300/76

G.P.-S.59968—1970-71—2 500 J 219

300/76

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

NEON & COLD CATHODE ILLUMINATIONS *Appellant,*

versus

DAVID EPHRON *Respondent*

Appellant's Attorney COOPER & SON.
Prokureur vir Appellant ~~HORWITZ, ORVAN & LEWIS~~

Respondent's Attorney
Prokureur vir Respondent ROSENDORFF & Co.

Appellant's Advocate
Advokaat vir Appelland M.W. Friedman

Respondent's Advocate
Advokaat vir Respondent L.I. Goldblatt

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

(T.P.D.)

Coram: Trollip, Rabie, Corbett, Katzé et Diemont ARR

Friedman - 9.45 - 11.00; 11.15 - 11.40; 12.20 - 12.45;
Goldblatt - 11.40 - 12.20;

C.A.V.

The Court dismisses the Cross appeal with costs.

Judgment per Trollip JA.

Registrar

11/11/77

Bills taxed—Kosterekenings getaksee

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 matter between:

NEON AND COLD CATHODE ILLUMINATIONS (PROPRIETARY)

LIMITED ..... APPELLANT

AND

DAVID EPHRON ..... RESPONDENT.

Coram: TROLLIP, RABIE, CORBETT, KOTZÉ, and DIEMONT, JJ.A.

Heard: 19 September 1977.

Delivered: 11 November 1977.

J U D G M E N T

TROLLIP, J.A. :

This appeal concerns the question whether or

not .... /2

not the appellant's right of action against respondent, a surety and co-principal debtor, became prescribed under the Prescription Act, No. 18 of 1943. The main facts may be summarized as follows.

1. On 27 February 1962 appellant, a neon sign manufacturer and supplier, and Benam Holdings (Pty.) Ltd. ("Benam"), through its director David Ephron (respondent), entered into a written "rental and maintenance agreement", herein called "the lease". According to its terms appellant undertook to construct, instal, and let to Benam a neon display sign for its business for 60 calender months with effect from the date of its installation (1 September 1963). The rental was R19 per month, payable in advance on the first day of every month.

2(a). Clause (g)(b) of the lease provided that, if Benam should default in the payment of any rental, appellant would be

entitled .... /3

entitled, upon notice in writing, to claim immediately the full balance of rentals for the remainder of the unexpired term of the lease. On payment Benam would be entitled to continue using the sign for such unexpired term.

(b). In terms of clause (g)(c) appellant and Benam consented to the jurisdiction of the magistrate's court for the district in which Benam carried on business, irrespective of the amount claimed by appellant.

3. Respondent at the same time also signed a separate undertaking, at the foot of the lease and beneath his signature on behalf of Benam, in these terms:

> "I, the undersigned, a director of the Lessee Company duly authorised on behalf of the Lessee Company, hereby bind myself jointly and severally in my personal capacity as Surety

and .... /4

and Co-Principal Debtor in solidum for the due performance by the Lessee Company of all its obligations under this Agreement."

4. After 1 September 1963 Benam failed to pay the rentals for some of the months, but up to and including April 1966 it had paid R513 in all. It then ceased all payments, so that, when the lease expired on 31 August 1968, a total amount of rentals of R627 had become due and remained unpaid.

5. On 25 March 1970 appellant sued respondent in his personal capacity for payment of the R627 in the Johannesburg magistrate's court. The summons was served on him on 1 April 1970. The precise cause of action relied on therein is important, since appellant maintained, as will presently appear, that that action interrupted the running of prescription. The particulars of the

claim .... /5

claim in the summons alleged that appellant and respondent (not Benam, it should here be noted) had entered into the lease, that in terms thereof respondent hired the neon sign on the conditions mentioned in paragraph 1 above, that respondent was in arrear with the rentals in the sum of R627, that upon payment of that amount appellant tendered the use of the sign for the remainder of the unexpired term of the lease, and that the Johannesburg magistrate's court had jurisdiction, inter alia, because respondent had consented thereto. Respondent defended the action. On 11 December 1972, at the end of the trial, appellant's claim was dismissed on the ground (it was common cause) that respondent had been incorrectly sued on the lease as the lessee and not as surety and co-principal debtor in terms of his own undertaking mentioned in paragraph 3 above. No appeal was noted against that judgment.

6. On 13 February 1973 appellant again sued respondent in the Johannesburg magistrate's court for payment of the R627. The summons was served on 16 February 1973. That commenced the present proceedings. This time appellant did sue respondent as surety and co-principal debtor in terms of the abovementioned suretyship. Respondent defended the action. The pleadings went through several vicissitudes before reaching finality. It is unnecessary to recount them. Suffice it to say that ultimately respondent's defence was that appellant's entire claim against Benam was for rentals that had all accrued prior to 16 February 1970, they were therefore prescribed for more than 3 years had since elapsed, and they were thus unenforceable against respondent. Appellant joined issue on all those points, alleging in particular that the period of prescription was six years, and that, in any

event .... /7

event, the running of prescription was interrupted by the service of the summons in the previous case on respondent on 1 April 1970 (see paragraph 5 above).

7. At the trial no evidence was adduced but the parties handed in a stated case of the agreed facts. These facts are incorporated in this summary. The magistrate granted judgment for appellant for the R627 and costs. The Transvaal Provincial Division (by consent apparently) set aside the judgment on appeal and remitted the case to the magistrate for re-hearing and ordered the costs of the appeal and the previous hearing to be costs in the cause. No reason emerges from the record why this was done. On the re-hearing the magistrate again granted judgment in appellant's favour as before. A further appeal to the above Division (IRVING STEYN and MOSTERT, JJ.) was allowed with costs and the magistrate's

judgment ..../8

judgment was altered to one for respondent with costs. With the leave of that Court the appellant has now appealed to this Court.

8. It was common cause that the Prescription Act, No. 18 of 1943, despite its repeal by the Prescription Act, No. 68 of 1969, continued to apply to this dispute in terms of section 16 of the latter Act.

9. According to section 5(1)(d) of the 1943 Act extinctive prescription in the present case began to run from the date on which appellant's right of action first accrued against Benam and therefore against respondent as its surety and co-principal debtor. It became common cause before us that at no stage during the currency of the lease did appellant exercise its right under clause (g)(b) of the lease of claiming, on the failure of Benam to pay any rental on due date, payment of the full balance of the

rentals for the remainder of the unexpired term of the lease. Hence, appellant's right of action for each rental first accrued on the second day of every successive month up to and including August 1968, when the lease expired. The applicable period of prescription therefore ran from each of those dates. But in regard to those rentals that fell due and were unpaid prior to April 1966, the running of prescription was interrupted (it was common cause) by the payment of the rental for and in that month (see section 6(1)(a) of the 1943 Act) and prescription in respect of those rentals recommenced to run from then.

That concludes the summary of the main facts.

The first question is, what period of prescription is applicable? Different periods of extinctive prescription are specified in section 3(2) of the 1943 Act. In

paragraph .... /10

paragraph (c)(iv) thereof the period is

"three years in respect of rent due upon any contract."

Paragraph (d), however, says the period is

"six years in respect of written contracts .... unless a shorter period is applicable under any provision of paragraph (c)."

According to section 4, if two or more periods of prescription may be applied to one cause of action, the longest period shall apply.

For respondent it was contended that, although the lease and suretyship were written contracts, appellant's claim against Benam was for "rent due upon a contract", that therefore, in terms of paragraph (c)(iv) read with the qualification in paragraph (d) of section 3(2) quoted above, only the shorter period of prescription of 3 years was applicable, that section 4 was thus of no application, that as more than 3 years had elapsed since

2 August 1968 when the last rental under the lease became exigible, appellant's claim for the entire balance of the rentals against Benam had become prescribed, and that that defence, being one in rem, can also be invoked by respondent in answer to appellant's claim against him as surety and co-principal debtor for Benam. The Court a quo upheld that contention.

Appellant's counsel accepted that in law the prescription of the principal debt is also a defence available to the surety and co-principal debtor if he is sued by the creditor. The correctness of the submission by respondent's counsel to that effect can therefore be assumed for the purpose of these proceedings (cf. Wessels on Contract, 2nd ed., pars. 4044, 4369; Ideal Finance Corporation v. Coetzer 1970 (3) S.A. 1 (A.D.) at pp. 8 F - 9 H). Furthermore, although in the heads of argument for appellant

it .... /12

it was submitted that the applicable period of prescription was 6 years in terms of sections 3(2)(d) and 4, that submission, while not abandoned, was not seriously pressed. In my view it is untenable. For whatever the true nature is of appellant's claim against respondent, whether it is against him as a co-lessee or purely as a surety - a problem to be considered presently - it clearly falls within the ample scope of section 3(2)(c)(iv) as being a right of action "in respect of rent due upon any contract" (my italics); i.e., one relating to, in connection with, or arising out of the rentals due upon the lease (Montesse Township and Investment Corporation (Pty.) Ltd. v. Gouws, N.O. 1965 (4) S.A. 373 (A.D.) at p. 384 B - D). Hence, in terms of the abovementioned provisions of the 1943 Act, the shorter period of prescription of 3 years specified in section 3(2)(c)(iv) must prevail. Were it otherwise

it .... /13

it would mean that, while the period of prescription for any rights of action mentioned in section 3(2)(c) against the principal debtor is 3 years, the period for a right of action against his surety under a written contract of suretyship would be 6 years in terms of section 3(2)(d), which could hardly have been contemplated by the legislature (cf. Union Government v. van der Merwe 1921 T.P.D. 318 at pp. 320/1).

The main contention for appellant was that, in terms of section 6(1)(b) of the 1943 Act, the service of the previous summons on respondent on 1 April 1970 interrupted the prescription of appellant's rights against respondent as surety and co-principal debtor; that the legal effect thereof was that prescription of its rights against Benam as lessee was also thereby interrupted; that until that action was finally disposed of on

11 December 1972 (see paragraph 5 above) prescription was suspended, that being the effect (so it was contended) of the decision in Kuhn v. Kerbel 1957 (3) S.A. 525 (A.D.); that therefore, if the period of prescription was 3 years, only those rentals that had become exigible prior to 1 April 1967 were prescribed, leaving those totalling R323, from 2 April 1967 to 2 August 1968 (17 months x R19), still recoverable from Benam and hence from respondent as its surety and co-principal debtor.

I think that the fundamental inquiry in regard to that contention is whether or not the service of the summons in the previous action on respondent interrupted the running of prescription of appellant's rights against respondent. Section 3(1) says that extinctive prescription is the rendering unenforceable of a "right" by the lapse of time. The different periods

of .... /15

of time are set out in section 3(2). Section 5 provides from when such periods shall begin to run in respect of various actions. Then section 6 deals with the interruption of the running of prescription. Inter alia it says in section 6(1)(b) that -

> "Extinctive prescription shall be interrupted by service on the debtor of any process whereby action is instituted."

"Action" is defined in section 1 as -

> "any legal proceedings of a civil nature .... for the enforcement of a right."

And "debtor" is defined as -

> "a person against whom a right is enforceable by action."

The effect of those provisions is, I think, that in order to effectively interrupt prescription under section 6(1)(b) there must at least be (a) a right enforceable against the debtor in respect of which extinctive prescription is running, and (b) a

process .... /16

process served on that debtor instituting legal proceedings for the enforcement of that very right or substantially the same right.

RAMSBOTTOM, J. (later J.A.), said in Park Finance Corporation (Pty.) Ltd. v. van Niekerk 1956 (1) S.A. 669 (T) at p. 673 B -

> "The process referred to in sec. 6(1)(b) must, I think, be a process by which action is instituted to enforce the right which would otherwise be rendered unenforceable by lapse of time. In other words, the action must be an action to enforce a particular right, so that if one person has two rights against another, the institution of an action to enforce one only will not interrupt prescription in respect of the other."

With respect I agree with that dictum, except that, in the light of other authorities to be mentioned later, I would qualify the phrase "the right which etc." by substituting therefor "the same or substantially the same right as would otherwise be rendered unenforceable by lapse of time." For the substance rather than the form of the previous process must be considered in determining

whether .... /17

whether or not it interrupted prescription.

Now the right enforceable by appellant against respondent arises from the contract of suretyship. That is a contract between appellant and respondent, separate and distinct from the lease between appellant and Benam, although it is accessory to it (see van der Merwe's case, supra, 1921 T.P.D. at p. 321). Although respondent bound himself, not only as surety, but also as co-principal debtor with Benam, that did not render him liable to appellant in any capacity other than that of a surety who has renounced the benefits ordinarily available to a surety against the creditor. That is borne out by the following authorities. Maasdorp v. Graaff Reinet Board of Executors 3 B.A.C. 482 at p. 490 per DE VILLIERS, C.J., (LAURENCE and HOPLEY, JJ., concurring):

"If .... /18

> "If, therefore, the defendant was a party to a promissory note now in question, either as a maker or as an endorser, she would not be entitled to the benefits (i.e., those then available to a woman surety). It has been said that she is a maker, because by her contact on the back of the note she has undertaken the liability of a co-principal debtor as well as of surety, but .... the use of the words 'co-principal debtor' does not transform her contract into any other than suretyship."

See also Du Plessis v. Estate Teich Brothers 1914 C.P.D. 48 at p. 50 and Shuter v. Ridgway 1926 N.P.D. 149 to the same effect. Hence, contrary to the argument advanced for appellant, respondent, by undertaking liability, not only as a surety, but also as a co-principal debtor, did not become a party to the lease as co-lessee with Benam. For he did not himself contract to hire the neon sign, nor did he intend to use it himself, or to acquire any rights against appellant except as a surety. An illustrative case,

directly .... /19

directly in point, is the Ideal Finance case, supra. There A purchased a motor car under hire-purchase agreement which contained a contract of suretyship in terms similar to those in the present one. The respondent signed it, thereby becoming surety and co-principal debtor for A. Both A and respondent failed to pay the arrear instalments and judgment was granted against them. The Hire-Purchase Act, No. 36 of 1942, provides in section 18 that no order under section 65 of the Magistrates' Court Act, 32 of 1944, shall be made for the purpose of enforcing payment "by the buyer" of any amount payable under a hire-purchase agreement. The question was whether respondent, as surety and co-principal debtor, was such a "buyer". In the Court a quo, 1969 (4) S.A. 43 (O), SMIT, J.P., with SMUTS, J., concurring, said at p. 44 C -

"Respondent signed the guarantee as surety and co-principal debtor; that, however, does not make him a buyer

nor .... /20

directly in point, is the Ideal Finance case, supra. There A purchased a motor car under hire-purchase agreement which contained a contract of suretyship in terms similar to those in the present one. The respondent signed it, thereby becoming surety and co-principal debtor for A. Both A and respondent failed to pay the arrear instalments and judgment was granted against them. The Hire-Purchase Act, No. 36 of 1942, provides in section 18 that no order under section 65 of the Magistrates' Court Act, 32 of 1944, shall be made for the purpose of enforcing payment "by the buyer" of any amount payable under a hire-purchase agreement. The question was whether respondent, as surety and co-principal debtor, was such a "buyer". In the Court a quo, 1969 (4) S.A. 43 (O), SMIT, J.P., with SMUTS, J., concurring, said at p. 44 C -

"Respondent signed the guarantee as surety and co-principal debtor; that, however, does not make him a buyer

nor .... /20

nor a co-buyer. He has not the rights of a buyer against the seller and never bought nor did he ever intend to buy. The addition of the words 'co-principal debtor' does not transform his contract into any other than one of suretyship... Therefore, although respondent is liable as a co-debtor he is not a co-buyer but remains a surety."

On appeal, although this Court reversed the decision of the Court a quo on other aspects, it expressly approved of its finding that, although respondent bound himself as surety and co-principal debtor, he could not by reason thereof be regarded as a buyer or co-buyer under the hire-purchase agreement (see 1970 (3) S.A. 1 at pp. 7 H, 11 D).

From the above and other authorities it appears that generally the only consequence (albeit an important one) that flows from a surety also undertaking liability as a co-principal debtor is that vis-a-vis the creditor he thereby

tacitly .... /21

tacitly renounces the ordinary benefits available to a surety, such as those of excussion and division, and he becomes liable jointly and severally with the principal debtor (see, for example, Caney, Law of Suretyship, 2nd ed., p. 51; Wessels on Contract, 2nd ed., paragraphs 4087, 4088, and 4124; Voet 46.1.16 and 24 (Gane's Translation, vol. 7 pp. 38/9, 48/9); Pothier on Obligations, pars. 408, 416 (Evans's Translation pp. 330, 335/6)). However, he retains the right, on paying the creditor, to obtain a cession of the latter's rights and securities in order to recover the full amount from the principal debtor (Caney, supra, at p. 52; Kotze v. Meyer 1 M. 466; in re Deneys 3 M. 309; Business Buying and Investment Co. Ltd. v. Linaae 1959 (3) S.A. 93 (T) at p. 96). It follows, I think, that in the present case respondent, by also signing as a co-principal debtor, did

not .... /22

not transform his accessory obligation as a surety into a joint principal obligation as co-lessee with Benam. As Burge on Law of Suretyship says of co-obligors liable in solidum (correi debendi) at p. 394:

> "It is necessary that the obligation of each of the obligants should be principal obligations, and not the one accessory to the other. In this respect a debtor in solido is distinguished from a surety."

In the light of the above conclusion I advert again to appellant's action against respondent in 1970. Appellant sued him therein for payment of the R627 as the lessee of the neon sign under the lease. That is manifestly clear from the cause of action set out in the particulars of the claim - see paragraph 5 above. The right which appellant thereby sought to enforce against respondent was non-existent, since Benam and not respondent was the lessee. Moreover, appellant's right,

enforceable /as

enforceable against the lessee, was quite different from the one that appellant is seeking to enforce in the present proceedings against respondent as surety and co-principal debtor. For the former originated from the lease, the latter from the contract of suretyship, and, for reasons already given, by undertaking the liability of surety and co-principal debtor, respondent did not become a lessee or co-lessee. For appellant it was earnestly contended, however, that the two rights were virtually the same since respondent's obligation as a co-principal debtor was "of the same scope and nature" as that of the lessee, Benam, who was the principal debtor. For that contention counsel relied heavily on certain dicta of WESSELS, J.P. (as he then was), in Union Government v. van der Merwe 1921 T.P.D. 318. There a promissory note made by a person in favour of appellant was also

signed by respondent as surety and co-principal debtor. At p. 322 the learned Judge President said:

> "The present case is however stronger for the surety has signed as surety and co-principal debtor. We must give some meaning to the words 'co-principal debtor'. That the addition of these words operate as a renunciation of the benefits of the surety is clear, but they have a still greater force. The addition of these words shows that the surety intends that his obligation shall be co-equal in extent with that of the principal debtor: or otherwise expressed, that his obligation shall be of the same scope and nature as that of the principal debtor." (My italics.)

The italicized dictum was applied by TINDALL, J.A., in Mohamed v. Lockhat Brothers & Co. Ltd. 1944 A.D. 230 at p. 238. It is not clear what the learned Judge President meant by the expression "of the same nature"; I think he used it ejusdem generis as "co-equal in extent" and "of the same scope" as meaning that the surety's liability is joint and several with that of the principal debtor and is no more or less than or different from the latter's.

But he could not have meant thereby that the surety, by also signing as co-principal debtor, became a co-maker of the note, because that would have been directly contrary to the decision in the Maasdorp case, supra, 3 B.A.C. 482, which was quoted in argument to him and would otherwise have been expressly mentioned and dealt with in his judgment. Mohamed's case, supra, takes the point no further. Hence, these authorities do not advance appellant's case.

Appellant's counsel also argued that the right sought to be enforced in the previous action was substantially the same as the one which is the subject matter of the present proceedings, in that the parties were the same, the amount claimed was the same, and the liability therefor arose out of the same cause - the non-payment of rentals due under the lease.

The .... /26

The only differentiating factor, so the argument went, was that in the previous case the cause of action was erroneously or defectively pleaded. In that regard counsel referred to authorities that say that in certain circumstances the service of a process to enforce a right, although it defectively sets out the cause of action, even so defectively that it is excipiable and is in consequence set aside, nevertheless interrupts the running of prescription, for the Prescription Act "is designed to penalise inaction, not legal ineptitude" (per COLMAN, J., in Van Vuuren v. Boshoff 1964 (1) S.A. 395 (T) at p. 403 G). See also, for example, Rooskrans v. Minister van Polisie 1973 (1) S.A. 273 (T), and Churchill v. Standard General Insurance Co. Ltd. 1977 (1) S.A. 506 (A.D.) at p. 517 A - C.

That argument is untenable. Here appellant

had ..../27

had two separate different rights for the payment of the R627 each of which it could enforce by action: the one on the lease against Benam as the lessee, the other on the suretyship against respondent as the surety and co-principal debtor. In the previous action appellant chose to sue respondent on the lease as the lessee. The two different rights were therefore completely confused. The cause of action as pleaded was not merely defective, it was non-existent, and consequently the process was completely devoid of legal effect (cf. Van Vuuren's case, supra, at p. 402 F - G). That is why the previous action was correctly dismissed. Possibly it could have been amended to substitute a cause of action against respondent based on the contract of suretyship, for a court has wide powers to amend pleadings. But that is not the test to apply here and it is in any event irrelevant for that was

not .... /28

not done. In Churchill's case, supra, at p. 517 B - C this Court, through RUMPFF, C.J., pointed out that, while the previous summons need not set out an unexcipiable cause of action, nevertheless, for its service on the debtor to interrupt prescription of a right of action, the latter must at least be recognisable or identifiable ("kenbaar") in the previous cause of action. There the plaintiff had two different rights of action against the defendant, the insurer of two vehicles, a truck and a trailer drawn by the truck, arising out of one and the same accident involving both vehicles. She first sued defendant for compensation for damages caused by the negligent driving of the truck by a certain person; thereafter, after the period of prescription had elapsed, she also, by amendment of her action, sued defendant for compensation for damages caused by the negligent driving of

the .... /29

the trailer by the same person. The Court a quo held that the latter claim was prescribed. This Court upheld that decision, saying that prescription was not interrupted by the first action since that right of action was not mentioned or otherwise comprehended therein. See too Schnellen v. Rondalia Assurance Corporation of S.A. Ltd. 1969 (1) S.A. 517 (W) at pp. 519 G - 520 A. A similar situation obtains in the present case: appellant's present right of action was not even hinted at in the previous summons.

On the other hand counsel for respondent relied heavily on the Park Finance Corporation (Pty.) Ltd. case, supra, 1956 (1) S.A. 669 (T). This case was much debated before us. There are dicta therein that strongly support respondent's case, but I have some reservation about the correctness of the

decision .... /30

decision on the facts. There the plaintiff company sued defendant on a written contract for moneys expended on behalf of defendant. The contract was furnished in the further particulars to the claim. It showed that, not the plaintiff, but a firm, Park Finance Corporation, had concluded the contract with defendant before plaintiff was incorporated. Defendant admitted that he had contracted with the firm but denied contracting with plaintiff. Thereafter plaintiff applied to amend its cause of action by now alleging that the contract had in fact been concluded between the firm and defendant but that the former had ceded its claim for the expended moneys to plaintiff prior to the institution of the action. By then the period of prescription had elapsed unless its running was interrupted by the service of the summons in the action. The amendment was refused on the ground that

prescription .... /31

prescription had not been so interrupted. The learned Judge said at p. 674 B - C:

> "The summons and declaration alleged a right arising from a contract between the plaintiff and the defendant, and the action was to enforce that right. In fact there was no such contract and the alleged right was non-existent; the action was brought to enforce a right which in fact did not exist. The amendment is to enforce a right which arose out of a different contract between the defendant and a different party, and that is quite a different right; the fact that the right sued for in the summons does not exist does not make the right referred to in the amendment the same right as that claimed in the summons."

That reasoning substantially supports the respondent's case, as do the other dicta mentioned earlier in this judgment. But there is much to be said for the argument advanced by counsel for the plaintiff on the particular facts of that case. It is summarized at p. 673 C - G. Briefly it was in effect that the amendment merely sought to enforce the

same .... /32

same or substantially the same right of action as alleged, albeit defectively, in the originating process, for when action was instituted there existed only one right arising out of the one contract, which right actually did reside in the plaintiff, not as a party to the contract as was wrongly alleged, but as the cessionary thereof, but that error did not nullify the process. In the light of the subsequent decisions in cases such as Van Vuuren's and Churchill's, supra, the decision on the facts in the Park Finance Corporation case, supra, might well have been wrong, but no firm view need be expressed on this aspect. It suffices to say that the present is an a fortiori or different case. For here the previous process was without any legal effect, and, in any event, there were two separate and distinct rights of action arising out of different contracts for reasons already

given .... /33

given.

My conclusion, therefore, is that appellant's previous action in 1970 did not interrupt prescription of the rights it is now seeking to enforce against respondent. It follows that it is unnecessary to consider whether, had it interrupted such prescription, it would also have had the legal effect, without more, of interrupting prescription of appellant's rights against the principal debtor, Benam. All that need be said is that in the result appellant's rights against both Benam and respondent in respect of the entire balance of the rentals under the lease have become prescribed. The Court a quo correctly so decided.

Before concluding I have some serious criticisms to make about the state of the appeal record. The photostat

copies .... /34

copies of the lease, which contains much fine print, are unclear and unsatisfactory; indeed those of the important suretyship contract are quite illegible. We had to rely on counsel to settle its precise wording for us. The proceedings of all the preliminary skirmishes between the parties about the pleadings, the various amendments to them, and counsel's arguments at the trial in the magistrate's court have all been copied and included in the record. This was quite unnecessary, particularly as the case ultimately turned at the trial on questions of law on a stated case of agreed facts. At a time when every effort should be made to curtail the high cost of litigation, this way of preparing an appeal record is unforgiveable. Were it not for the fact that the appeal fails, an appropriate order of costs relating to these offending aspects of the appeal record would

have .... /35

have been made against the appellant or its attorneys responsible therefor.

The appeal is dismissed with costs.

W.G. TROLLIP, J.A.

RABIE, J.A.)
CORBETT, J.A.) concur.
KOTZÉ, J.A.)
DIEMONT, J.A.)