context of our law; and I know of no authority for the existence of such a concept. In English law, in addition to the lien already described, a seller is accorded a right which has been described as a "quasi-lien" (see Benjamin, op. cit., p 847) but this pre-supposes that the property in the goods has not passed to the buyer. It appears to be similar in effect to the rule in our law that, in the absence of special agreement, delivery and payment are concurrent conditions, with the result that an unpaid seller may withhold delivery until the purchase price is paid or tendered (see Mackeurtan, op. cit., pp 197-8). In the

present/.....

present case, if delivery of possession took place on shipment (and ownership passed simultaneously), then it is difficult to see what form of security could, in the absence of possession, be retained by the seller. If, as would seem to be the case, the form of the intended bill of lading and the manner in which it was to be dealt with would postpone delivery until transference of the bill against payment, then no ownership could pass and no security in the form of a lien would be either necessary or, for the reasons already indicated, legally possible. In my view, there is no substance in this contention.

A further argument raised by appellant's counsel was that the provision of the irrevocable confirmed letter of credit by the buyers bank constituted the giving of security for the price and made this a sale on credit. To my mind, the furnishing of the letter of credit was in this case irrelevant to the passing of ownership. If, as I have held to be the prima facie viewpoint, there was to be

no delivery until the handing over of the bill of lading and this was to be done against payment of the purchase price in cash, then clearly ownership would pass then and it would be a cash sale, the letter of credit notwithstanding. The nature of the relationship created between banker and seller by the issue of a letter of credit is a matter of considerable difficulty (see Gutteridge and Megrah, The Law of Bankers' Commercial Credits, pp 15 et seq.) KMX but, whatever it may be, the letter does no more, in a case like the present one, than to provide the seller with the assurance that the buyer will be able and willing to implement his obligations when they become due: it could not convert a sale expressly for cash into a credit transaction.

For the reasons aforestated, I am of the view that the provisions of the maize contract indicate, prima facie, that it was intended by the parties that delivery of possession of the maize to the buyer should take place

when/....

when the relative bill of lading was transferred by the seller against payment of the purchase price and that ownership was to pass then; and that no alteration to these provisions is shown to have been agreed to by the parties. Certainly Lendalease did not establish any contrary intention or state of affairs. In the circumstances, at the stage when the Court a quo was asked to make an order of attachment, the ownership of the maize was still vested in the seller, the Board. It would follow that the maize was not an asset belonging to CMA which could be attached to found jurisdiction and that the application for attachment was correctly dismissed. Appellant's counsel argued that, alternatively, the bill of lading which "was in effect issued in favour of CMA" was a species of property belonging to CMA which Lendalease was entitled to attach. As no bill of lading had in fact been issued when the attachment order was sought this argument cannot succeed. The prayer for attachment of the bill of lading was rightly refused.

This conclusion renders unnecessary a consideration of the correctness of the finding of the Court a quo in regard to sovereign immunity. Nevertheless, appellant's counsel invited this Court to express its views on this topic and, in particular, to hold that the Court a quo erred in following the Baccus case (supra). A welter of authority, emanating from many jurisdictions, was quoted to show that in recent years the doctrine of sovereign immunity has undergone radical changes and that by now, apart from the United Kingdom and Soviet Russia, most legal systems have abandoned the principle of absolute immunity in relation to commercial transactions. A distinction is drawn between acta jure imperii and acta jure gestionis and immunity is restricted to the former. Even in England, so it was submitted, recent decisions, such as that of the Court of Appeal in The Harmattan [1975] 3 All E.R. 961) and that of the Privy Council in Philippine Admiral (Owners) v Wallem Shipping (Hong Kong) Ltd. ([1976] 1 All E.R. 78), showed a movement away from the doctrine of absolute

sovereign immunity, especially in the realm of commercial transactions. I think it can be accepted that the majority judgments in the Baccus case (supra) are not the last word on the subject of sovereign immunity in English law and it may well be that that system is moving in the direction suggested by counsel. Generally, the problem is an interesting and difficult one but, in my view, the decision as to whether in this country we should adopt the approach followed in the Baccus case (supra) or that of other authority leading in the direction of a more restricted immunity, must be left for some future occasion when the issue arises more pertinently.

The appeal is dismissed with costs, including the costs of two counsel.

M.M. CORBETT.

RUMPFF, C.J.)
JANSEN, J.A.)
VILJOEN, A.J.A.) Concur.
MILLER, A.J.A.)