G.P.-S.43575—1969-70—2,000

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

C. LIPSCHITZ N.O. *Appellant,*

versus

U.D.C. BANK LTD. *Respondent*

Appellant's Attorney ISRAEL FS
Prokureur vir Appellant

Respondent's Attorney WEBBER N
Prokureur vir Respondent

Appellant's Advocate D. J. Shaw Q.C.
Advokaat vir Appellant M.W. Oldes

Respondent's Advocate B. O'Donovan SC
Advokaat vir Respondent A.M. van Niekerk

Set down for hearing on
Op die rol geplaas vir verhoor op 25-9-78
(W.L.D.)

Coram: Rabie C.J., Wessels, Diemont J.J.A.
et Hoexter A.J.A.

9.45 am ——— 11.00 am
11.15 am ——— 12.45 pm
2 15 pm ——— 3 30 pm
3.45 pm ——— 4.45 pm

C.A.V.

The Court orders as follows:-
A Claims against UBCO

Bills Taxed—Kosterekenings Getakseer
(See judgment page 60

Date / Datum	Amount / Bedrag	Initials / Paraaf
61, 6, 8	3 964	- - -

Counsel are authorised.

Writ issued
Lasbrief uitgereik

Date and initials
Datum en paraaf

(Judgment per Miller A.J.A.)
25.11.78

Registrar

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

CHARLES LIPSCHITZ Appellant

in his capacity as Receiver
for creditors of:

UBCO (PTY.) LTD.
(case no. M.3757/76)

OREON PLACE (PTY.) LTD.
(case no. M.3758/76)

KRUBEN HOLDINGS (PTY.) LTD.
(case no. M.3759/76)

and

UDC BANK LIMITED Respondent

Coram: RABIE, CORBETT, MILLER, DIEMONT, JJ.A.,
et HOEXTER, A.J.A.

Heard: 25 September 1978

Delivered: 28 November 1978

J U D G M E N T

MILLER, J.A. :-

This appeal is against orders of the

/Witwatersrand .....

Witwatersrand Local Division (Franklin, J.,) reversing the decision of the appellant that certain claims lodged by the respondent against three companies, which had during October, 1974 been placed in liquidation, be rejected. The judgment of the Court a quo has been fully reported at 1977 (1) SA 275. In this judgment I shall refer to the appellant as "the receiver", to the respondent as UDC, and to the three companies, respectively, as Ubco, Oreon and Kruben. As a reference to the report of the judgment a quo will show, the receiver, who was the liquidator of each of the three companies, was appointed by the Court "as receiver for the creditors of each company to give effect" to an order sanctioning an offer of com= promise made in respect of each of the companies in liquidation. The ground upon which the receiver rejected the claims lodged by UDC was that the transactions upon which such claims were founded were transactions in con= travention of the provisions of section 86 bis (2) of the

/Companies .....

Companies Act, 46 of 1926. That Act was in force at the relevant times.

Before describing the transactions in question it is necessary to refer very briefly to the question discussed by Franklin, J., at pp 277 D to 279 B of the report. That question related to the Court's powers in the proceedings, which were styled "review" proceedings and were brought in terms of a special provision contained in each of the duly sanctioned offers of compromise. The Court a quo held that its powers on review, in the existing circumstances, were not limited as they would be upon review of the discretionary decision of certain domestic tribunals and that the proper approach in this case was "simply for the Court to decide whether the receiver's decision was right or wrong." On appeal that conclusion was not only not attacked but it was common cause between the parties that the approach of the trial Judge in that respect was correct and the appeal was argued

/on that .....

on that basis. That being so I need say no more in that regard than that I share the learned Judge's view, although I would add that the word "simply", in relation to the decision ultimately to be made in this particular case, is euphemistic.

The background to the relevant transactions may be briefly stated. Each of the three companies owned, in one particular area, a piece of ground; Ubco owned stand 876, Ferndale, Oreon stand 874, Ferndale and Kruben stand 872, Ferndale. During March, 1972, a company to which I shall refer as "Prosun", offered to purchase the shares in and loan accounts against Kruben. Part of the purchase price was to be paid in cash and the balance (less the amount of a bond registered against the immovable property) was to be paid about a year later. Such balance, in round figures, was R87 000. Prosun was controlled by one Baker. The offer was duly accepted during March 1972. During June of that year

/Prosun .....

Prosun made an offer for the purchase of the shares in and loan accounts against Oreon, which was accepted. In due course Ubco, also controlled by Baker, took over the rights and obligations of Prosun under the two agreements and became substituted for Prosun as the purchaser of the shares in and loan accounts against Oreon and Kruben. It appears to have been common cause that Baker's purpose was that Ubco, so soon as it obtained full control of the stands owned respectively by Oreon and Kruben, by virtue of its acquisition of Prosun's rights, would consolidate those stands, together with stand 876 which it already owned and controlled, into a single stand for development. It was in those circum= stances and with that purpose that Ubco approached UDC, a bank, for a loan. Such approach was made towards the end of 1972. UDC, while not prepared to grant the loan as asked for by Ubco, signified its willingness to advance on loan R132 500, which would cover the balance

/of the .....

of the purchase price owing by Ubco to Prosun in respect of the shares in and loan accounts against Oreon. Of that total sum, R77 640,64 had been determined as being the price of the Oreon shares and the balance of R54 859,36 as the price of the loan accounts. In due course agreement was reached in respect of such a loan, subject to several conditions imposed by UDC and accepted by Ubco. The nature of such conditions is reflected by the following acts thereafter performed, all of which form part of what, for convenience, I shall refer to as "the first transaction".

On or about 12 January 1973,

A (i) Ubco signed an acknowledgement of debt in favour of UDC in the sum of R77 640,64, being the agreed price of the Oreon shares;

A (ii) Oreon passed a resolution in terms of which it acknowledged its liability to UDC for R54 859,36 (together with interest at 10% p.a.), being the agreed amount of Oreon's debt on loan account, and it undertook to pass a mortgage bond over certain of its

/fixed .....

fixed property in favour of UDC in order to secure payment of that sum;

A (iii) Ubco ceded to UDC its rights to the loan accounts against Oreon;

A (iv) Oreon furnished UDC with a special power of attorney to pass the bond referred to in A (ii) above; i.e. to pass a bond securing payment of the amount allocated to the loan accounts against Oreon;

A (v) Ubco granted an option to UDC to subscribe at par for one-quarter of the issued share capital of Oreon, or to require payment by Ubco, in lieu of its right to acquire such shares, of R25 000.

UDC thereupon duly advanced the sum of R132 500 to Ubco on loan and it was not disputed that when so doing, UDC knew that the purpose of the agreement

/was to .....

was to enable Ubco to acquire the shares in and loan accounts against Oreon. I should add, at this stage, that the mortgage bond referred to in A (ii) was never passed and that the special power of attorney referred to in A (iv) was not an irrevocable power, nor was it at any time expressly revoked.

On 20 February, 1973, Ubco again approached UDC for a loan, this time to enable it to discharge its obligations to Prosun in respect of the purchase of the shares in and the loan accounts against Kruben. UDC agreed to advance R87 000 to Ubco subject to conditions which were accepted and complied with. This was what I shall call "the second transaction", the details of which I shall enumerate under the letter B, to distinguish them from the enumerated items under the letter A in respect of the first transaction. The relevant compo= nents of the second transaction follow. (In most

/instances .....

instances the conditions were complied with on 2 March, 1973.)

B (i) Ubco consented to transfer to UDC, for so long as Baker and Ubco remained indebted to UDC, the entire issued share capital of Ubco.

B (ii) Ubco signed an acknowledgement of debt in favour of UDC for R87 000, with interest at 10% p.a.;

B (iii) Ubco, Oreon, Kruben and Baker signed a deed (to which I shall refer as "the cross-guarantee") in terms of which they jointly and severally bound themselves as sureties and co-principal debtors to UDC

> "for the due fulfilment of all the obligations of whatsoever nature and from whatsoever cause arising which now exist or which may arise in future for

/which .....

which each and all of (Kruben, Oreon, Ubco, Baker) ..... may be or become liable to you and we agree that this is a continuing guarantee .....";

B (iv) Each of Kruben and Oreon gave to UDC a special power of attorney to enable "surety mortgage bonds" to be passed over their immovable property. In the case of Oreon, the power of attorney was granted for the purpose of securing the indebtedness of Ubco to UDC in the sum of R142 000 (plus an additional R18 000 in respect of costs); in the case of Kruben, the power of attorney was granted for the purpose of securing Ubco's debt to UDC in the sum of R77 000 (plus an additional R8 000 in respect of costs).

B (v) On 15 August 1973 the contemplated surety mortgage bond by Oreon in favour of UDC was duly executed. This bond served to secure

/ the .....

the obligations of Ubco to UDC in respect of the purchase by Ubco of the loan accounts against Oreon i.e. for the sum of R54 859,36, and the purchase of the shares in Kruben for the sum of R87 000.

B (vi) On 12 June 1973, a surety mortgage bond by Kruben in favour of UDC was duly executed to secure the obligation of Ubco to UDC in respect of the purchase of the Oreon shares, for the sum of R77 000. (My underlining in B (v) and (vi).)

B (vii). On 2 March 1973, Ubco granted to UDC an option to subscribe at par for one-quarter of the issued share capital of Kruben, or to require, in lieu of its right to subscribe for the shares, payment of R15 000.

In support of the receiver's rejection of the claims lodged by UDC (for the details of such claims, see

/1977 .....

1977 (1) SA at pp 279 C to 281 H) Mr Shaw contended on appeal that each of the first and second transactions, considered as entirely separate and distinct transactions, fell foul of section 86 bis (2) because in each of them the company concerned (Oreon in the first and Kruben in the second transaction) gave financial assistance, whether directly or indirectly, for the purpose of or in connection with the purchase of its shares. Consequently, so he contended, the agreements in respect of the loans made by UDC to Ubco and in respect of security for such loans were void and therefore entirely unenforceable. And if it were found that the first transaction, considered on its own as if the second transaction had not taken place at all, did not contravene the section, Mr Shaw argued that the terms of the second transaction sealed not only its own doom but also that of the first transaction, for reasons which I shall later discuss.

The relevant provisions of section 86 bis (2) read:-

/"No .....

"No company shall give, whether directly or indirectly, and whether by means of a loan, guarantee, the provision of security or otherwise, any financial assistance for the purpose of or in connection with a purchase or subscription made or to be made by any person of or for any shares in the company or in any company to which it is subsidiary ....."

The prohibition against the giving of financial assistance is couched in very wide terms. It relates to "any" financial assistance, whether given "directly or indirectly" and it relates, moreover, to such assistance not only when it is given for the purpose of the purchase of or subscription for any shares in the company, but also if it is given in connection with such purchase or sub= scription. The words "in connection with" serve to extend (albeit not considerably, as I shall later show) the field marked out by the words "for the purpose of". (See S v Hepker and Another, 1973 (1) SA 472 (W) at p 479 B and cf. Rabinowitz and Another v De Beers Consolidated Mines Ltd., 1958 (3) SA 619 (A) at pp 631 E - 632 and S.I.R.

/v Wispeco .....

v Wispeco Housing (Pty.) Ltd., 1973 (1) SA 783(A) at p 793 A - C.) And as Schreiner, J.A., pointed out in Gradwell (Pty.) Ltd. v Rostra Printers Ltd. and Another, 1959 (4) SA 419 at p 424 E - F, it appears that "the words 'made or to be made' ..... cover assistance provided even after the purchase or subscription". The terms of the section have been the subject of considerable criticism not only in South Africa but also in England and elsewhere, where a similar prohibition is contained in legislation concerning companies. In the report of the Jenkins Company Law Committee (1962) in England it was observed that the statutory prohibition had "proved to be an occasional embarrassment to the honest without being a serious inconvenience to the unscrupulous" and that the fear had been expressed by some witnesses that "the section prohibited a number of quite innocent transactions." (See also Gower, Modern Company Law, 3rd Ed., at p 113; Vol 48, The Australian Law Journal, (January 1974) at p 6; and cf.

/a note .....

a note by J.C. Beuthin in 90 SALJ at p 217.)

There has, moreover, been a tendency, in the light of the extremely wide terms of the prohibition considered in conjunction with the circumstance that contravention of the section constitutes a criminal offence, to give close attention to the underlying purpose of the prohibition and the real mischief at which it was aimed (as to which, see Trevor v Whitworth (1887) 12 AC 409) and, with that in mind, to adopt what J.C. Beuthin has described in the note referred to above (at p 213) as "a much narrower approach to the section". (See, for example, Karnovsky and Others v Hyams 1961 (2) SA 368 (W) at pp 369 - 370; and see also The Australian Law Journal, ibid, at pp 6 - 8.)

Valid as the criticism of the section may be (despite earlier criticism, it was re-enacted in section 38 of the new Companies Act, 61 of 1973, with only minor alterations) there is no latitude for curtailment by the Courts of its scope in respect of conduct which has been

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clearly prohibited. The words "financial assistance", however, have not been comprehensively defined in the section or elsewhere in the Act and, inevitably, problems sometimes arise as to whether what a company has done in a given case constitutes the giving of financial assistance within the meaning of those words as used in the section. In their endeavour to facilitate the solution of such problems, the Courts have from time to time formulated certain "tests" to guide them to a proper answer. One of such tests has come to be known as the "impoverishment test", the question in effect posed thereby being: has the company, in consequence of what it did for the purpose of or in connection with the purchase of its shares, become poorer? The approach of this Court to the problem in Gradwell's case (referred to earlier herein) indicates that that test was invoked and that the negative answer to the question whether the company

/would .....

would become poorer led to, or played a part in leading to, the finding that financial assistance in breach of the section had not been given. (See especially at p 426 A - E.) The decision in Gradwell's case has been the subject of much comment. Its correctness has been doubted and, at least by one commentator, strongly attacked. (See 77 SALJ 17; and cf. 1959 Annual Survey of SA Law at pp 174 - 5; 90 SALJ at pp 213 - 5; 94 SALJ 265; 1961 Annual Survey of SA Law at p 271.) The factual context of the decision differs appreciably from that of the case now before us. It is therefore unnecessary to express any opinion on the correctness of that decision in the light of its own facts. What is necessary, however, is to examine closely the reasoning of Schreiner, J.A., in that case, because of what follows.

The learned author of the note in 90 SALJ (at pp 213 - 4) says :-

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1.

> "Since Schreiner, J.A., delivered his judgment in Gradwell, it seems to have been generally accepted that in deciding whether financial assistance has been given, the inquiry should be directed towards ascertaining whether the company has been made the poorer ....."

and the following cases are cited as illustrations of such acceptance: Miller v Muller 1965 (4) SA 458 (C) at p 466; Bay Loan Investments (Pty.) Ltd. v Bay View (Pty.) Ltd., 1972 (2) SA 313 (C) at p 317 and S v Hepker 1973 (1) SA 472 (W) at pp 479 - 80. Leon, J., in Evrard v Ross 1977 (2) SA 311 (D) at p 317 B - C, repeated in almost identical words the substance of the above extract, with citation of the same cases, to which he added Lomcord Agencies (Pty.) Ltd. v Amalgamated Construction Co. (Pty.) Ltd., 1976 (3) SA 86 (D). (See also Jacobson and Another v Liquidator Estate M. Bulkin & Co. Ltd., 1976 (3) SA 781 (T) at p 788 A.). I am not convinced of the generality of the acceptance postulated in the above extract

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but if there has, since Gradwell's case, been a tendency to approach in that way all questions as to whether financial assistance has been given, it must be pointed out that the judgment of Schreiner, J.A., does not justify it.

The vital facts in Gradwell's case were these. C purchased from R the issued shares of the P company and its loan indebtedness to R. Such loan indebtedness was then due and payable to R. The P company was to raise money on bond and pay part of such money to R "on account of the balance of the purchase price of the shares and the loan account ..... and the simultaneous reduction of R's loan account" against the P company. Schreiner, J.A., was at pains to point out (at p 425 E - F) that the question whether a company gave financial assistance did not depend upon how it obtained the money concerned (whether by loan, by realizing assets, or otherwise) but upon what it was to do with the money when it became available. It was in that context that the learned Judge of Appeal reasoned that if it obtained the money and therewith discharged in part its obligation to its /creditor .....

creditor, the company would be no poorer, for it would merely have increased one of its liabilities and co-extensively (using the word in a quantitative sense) partially discharged another. (p 425E) It is important to note, however, that Schreiner, J.A., (at p 426 D - E) also observed that the partial discharge by the company of the loan account debt would not be "merely incidental" to the transaction and that, although "the ultimate goal" of the transaction was the purchase of the shares, "it was the direct object ..... to pay off part of the loan account".

The prohibition in the section comprises two main elements; one is the giving of financial assistance, the other is the purpose for which it is given (or the "in connection with" provision). The two elements are linked to form a single prohibition, but although so linked they are vitally different in concept. The further observations of Schreiner, J.A., to which I have

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just referred, have a direct bearing on the second of the two elements. It was obviously considered to be of importance to the decision of the case that although "the ultimate goal" of the transactions was the purchase of shares in the company (see also p 425 F - G) there was another and more direct object, not merely incidental, which was to reduce the company's debt in respect of the loan account. These observations by the learned Judge of Appeal gain added significance when they are read with what he had said earlier in the judgment (at p 424 G):-

> "Although it was conceded that generally payment of a debt owed by the company would not be described as the giving of financial assistance to the payee or any other person, it would be properly so described where the payment was made not in the ordinary course of the company's business and to advance its interests but as part of a scheme designed solely to facilitate by financial means the purchase of shares in the company."

/ (This .....

(This passage occurs in a part of the judgment in which the argument of counsel for the respondents was being discussed and at first blush it might appear that the words I have underlined formed part of the summary of counsel's argument. I am satisfied, however, that such words were interpolated by the learned Judge to reflect his own view. In the context of Gradwell's case, learned counsel for the respondents would hardly have advanced the argument that the payment would amount to the giving of financial assistance only where it was made " ... as part of a scheme designed solely to facilitate ... " The learned Judge's later reference to what counsel for respondents contended - at p 426 D - seems to me to remove whatever doubt there might otherwise possibly have been as to whether the words underlined in the abovequoted passage represented the learned Judge's own view.)

/It is .....

It is true that it was also pointed out that the "purpose and connection" of a payment would not be important unless it amounted to giving of financial assistance (p 425 G), but it would appear from the judgment as a whole that the conclusion that financial assistance was in breach of the section not to be given derived in part from an examination of the direct purpose of the payment to be made by the company. The ultimate finding was that the section had not been contravened because (i) the payment, although it would facilitate the purchase of the company's shares, which was the ultimate object, would be made with the direct (and legitimate) object of discharging an existing debt which was due and payable; (ii) such payment would not alter to its detriment the financial position of the company; (iii) therefore, in the particular circumstances of the case, the paying off of the existing debt could not be brought "within the notion of giving financial assistance". And it must constantly be borne in mind that the Court

/found .....

found that the passing of the bond by the company would not constitute the giving of security for the purpose of the purchase of the shares but would be the means whereby money was to be raised to pay off the existing and due debt of the company.

As I have mentioned, it is not necessary for present purposes to comment on the correctness or otherwise of the ultimate decision on the facts of Gradwell's case. Nor is it necessary to decide whether, where the purpose of the company in giving financial assistance is in issue, the Court must be satisfied, before finding that the section has been contravened, that it was the company's sole purpose to facilitate by such assistance the purchase of shares in the company. It is sufficient for present purposes to say that Gradwell's case is not authority for the general proposition, touching upon the "impoverishment test", which appears to have been substantially accepted in some

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of the cases mentioned earlier herein. In Evrard's case (supra, at pp 322 H - 323 B) the learned Judge said:

> "Despite the criticisms which have been made of the 'impoverishment' test, the weight of authority would seem to favour the view that this will usually determine whether there has been a contravention of the section. The language of the section is very wide indeed but the cases show that the Courts have been extremely reluctant to stigmatize 'innocent' transactions. If due weight is given to the word 'financial' in the section I do not think that it would be correct to hold that the company's pecuniary resources have been employed where its true financial position has remained unchanged."

/Such .....

Such an interpretation unduly narrows and restricts the terms of the section. (See also the Bay Loan Investment case, at p 317 E - F.) Section 86 bis (2) expressly and unequivocally includes within the meaning of "financial assistance" acts not necessarily nor even probably involving impoverishment of the company or the employment at all of its "pecuniary resources". The giving by a company of a guarantee or the provision by it of security does not per se involve the actual or even probable disbursement or employment of the company's funds (cf. Jacobson's case at pp 788 H to 789 A; 94 SALJ at p 268), yet if such guarantee or security was provided by the company and if it were to be established that it was provided for the purpose of or in connection with the purchase of the company's shares, the section would be shown to have been contravened whether or not such guarantee or security actually rendered or was likely to render the company poorer, for the section expressly provides that ~~financial~~

/the .....

the giving of a guarantee or the provision of security constitutes financial assistance. (See 90 SALJ at p 214.) The learned author of the article in Vol 48 of The Austra= lian Law Journal, although apparently sympathetic to an approach which tends to restrict the scope of the section, says:-

> "Since s. 67 is concerned with the protection of this class, there can presumably be no objection to a transaction which, while it assists in a financial way a person involved in a purchase of or subscription for the company's shares, at the same time does not conflict with the legitimate expectations of the protected class. Provided that the transaction is not a loan, or a guarantee, or the provision of security, and involves neither an expenditure of capital for a purpose outside the company's authorised objects nor a return of capital, then the fact that it also gives financial assistance should be beside the point." (My underlining.)

/Clearly .....

Clearly, the purpose of the legislature in specifically including the giving of a guarantee and the provision of security in the concept of "financial assistance" was to guard also against a company's merely exposing its funds to possible risk (as distinct from actually employing or depleting its funds) for the purpose of or in connection with the purchase of its shares.

I have no doubt that in certain cases, depending largely upon the form which the alleged financial assistance is said to have taken, the impoverishment test might be a very helpful guide and might often yield a clear and decisive answer to the question whether financial assistance was given by the company. (Cf. per Lord Denning, M.R., in Wallersteiner v Moir (1974) 3 All E R 217 at p 238 *h*.) But in other cases, of which I have given examples, the inquiry envisaged by the impoverishment test might be not only unhelpful but entirely irrelevant

/to the .....

to the question whether what was done constituted financial assistance, although the state of the finances of the company and of other persons involved in the transactions, and other related circumstances, might indeed be relevant to and helpful in deciding a different question, namely, whether such assistance as was given was in truth given for the purpose of or in connection with the purchase of the company's shares.

In the Court below it was apparently conceded by Counsel (not Mr Shaw) who then appeared for the receiver that the first transaction, considered on its own merits, was not in contravention of the section. In this Court Mr Shaw rightly contended that he was not bound by that concession. The loan given by UDC was in respect of the purchase by Ubco of Oreon's shares and the loan accounts against Oreon and most of the obligations imposed by the agreement were undertaken by Ubco. There is, of course, no prohibition against the giving by one company

/of .....

of financial assistance for the purpose of the purchase of shares in another company. There were, however, two respects in which Oreon itself undertook certain obliga= tions in terms of the agreement concerning the loan by UDC to Ubco. Those two respects are listed above under A (ii) (the undertaking to pass a bond over its property to secure the agreed amount of the loan accounts) and A (iv) (the furnishing of a special power of attorney to pass such bond). These undertakings related specifi= cally to the purchase of the loan accounts against Oreon, not to the purchase of shares in Oreon. Moreover, the bond was never passed nor was the special power of attorney ever utilized. These considerations notwithstanding, Mr Shaw contended that Oreon gave financial assistance for the purpose of or in connection with the purchase of Oreon's shares because (i) the agreement (so he contended) was an indivisible whole comprising the purchase of both shares and loan accounts and therefore the undertaking by

/Oreon .....

Oreon to secure the price of the loan accounts was an undertaking to give financial assistance not only in respect of such loan accounts but also in respect of the purchase of the shares; and (ii), with reference to the circumstance that the bond was never passed, he contended that whether or not its terms were carried out, an agreement to give future financial assistance which, if given, would be in contravention of the section, was ab initio null and void and therefore unenforceable.

I did not understand Mr O'Donovan, for UDC, to contest the second of the above propositions. More than thirty years ago, in England, it was held, in effect, that an agreement for the giving of financial assistance within the meaning of the section was not void although the actual giving of such assistance would be hit by the section. (Victor Battery Co. Ltd. v Curry's Ltd., (1946) Ch 242.) But that decision appears to have

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fallen into disfavour in England. (See South Western Mineral Water Co. Ltd. v Ashmore (1967) 2 All E R 953; Selangor United Rubber Estates Ltd. v Cradock (1968) 2 All E R 1073; Heald v O'Connor (1971) 2 All E R 1105; Gower, ibid, p 113, note 52.) It appears that both in Australia and New Zealand the decision in the Victor Battery case has not been followed. (The cases are referred to in 48 Australian Law Journal - the relevant Australian and New Zealand reports are not available to me.) And in South Africa (since the decision in Crispette and Candy Co. Ltd. v Michaelis 1948 (1) SA 404, which tends to support the Victor Battery approach) it has consistently been held in the Provincial Divisions that an agreement for the giving of financial assistance in breach of the prohibition in the section is void. (See Karroo Auctions (Pty.) Ltd. v Hersman 1951 (2) SA 33; Albert v Papenfus 1964 (2) SA 713; Goss v E.C. Goss & Co. (Pty.) Ltd., 1970 (1) SA 602; Jacobson's case, supra;

/Bay .....

Bay Loan Investment case, supra; Straiton v Cleanwell Dry Cleaners (Pty.) Ltd., 1960 (1) SA 355 (SR); Veron and Others v Schoeman and Another 1978 (2) SA 305 (D).) Although the question was not discussed in the judgment in Gradwell's case, the relief sought in that case was an order declaring null and void a contract allegedly providing for the giving, in the future, of financial assistance contrary to the provisions of the section. It appears to have been accepted by all concerned, including the Court, that if the contract indeed provided for future financial assistance which if actually given would be in contravention of the section, it would be null and void. It is true that section 86 bis (2) does not in terms prohibit the entering into of such a contract but specifically provides that "no company shall give .... any financial assistance ....", which prima facie envisages the actual giving of such assistance. But it would be strangely purposeless to prohibit the performance of an

/act .....

act yet to leave untouched an agreement for the performance of such act. It might be (I express no opinion on the point) that an agreement of that kind, not carried out, would not constitute the criminal offence created by the section, but it is to me unacceptable, in the context of the legislation now in issue, that a contract for the performance of an act which is not only prohibited but which would constitute a criminal offence if it were performed, could be an enforceable contract. All the indications are that the legislature intended that such a contract should be invalid and unenforceable; the prohibition is couched in negative terms and there is no realistic method (the penalty for contravention is a comparatively modest fine) by which the mischief at which it is aimed could effectively be avoided otherwise than by treating the contract as void and unenforceable. (Cf. e.g., Pottie v Kotze 1954 (3) SA 719 (A) at p 723; Palm Fifteen (Pty.) Ltd. v Cotton Tail Homes (Pty.) Ltd.,

/1978 .....

1978 (2) SA 872 (A) at p 885 E - G and the cases there cited.) I accept, therefore, as correct, the decisions in our Courts that such a contract is void and unenforceable. It follows that if the agreement in respect of the first transaction was one for the giving of financial assistance by Oreon for the purpose of or in connection with the purchase of its shares, the fact that such assistance was not actually given (in that the bond was never passed) would in itself be no answer to the contention that the agreement was unenforceable.

The first part of Mr Shaw's argument, however, depending as it does to a large extent upon the alleged indivisibility of the agreement, rests on less firm ground. There is undoubtedly a great deal to be said for the indivisibility of the initial agreement in respect of the purchase of the Oreon shares and loan accounts. Despite the fixing of separate prices for the shares and

/the .....

the loan accounts (which has been said to create "a strong presumption" that the contract is divisible - see Collen v Rietfontein Engineering Works, 1948 (1) SA 413 (A) at p 435), the facts of the case and the background circumstances tend to point to a conclusion that Ubco would not have been prepared to purchase the loan accounts if it were not able to purchase the shares, and vice versa. This consideration might be sufficient to override any presumption or prima facie inference stemming from the allocation of a separate price to each of the assets bought and sold. (Collen's case, ibid.) In the view which I take of this matter, however, it is unnecessary to decide that question. I shall assume in favour of the receiver that the Oreon shares and loan accounts were acquired by Prosun (and thereafter by Ubco) by means of an indivisible contract. But I do not think that this is of material assistance to the receiver's contention that the agreement of loan concluded by UDC and Ubco is unenforceable. If no separation of shares from loan accounts was achieved in

the agreement by which such assets were purchased by Prosun (and thereafter by Ubco), conditions A (ii) and (iv) of the loan agreement between UDC and Ubco (an entirely separate agreement between different parties) appear clearly to have achieved such separation for purposes of the loan agreement - and it is, after all, such loan agreement with which we are primarily concerned; it is its validity that is in issue in this case. When, as a condition of its lending Ubco the required money, UDC stipulated for the provision of security by Oreon, such security as was agreed upon expressly related only to the amount involved in the purchase of the loan accounts. No security was to be provided by Oreon in respect of the purchase price of its shares. By agreement, therefore, UDC, Ubco and Oreon, for the purposes of the loan transaction, recognized the severability of the share purchase from the loan accounts purchase, and gave real, practical effect to such recognition by the terms of their agreement. What is manifested by Oreon's willingness to provide security

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for the price of the loan accounts, but not for the price of the shares, is that its purpose was to afford financial assistance by way of provision of security for the purpose of the purchase of the loan accounts (which it could legitimately do) but to withhold any such assistance for the purpose of the purchase of its shares. By giving such financial assistance in respect of the loan accounts the purchase of the shares was no doubt facilitated, but section 86 bis (2) does not prohibit the giving of such assistance unless it is given for the purpose of the purchase of the company's shares, or in connection with such purchase. For the reasons I have mentioned, it cannot be said that Oreon's assistance, in the form of agreeing to provide security limited to the loan accounts purchase, was given for the purpose of the purchase of its shares. The remaining question to be answered, then, regarding the first transaction, is whether such financial assistance, although not given by Oreon for the purpose of

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the purchase of its shares was given "in connection" therewith, within the meaning of section 86 bis (2).

If given their literal meaning, the words "in connection with" may have a very wide connotation but it is probably seldom that they are used in legislation in their wide, literal sense. An act only remotely associated with an event may be said, literally, to have been an act in connection with such event, but unless the subject matter of the legislation and the context of the particular provision clearly indicate otherwise, it would not ordinarily be accepted that even the most remote connection was intended to be visited with sanctions or penal consequences. The proper approach to the con= struction of such or similar words in legislation has been succinctly stated by Schreiner, J.A., in Rabinowitz and Another v De Beers Consolidated Mines Ltd., ibid, at p 631 F :-

/"I proceed .....

> "I proceed then to consider the question from the angle most favourable to the appellants, namely, whether a discoverer's certificate is 'a right in connection with' a claim. In the widest sense no doubt it is, since it is, or evidences, a right, and the acquisition of claims, if and when pro= clamation takes place, is the reason for its existence. But expressions like 'in respect of' and 'in connection with', though they may sometimes be used to cover a wide range of association, must in other cases be limited to the closer or more direct forms of association indicated by the context."

The prohibition in section 86 bis (2) is clearly aimed against the giving of financial assistance by a company if it is given for the purpose of the purchase of its shares. The "in connection with" provision is an alternative to "for the purpose of" and in the context of the section its connotation cannot be otherwise than profoundly affected by the concept to which it is an alternative. The words "in connection with" appear to have been inserted in order to cover a situation where, although the actual purpose

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of the company in giving financial assistance might not have been established, its conduct nevertheless stood in such close relationship to the purchase of its shares that, substantially if not precisely, its conduct was similar to that of a company which gave the forbidden assistance with the purpose described in the section. In short, the alternative was inserted merely to close possible loopholes; it was not intended by such insertion to create a different type of offence, or a lesser offence, or to prohibit conduct which was not substantially similar to the conduct prohibited by the main provision characterized by the words "for the purpose of". Obviously, it is not possible to define the exact extent of the enlargement of the scope of the prohibition by the addition of the words in question; the facts of each case will determine whether the established "connection" with the purchase of shares constitutes conduct which the legislature was con= cerned to prohibit.

/Where .....

Where the purpose of the company in performing the act complained of is established, and that purpose is for something other than the purchase of the company's shares, there would in general (though there may be exceptions) be little or no room for a finding that, for purposes of section 86 bis (2), the act was nevertheless performed in connection with the purchase of the shares. For example, company A, for its own business purposes, guarantees B's overdraft at a bank so as to enable B to carry on his business of manufacturing certain equipment which the company necessarily requires for its business and which equipment it purchases from B. Company A knows full well at the time of giving the guarantee that B, who has confidence in its stability and management, intends to invest in shares in company A the surplus profits he will make as a result of being able to continue his manufacturing business by reason of the overdraft facilities made available to him by virtue of A's guarantee. B in fact thereafter

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uses such profits for the purchase of shares in A. The guarantee given by A clearly amounts to the giving of financial assistance to B, but not at all for the purpose of the purchase of the company's shares; its purpose, clearly established, was to enable B to continue producing the equipment required by A for its business. In such a case there would surely be no room for a finding that because A knew of B's ultimate intention regarding the purchase of shares in the company, the financial assistance given by A, although not given for the purpose of the purchase of shares but for a different purpose, was nevertheless given in connection with the purchase of shares and was therefore in contravention of the section. The facts of the case now before us differ in several respects from the hypothetical example I have given, but it is an incontrovertible fact that with knowledge that both the shares in and loan accounts against Oreon had been purchased, and that UDC was being asked for a loan to enable payment to be made of the price of both assets,

Oreon limited its provision of security so as to cover only the price of the loan accounts, which, as I have said, was for purposes of the loan agreement between UDC and Ubco, severed from the price of the shares. Whatever Oreon's motive may have been in agreeing to provide such security, its intention not to secure the payment of the price of the shares is manifest. Accepting that it realized that by reason of the provision of security to cover the value of the loan accounts the advance on loan by UDC of the total amount which Ubco had to pay would be facilitated, such facilitation would be no more than an ensuing incident of its provision of security for an amount which expressly and purposefully excluded the price of the shares. The circumstance that the giving of financial assistance for the expressly limited purpose of, or in connection with, Y, might or will in the result also serve the purpose of Z, does not justify extending the limited purpose or connection so as to relate also to Z.

/I conclude .....

I conclude, therefore, that the Court a quo rightly accepted that the first transaction, considered on its own merits, did not constitute a contravention of the section.

I might add a further observation in regard to the first transaction. It relates to the circumstance that the bond referred to in A (ii) was never passed. Although, as I have held, that in itself does not signify that the transaction is not hit by the section, there is evidence which suggests that the reason why the special power of attorney (A (iv)) was never utilized and the bond not passed, was that it was feared that the passing of the bond might have the effect of bringing the transaction within the scope of the section. There might well be justification for inferring from the evidence as a whole that the parties tacitly agreed to excise conditions A (ii) and (iv) from the agreement, and that, by tacit consent, the agreement was in effect newly constituted without

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those conditions. If this is a proper inference (and there is something to be said for it, though it is not necessary to decide thereon because of the conclusion to which I have already come) that would be another ground for holding that the first transaction did not offend against section 86 bis (2).

I now turn to the second transaction. The terms thereof which are said to bring it into conflict with the section are B (iii), (iv), (v) and (vi), summarized earlier herein. As to (iv), (v) and (vi), it will be noted that the surety mortgage bonds passed by Oreon and Kruben respectively were not given by either of those companies to cover the purchase price of its shares. The Oreon bond was to secure the obligations of Ubco in respect of the purchase of Kruben shares (and the loan accounts against Oreon) and the Kruben bond to secure Ubco's obligation in respect of the purchase of Oreon shares. What I have said concerning condition A (iv)

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in the first transaction is also applicable, with the necessary adaptation, to the surety bond passed by Kruben. Notwithstanding that Kruben must have realized that the provision of such security would facilitate the transaction in regard to the purchase of its shares, care was taken to avoid provision of security for the price of its shares. No doubt the matter was so arranged with the very object of ensuring that section 86 bis (2) was not contravened, but it is trite law that that would not be improper, provided only that the agreement was genuine and not disguised in order to conceal the true agreement. It cannot be said that the agreement was not genuine.

Term B (iii), (the cross-guarantee) however, stands in a wholly different position. Here we find each of the two companies, Kruben and Oreon, binding itself unequivocally as surety and co-principal debtor to UDC in respect of obligations "of whatsoever nature",

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whether already existing or to arise in the future, for which the other company or Ubco or Baker may be or become liable to UDC. It appears to me that by agreeing to the terms of the cross-guarantee, both Oreon and Kruben did precisely that which they studiously avoided doing in regard to the surety mortgage bonds. It was recognized by the Court a quo (p 294 of the reported judgment) that if UDC sought to enforce the provisions of the cross-guarantee in respect of the price of the shares it could be met by a defence that such a claim ran counter to the section. But regarding the effect of the cross-guarantee, the Court held that there was "no sound reason" why it should not be interpreted "so as to exclude any transactions hit by section 86 bis (2)". I have difficulty in finding justification for the exclusion from the wide, general terms of the cross-guarantee, of debts owed by Ubco to UDC in respect of loans for the purpose of paying the price of the Kruben or Oreon shares.

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The intention that the cross-guarantee was to cover all obligations of Ubco to UDC could hardly have been more clearly expressed than it was. It is true that the extent of the guarantee is so wide that it appears, on the face of it, also to include debts owing in respect of possible other transactions having not even the most remote connection with or relevance to the transactions in question in this case. Whatever justification there might be for the exclusion, as a matter of inter= pretation in the light of relevant surrounding circum= stances, from the scope of the cross-guarantee casual debts entirely unrelated in any way whatever to the transactions which gave rise to the cross-guarantee, it appears to me that debts directly related to the loan transactions for the purpose of enabling payment to be made for the acquisition of shares in and loan accounts against the companies concerned, were clearly visualized by the parties and that it was indeed in respect of those very transactions that the cross-guarantee was required

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by UDC and given by the signatories. The conclusion is inescapable that condition B (iii) of the second transaction constitutes the giving of financial assistance by Kruben by way of suretyship or guarantee for the purpose of the purchase of its shares and that it therefore contravenes section 86 bis (2).

It was, however, contended on behalf of UDC that even if that were to be the Court's finding, there was no reason for holding that the whole agreement whereby the second loan was advanced was invalid or un= enforceable. It was argued, largely on the authority of South Western Mineral Water Co. Ltd. v Ashmore, (supra), that although there could not be a valid security for an invalid principal debt, the validity of the principal obligation need not be affected by an invalid accessory obligation (see also the reported judgment a quo, at p 286 E - F) and that in the circumstances of this case the Court was entitled and ought to uphold the principal

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provision of the transaction (i.e. the loan) even while rejecting the cross-guarantee as unenforceable. (Cf. Spink (Bournemouth) Ltd. v Spink (1936) 1 All E R 597, also relied on by Mr O'Donovan.) That such an approach might in certain cases be permissible may readily be accepted. As Schreiner, J.A., observed in Middleton v Carr, 1949 (2) SA 374 at p 391,

> " ..... in a proper case the legal part of a contract may be treated as separate from the illegal part and be enforced."

(See also Vogel, N.O. v Volkersz, 1977 (1) SA 537 at p 548; Vernon and Others v Schorman, supra, at p 307.) The primary question whenever a Court is asked to uphold the good while rejecting the bad part of a contract is whether the contract is divisible in that respect. (In Spink's case, supra, at p 601, the relevant portions of the agreement were held to be "perfectly severable".) Here we are concerned with a provision as to guarantee which was undoubtedly inserted for the benefit of the lender, UDC. Clearly, UDC could elect not to prefer

any claim on the cross-guarantee. But that circumstance alone does not render the agreement divisible. It is true that the cross-guarantee was in form a separately executed contract of suretyship between UDC and the signa= tories thereto, but in the circumstances of this case it would be unrealistic in the extreme to regard it as in= dependent of, or as anything other than an agreement fully integrated with, the loan agreement. It is very clear that UDC was prepared to lend to Ubco the sum of R87 000 only if certain conditions, including the provision of the cross-guarantee, were met. UDC required not only each of the companies to bind itself as guarantor, but it also required Baker, who controlled all three companies, so to bind himself. The aim, clearly, was to obtain the greatest possible degree of cover for this, the second loan, and at the same time to increase the cover in respect of the money already advanced in terms of the first loan. The separate document recording the cross-guarantee was undoubtedly an essential and integral part of a design

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for the obtaining of the second loan and it was no less an integral and inseverable part of such design and of the loan agreement than it would have been had all been contained in one document signed by all the parties concerned and clearly reflecting the provision of the cross-guarantee as a condition of the granting of the loan. The agreement of loan, therefore, was in breach of section 86 bis (2) and illegal and I am unable to accept (with due

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respect to certain observations made by Cross, J., in the South Western Mineral Water case, supra, at p 958 B - E) that it could thereafter be rendered lawful by a decision by UDC not to found a claim on the cross-guarantee or by any other unilateral act by UDC or any one of the parties to the agreement. Aliter if the parties, after conclusion of the contract, by common consent (whether expressly or tacitly given) reconstituted it as a new agreement from which the cross-guarantee was omitted. There is no evidence of any such reconstitution.

The conclusion, then, on this aspect of the case, is that the second transaction was and is unenforceable and that the claims founded thereon were rightly rejected by the receiver.

What remains to be considered is the contention earlier referred to that the first transaction, even if valid on its own merits, became invalid and wholly un=

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enforceable by virtue of the cross-guarantee given in the second transaction. The argument on behalf of the receiver was to the effect that the arrangements for the second loan became an integral part of the first loan, in that the security for the loan which was the subject of the first transaction was by the terms of the second transaction augmented. It was further contended that taking a realistic view of the situation, the two transactions were "intermingled" and formed successive stages of the implementation of one scheme or design for the raising of money by Ubco for the purpose of the purchase of the shares in and the loan accounts against Oreon and Kruben. The result of the second transaction, so it was contended, was to make of the two "a composite transaction" which, as such, was void by virtue of the provisions of section 86 bis (2). I have earlier herein described the background to the transactions and Baker's purpose to give Ubco control of the land owned

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by each of the companies by acquiring the shares in and loan accounts against Oreon and Kruben. It is also clear that when UDC was initially approached for a loan, Ubco attempted to borrow a larger sum than UDC was then prepared to advance, presumably with a view to acquiring, inter alia, the shares in both Oreon and Kruben. The scheme contended for by the receiver's Counsel finds support, to that extent, in the evidence. But it is reasonably clear from the documents (to which I need not refer in detail) that even if at the time of granting the first loan UDC may have contemplated the possibility of later making further advances to Ubco, it had by no means resolved or indicated any willingness to do so. In fact, in a letter addressed to Baker on 22 December 1972, UDC made it clear that although it was prepared, in principle, to grant a loan of R132 000, (the approximate amount of the first loan) it was not under any obligation to finance any future development. On the evidence it is highly

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probable that at the time of the granting of the first loan and the conclusion of the first transaction, whatever Baker's hopes and aspirations may have been, there was no arrangement or understanding whatever for the grant of further loans by UDC.

The reasonably clear inference to be drawn from all this is that the agreement constituting the first transaction was concluded as a self-contained, independent contract for the loan of R132 500, subject only to the terms and conditions therein contained. It was not designed as the forerunner of any subsequent contract of which it was later to become part or to which it was to become adherent. And by the same token, the second transaction, concluded some two months after the first, was a separate, independent transaction. When such second agreement of loan was being negotiated, UDC seized the opportunity, as I have pointed out, not only of obtaining full security and guarantees for the

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second loan, but also of fortifying its security in respect of the already completed first loan. That was a condition of the grant of the second loan. I cannot accept that the result thereof was a fusion of the two transactions so as to make of them a composite, unitary whole. They remained separate transactions of loan and the provision in the second agreement of loan of additional security in respect of the first loan did not, to my mind, serve to amend the terms of the first agreement or novate it. I therefore agree with Franklin, J., that the original loan "was never varied at all" by the second transaction and that the adding of further security in respect of money already advanced by UDC was simply for the purpose of obtaining the second loan. The validity of the first transaction therefore cannot be said to have been undone by the agreement constituting the second transaction. It is

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necessary to mention, for the sake of completeness, that certain alternative contentions were raised by the receiver before the Court a quo, which ruled that they could not properly be raised at that stage. (See pp 294 H - 296 F of the reported judgment.) In so far as such alternative contentions relate to claims founded upon the second transaction they fall away because the main contentions have been upheld. And in regard to the contention relating to the Limitation and Disclosure of Finance Charges Act, 73 of 1968, there is in my opinion no justification for interference with the learned Judge's ruling, the reasons for which were briefly stated at p 296 E - F of the reported judgment.

To sum up:-

The first transaction is held to be valid and enforceable and it follows that the claims against Ubco which are founded exclusively on that transaction

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were rightly ordered by the Court a quo to be admitted. Others, which depend upon terms of the second transaction were rightly rejected by the receiver. Certain claims against Oreon, which depend upon the first transaction and not at all upon any provisions in the agreements consti= tuting the second transaction, were also rightly ordered by the Court a quo to be admitted. The claims against Kruben, resting as they do upon the second transaction, were rightly rejected by the receiver and the order of the Court a quo in relation to such claims cannot stand. The Court a quo made separate orders in respect of the claims against each of the companies (and as to costs) for there was no consolidation of the three applications for review, although they were heard together. The same Counsel represented the receiver in his capacity as such in respect of each company. It is advisable (and, I think, necessary) to make separate orders on appeal too. This may present problems in regard to the allocation of costs to each application but they

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ought not to be beyond the capacity of the parties and the taxing officer to resolve. I might add that when considering what would be appropriate orders as to costs, I have not lost sight of the fact that the upholding of only concurrent claims against any company in liquidation, might, conceivably, not betoken substantial success if measured by the yardstick of dividends likely to be paid. It appears to me, however, that where UDC correctly succeeded in the Court a quo in obtaining admission of claims against a company, albeit concurrent claims, which had been rejected by the receiver, it ought to be regarded as having achieved substantial success entitling it to costs in that Court; and similarly where, on appeal, there has been success in the respect that some claims ordered to be admitted by the Court a quo have been held to be invalid claims.

Before making the necessary orders I should explain that so as to avoid encumbering

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the orders themselves with parenthetical explanations and descriptions of the source or grounds of particular claims, I shall refer to them by the numbers assigned to them in the judgment of the Court a quo (in which is briefly explained the nature and ground of each claim) under the heading of each company (1977 (1) SA at p 279 C to p 281 H should be referred to) and to the orders made by the Court a quo in respect thereof, by the numbers reflected under the heading of each company in the said report at pp 296 to 298.

It is ordered:-

A. Claims against Ubco

1. The appeal against paras (1) and (2) of the order by the Court a quo is dismissed in respect of claims 9.1, 9.2, 9.5 and 9.7.

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2. The appeal against paras (1) and (2) aforesaid is allowed in respect of claims 9.3, 9.4, 9.6 and 9.8.

3. Para (1) of the Court's order is altered to read:

> setting aside the respondent's decision rejecting those of the applicants claims against Ubco (Pty.) Ltd., which are numbered 9.1, 9.2, 9.5 and 9.7.

4. Para (2) of the Court's order is amended by substituting for R310 045,41, the total of the claims referred to in para 3 hereof, that is, R181 651,96.

5. Para (3) of the order of the Court a quo stands.

6. Costs of appeal, in respect of which fees for two Counsel are authorized, are awarded to the appellant (the "receiver",

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in his capacity as such for Ubco (Pty.) Ltd., in liquidation).

B. Claims against Oreon

1. The appeal against para (1) of the order by the Court a quo is dismissed in respect of claims 9.1 and 9.4, but as to claim 9.4, subject to paras 3 and 4 of this order.

2. The appeal against the said para (1) is allowed in respect of claims 9.2, 9.3, 9.5 and 9.6.

3. Para (1) aforesaid of the order of the Court a quo is altered to read:

> setting aside the respondent's decision rejecting applicant's claim, 9.1, against Oreon Place (Pty.) Ltd., and its decision not to admit claim 9.4 as a concurrent claim.

/4. Paras .....

4. Paras (2) and (3) of the order of the Court a quo are set aside.

5. Para (4) of the said order is amended by deleting the words

> "of the balance of the claim of the applicant against Oreon Place (Pty.) Ltd., amounting to a total concurrent claim of R33 398,08 together with interest at the rate of 10% per annum on R141 859,36"

and substituting therefor the following:

> of claims 9.1 and 9.4, totalling R64 858,99, as concurrent claims against Oreon Place (Pty.) Ltd., together with interest at the rate of 10% per annum on the said sum of R64 858,99.

6. Para (5) of the order of the Court a quo stands.

/7. Costs .....

7. Costs of appeal, in respect of which fees for two Counsel are authorized are awarded to the appellant, ("the receiver", in his capacity as such for Oreon Place (Pty.) Ltd., in liquidation.)

C. Claims against Kruben

1. The appeal is allowed and paras (1), (2), (3) and (4) of the order made by the Court a quo are set aside.

2. Costs of appeal and costs in the Court a quo are awarded to the appellant ("the receiver", in his capacity as such for Kruben Holdings (Pty.) Ltd., in liquidation) in respect of which costs fees for two Counsel are authorized.

S. MILLER
JUDGE OF APPEAL

RABIE, J.A.)
CORBETT, J.A.) Concur
DIEMONT, J.A.)
HOEXTER, A.J.A.)