M.P.
(385/77)

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

KARL WERNER RUDOLPH LIST — Appellant

and

PIERRE JUNGERS — Respondent

CORAM: WESSELS, MULLER, KOTZÉ, DIEMONT, JJA

et VILJOEN, AJA

HEARD: 5 March 1979

DELIVERED: 28 March 1979

J U D G M E N T

DIEMONT, J.A.

This case has something of an international flavour. In October 1969 Pierre Jungers, a Belgian citizen, sold to Roger Van de Ghinste of Cape Town, his

interest .....

interest in a crayfish trawler which was registered at Brest and operated under a French flag. The purchase price was 4 million Belgian Francs and was payable at Bruxelles in convertible Belgian Francs or any other currency.

In May 1970, Karl Werner Rudolph List of Kaiser Street, Windhoek, wrote to Jungers in Belgium guaranteeing that the purchase price would be paid to him by the end of December 1970. Thereafter, in August, 1974, Jungers issued summons against List in the South West Africa Division of the Supreme Court of South Africa for the balance of the amount alleged to be due to him.

No evidence was led at the trial in Windhoek and argument was confined to certain legal issues which had been raised on the pleadings.

On 23 November 1977, HART, J., gave judgment in favour of Jungers in the sum of R33 937,94 with interest and costs. The whole of the judgment is now appealed

against .....

against by List.

I turn now to the facts.

A translation of the agreement which was entered into between Jungers and Van de Ghinste on 10 October 1969 and which is annexure "B" to the Reply to the Defendant's request for further Particulars, reads as follows:

"MR JUNGERS Brussels on the 10th October 1969.

I, the undersigned, Pierre Jungers, domiciled 15, Boulevard du Souvera in Brussels 17 - Belgium, hereby make over to Mr. Roger Van de Ghinste, residing in Cape Town my quota (i.e. 50%) of our 49% share, being 118 shares of a total of 237 shares, which we own jointly with Mr. Van de Ghinste, of the fishing vessel "Maria-Martina" operating under French flag and registered in BREST harbour under No. 03152 L and having been entered as French under No. 796390000 I.

This transfer is made, free of charge, to the undersigned for the price of 4.000.000 F.B. (Four Millions Belgian Francs) payable at

Bruxelles ...

Bruxelles in Convertible Belgian Francs or in any other currency for the counter value of B.F. 4.000.000.

The sum of 4.000.000 B.F. is payable to me as follows:

1.000.000 B.F. on the 1st of July, 1969.
1.000.000 B.F. on the 31st of December 1969.
1.000.000 B.F. on the 30th April 1970.
1.000.000 B.F. on the 31st of July, 1970.

Failing payment on the dates agreed upon the amounts owing will be subject to 8% interest annually capitalizable quarterly.

Should payments be delayed for more than three months, the interest rate will increase up to 13%.

The undersigned undertakes to sign all documents enabling the ratification of the transfer of the francization deed after settlement of the total amount owing plus interest if any.

Done at Brussels on the 10th of October 1969.

Signed: Pierre Jungers.

The present document is signed, for agreement by the transferee Mr. Roger Van de Ghinste.

Signed: R. Van de Ghinste.

It is .....

It is common cause that certain payments totalling 1.663.373 Belgian Francs were made during 1969 and 1970 to the plaintiff (now Respondent) in terms of the agreement, but that no further payments were made on the due dates or at all.

Thereafter, on 22 May 1970, defendant (now Appellant) gave the Respondent a written undertaking (annexed to the Particulars of Claim, marked "A") in the form of a letter which reads as follows:

> Mr Jungers,
> Administrateur Délégué,
> Sarmintor
> 6, Rue des Quatre-Bras,
> BRUXELLES 1
> BELGIQUE
>
> Dear Sir,
>
> On behalf of this Company and on my own personal behalf, I hereby warrant and guarantee that the purchase price due to you in respect of the purchase of your joint interest with Mr Van de Ghinste in the 108 units in the "MARIA MARTINA", will be paid to you by the end of December 1970.
>
> Yours faithfully,
> JAMY FISHING AND DRYING CORPORATION (PTY) LTD.
> (Signed) K.W.R. List
> K.W.R. LIST.

Certain....

Certain correspondence followed which need not be referred to and no further payments having been made, Jungers issued summons against List for payment of the sum of R41 865,00, being the equivalent value of 2.336.627 Belgian Francs, (the amount alleged to be due) with interest, a tempore morae and costs. The rate of interest claimed is a matter to which I shall refer in due course.

In the Plea, as amended, Appellant either denied or put Respondent to proof of a number of allegations made in the Particulars of Claim but, as was pointed out by the trial judge, agreement was reached on some of these issues at a pre-trial conference which obviated the necessity for calling evidence. It is necessary to refer only to paragraphs 4 and 8 of the Plea.

> 4.1. Defendant admits that on or about the 22nd May, 1970 and at Cape Town he signed the document of which the said Annexure "A" is a copy.
>
> 4.2. Apart from the above admission all the other allegations in paragraph 5 are denied.

4.3. Defendant says that at all material times it was the intention of all the parties to the contract, including the Plaintiff, that Defendant and the said JAMY FISHING & DRYING CORPORATION (PTY) LTD. should be ordinary co-sureties for the due payment of the debt due to Plaintiff and that it was not the intention that the Defendant should assume the liability of a principal debtor or co-principal debtor to Plaintiff.

4.4. Defendant says that by signing the document he undertook the obligations of an ordinary co-surety without renunciation of the benefits of excussion and division.

4.5. Defendant further says that by virtue of the provisions of Section 6 of Act 50 of 1956, as amended, no valid contract was concluded between the parties as the said document does not contain all the terms of a contract of suretyship in that the name of the person whose debt was to be guaranteed does not appear thereon.

4.6. Alternatively to sub-paragraph 4.5 hereof, if the contract is not invalid by virtue of Section 6 of Act 50 of 1956, as amended, then Defendant says that the Plaintiff has not in any way whatever excussed the principal debtor and that until such excussion Defendant is not indebted to Plaintiff in any amount whatever.

8. Alternatively to the above, the Defendant says that any right of action which the Plaintiff might have had against him has become extinguished by prescription in terms of the provisions of Act 68 of 1969 or alternatively of Proclamation 13 of 1943 (SWA), as amended, or Act 18 of 1943, as amended, by virtue of the fact that when the summons herein was issued and served, a period of more than three years had elapsed after the alleged debt was due or after the Plaintiff's right of action first accrued.

The minutes of the pre-trial conference which took place on 7 November 1977 record that an agreement was reached on the following matters:

"1. Defendant admits paragraph 3(a) of the Particulars of Plaintiff's Claim and in particular admits that Mr. Roger van de Ghinste was acting as nominee on behalf of Jamy Fishing & Drying Corporation (Pty) Limited when the shares referred to in that paragraph were purchased.

2. Defendant admits paragraph 4 of the Particulars of Plaintiff's Claim as to

the allegations as to payment and in particular admits that the balance of the purchase price not yet paid was as at the 31st of December, 1970 the sum of 2.336.627 Belgian Francs plus interest thereon.

3. Paragraph 8 of the Particulars of Plaintiff's Claim is admitted by Defendant. It is agreed that the bank rate of interest at all material times was 9% p.a.

4. The parties agree that the rate of exchange as at the 31st of December, 1970, was 68.85 Belgian Francs for R1,00, and that the 31st of December, 1970, is the relevant date at which the conversion from Belgian Francs into Rands is to take place for the purposes of all matters arising in this action.

5. The parties agree that the balance of the purchase price referred to in Annexure "A" to the Particulars of Plaintiff's Claim was, as at the 31st of December, 1970, and after conversion into South African Rands the sum of R33 937,94. It is further agreed that whatever applicable rate of interest this Honourable Court decides is applicable, will apply to the aforesaid sum of R33 937,94 as from the 1st of

January, 1971....

January, 1971.

6. It is agreed between the parties that for the purposes of any judgment that may be given in this case in favour of the Plaintiff, the necessary exchange control permission has been obtained by the Plaintiff from the South African Exchange Control Authorities.

7. It is agreed between the parties that Jamy Fishing & Drying Corporation (Pty) Limited was placed in provisional winding-up on the 15th of September, 1971 on the grounds that in fact:

   (a) The paid share capital of the company had been completely lost.

   (b) The company was insolvent and unable to pay its debts.

   (c) It was just and equitable that the company should be wound up.

   It is further agreed that thereafter the said company was finally wound up.

8. It is agreed between the parties that the reference in the fourth line of Annexure "A" to the Particulars of Plaintiff's Claim to 'the 108 units' is an error and that this should read 'the 118 units.' The parties agree that the said document is to be treated as if it

in fact .....

in fact referred to 'the 118 units' and that it is accordingly unnecessary for any formal claim for rectification to be made.

9. It is agreed that costs of Counsel's attendance at this pre-trial conference be allowed.

10. It is recorded that Plaintiff has notified the Defendant that at the hearing of this action, an application will be made to amend the Particulars of Plaintiff's Claim so as to include therein a claim for interest at the rate of 12% per annum alternatively 11% per annum."

At the outset of the trial, Respondent sought leave to amend the Particulars of Claim in compliance with the agreement reached at the pre-trial conference. The amendment was allowed without opposition and reads as follows:

"1. By the addition to Paragraph 3 thereof of the following sub-paragraph -

(c) In terms of the above Agreement interest was payable as follows:-

(i) at the rate of 8% per annum capitalised quarterly on any amount not paid within the first three months of due date;

(ii) at the rate of 13% per annum on any amount outstanding after the first three months of due date."

2. By the deletion in Paragraph 6(b) thereof of the sum of R41 865,00 and by the substitution therefor of the sum of R33 937,94.

3. By the deletion of Prayers (a) and (b) thereof and by the substitution therefor of the following:-

'(a) payment of the sum of R33 937,94;

(b) interest on the said sum at the rate of 12% per annum, alternatively 11% per annum, further alternatively 9% per annum from the 1st of January, 1970 to date of payment.'"

At the commencement of his argument Mr. Viljoen stated that his submissions would be based on three main contentions and that the appeal must succeed if any one of these was upheld. These contentions were:

Firstly, that the undertaking given by the Appellant in the letter dated 22 May 1970 (Annexure "A") was one of suretyship and that it was fatally defective by

reason .....

reason of the provisions of Section 6 of Act 50 of 1956 in that the identity of the principal debtor did not appear from the undertaking. Moreover there was no averment that the principal debtor had been excussed.

Secondly, that if the undertaking were an original undertaking and not a suretyship, the claim had become prescribed by virtue of the provisions of the Prescription Act, No. 68 of 1969, which applied to South-West Africa.

Thirdly, that if Act 68 of 1969 did not apply, the provisions of the South-West African Prescription Proclamation, No. 13 of 1943, applied to the Appellant's obligation in which case the relevant period of prescription was three years and the claim was accordingly prescribed.

A fourth and supplementary issue related to the rate of interest to be applied in the event of the Respondent being held entitled to payment of the capital sum claimed.

Much .....

Much of the argument of both counsel was directed at the determination of the exact nature of the undertaking which the Appellant gave in the letter written to the Respondent on 22 May 1970.

Mr. Viljoen placed great emphasis on the word "guarantee". It was, he conceded, a word which had several meanings but it was commonly and most properly used in the sense of an undertaking to stand surety for the performance of, or to make good, someone else's obligation. For this there was ample authority, both in the case law and in standard lexicons, such as the Shorter Oxford English Dictionary (at page 840 of the 1934 edition). Almost a century ago the Privy Council had held in The Heirs Hiddingh v De Villiers, Denyssen, and others 5 S.C. (1887) 298 at 311 that:

> "The very notion of a guarantee requires that there shall be two sources of security to the creditor, the original source and the guarantor."

Coming .....

Coming to more recent times STRATFORD C.J., had stated in Hazis v Transvaal and Delagoa Bay Investment Co. Ltd. 1939 A.D. 372 at 384 that:

> "The word (guarantee) is usually and more properly employed by a surety who promises to saddle himself with an obligation if the principal obligor defaults."

It was further submitted that the ordinary meaning of a word was an important factor in determining what was meant by its use and there should not be a departure from the sense in which it was commonly used without cogent reason. If the Court did not look to and adopt the ordinary meaning of a word in construing a document it would lead, said counsel, to a "Lewis Carroll situation", and presumably an "Alice in Wonderland" result.

Mr. Williamson, for the Respondent, while conceding that the word 'guarantee' was more usually employed in the context of suretyships, submitted that this was by no means decisive, as the word was capable of several meanings.

Thus .....

Thus it could be used in a loose sense to denote a primary obligation to pay in a certain event. Authority for this submission was to be found in several cases; he referred, inter alia, to Cazalet v Johnson 1914 T.P.D. 142, a case in which GREGOROWSKI J., is reported to have stated at p.145:

> "The difficulty is created by the use of the word 'guarantee' in the document, and that the word guarantee is ordinarily a promise to pay the debt of a third person in case of his default, but it is well known that the word is used very often in quite a different sense and much less definitely. Webster in his dictionary says that 'guarantee' is in addition to other meanings 'an agreement by which one person promises to make another secure in the possession, enjoyment or the like of something'".

Reference was also made to Walkers Fruit Farms v Sumner 1930 T.P.D. 394 where GREENBERG J., said at page 398 of the report that the word was capable of a number of meanings "but the ordinary meaning is to assure

a person .....

a person of the receipt or possession of something."

Again in the case of Dempster v Addington Football Club (Pty) Ltd. 1967 (3) SA 262 (D), one of the questions which the Court had to consider was the meaning to be given to the word "guarantee". Was it used in its "literal legal sense" relating to suretyship or was it "used in a loose and popular sense"? CANEY J., who was an authority on the subject of suretyship stated at p. 267:

> "I agree with counsel that the word 'guarantee' has not in this contract the sense attributable to it in relation to suretyship or the like, and I think that Mr. Didcott is correct in contending that it means 'pay'. That is not a far-fetched or strained meaning and it does not truly involve a change in the language: it is merely giving to the word which appears, 'guarantee', one of its meanings, and particularly a meaning which one could expect in a contract which has clearly been prepared by laymen, not by a draftsman using the skill and experience of a legal training."

It is in .....

It is, in my view, an unrewarding and misleading exercise to seize on one word in a document, determine its more usual or ordinary meaning, and then, having done so, to seek to interpret the document in the light of the meaning so ascribed to that word. Apart from the fact that to decide on the more usual or ordinary meaning of a word may be a delicate task - so for example STRATFORD C.J., and GREENBERG J., gave differing "ordinary meanings" to the word 'guarantee' in the cases noted above - it is clear that the context in which the word is used is of prime importance. I find the words of KRIEK J., as reported in Hermes Ship Chandlers Ltd. v Caltex Oil Ltd. 1973 (3) S.A. 263 (N) at p. 267 apposite:

> "The passages from the various judgments I have mentioned deal with the popular or ordinary meaning of the word 'guarantee', but it seems to me that they demonstrate only that the word is capable of bearing different meanings depending upon the context in which it is used. It seems to me also that when the meaning of the word in a

particular.....

particular document is being considered, it is undesirable to commence the enquiry on the basis that any one of its possible meanings predominates, and that the proper approach to the question is to be alive to the various meanings which it can bear and by a consideration of the context in which it is used (together with such other circumstances as may be permissible) to decide which meaning must be attributed to it in that context."

More recently RUMPFF C.J., emphasised that in seeking to interpret a contract, words must not be examined in isolation and divorced from the context in which they are used:

"Wat natuurlik aanvaar moet word, is dat, wanneer die betekenis van woorde in 'n kontrak bepaal moet word, die woorde onmoontlik uit= geknip en op 'n skoon stuk papier geplak kan word en dan beoordeel moet word om die betekenis daarvan te bepaal. Dit is vir my vanself= sprekend dat 'n mens na die betrokke woorde moet kyk met inagneming van die aard en opset van die kontrak, en ook na die samehang van die woorde in die kontrak as geheel."

(Swart en 'n ander v Cape Fabrix (Pty) Ltd. 1979 (1) S A 195 (A) at 202).

Attention is also drawn in a passage in a recent judgement by JANSEN J.A. to the danger of ascribing an "ordinary" meaning to a word when construing a contract:

> "The first step in construing a contract is to determine the ordinary grammatical meaning of the words used by the parties (Jonnes v Anglo-African Shipping Co. (1936) Ltd.,1972(2) S A 827 (A D) at p. 834E). Very few words, however, bear a single meaning, and the 'ordinary' meaning of words appearing in a contract will necessarily depend upon the context in which they are used, their inter= relation, and the nature of the transaction as it appears from the entire contract. It may, for example, be quite plain from reading the contract as a whole that a certain word or words are not used in their popular everyday meaning, but are employed in a somewhat exceptional, or even technical sense. The meaning of a contract is, therefore, not necessarily determined by merely taking each individual word and applying to it one of its ordinary meanings."

(Sassoon Confirming & Acceptance Co. v Barclays Bank. 1974 (1) S A 641 at 646 (A)).

In the light of the authorities cited I am not persuaded that the word "guarantee" as used by the Appellant in the letter of 22 May 1970, must be looked at in isolation, nor am I persuaded when the word is looked at in its context that it was used in the sense of an undertaking to stand surety for another's obligation. Nor does it seem to me that the use of the word "warrant" immediately before the word "guarantee" adds any force to the argument advanced by Appellant's counsel.

It must always be a matter of interpretation to ascertain whether what passed between the parties, the creditor and the person said to be a surety, amounts to a contract of suretyship or not. In discussing the problem CANEY in his work on "The Law of Suretyship in South Africa" (2nd edt. at p. 65) after referring to the passage cited above from the judgment of the Privy Council in the case of "The Heirs of Hiddingh" then makes the general statement:

"In the .....

> "In the sense in which the word is used in relation to suretyship, it implies an undertaking to pay the debt of another in case of his default, but primarily it is an undertaking that the debtor himself will pay his debt. Where a person has done no more than 'guarantee' or undertake to pay in the event of the debtor not doing so, this is not a suretyship but an original undertaking made on the condition of non-payment by the debtor."

The letter under consideration in this case is no more than an original and unqualified undertaking by the Appellant List, to pay money to the creditor by a certain date. There is no suggestion that it is an accessory contract or that it is an undertaking that the principal debtor, Van de Ghinste, will perform his obligations. Indeed the latter's name is only mentioned in order to identify the purchase price. Accordingly I am satisfied that in writing the letter, the Appellant bound himself as a principal debtor and not as a surety.

Mr. Williamson .....

Mr. Williamson stated at the outset of his argument that the Court should have regard not only to the language used in the letter, but also to the circumstances under which it was written. He pointed out that it was alleged in paragraph 3 of the Respondent's particulars of claim that on 10 October 1969 "plaintiff sold to one Roger Van de Ghinste (a nominee acting on behalf of Jamy Fishing and Drying Corporation (Pty) Ltd.) certain shares in a crayfish trawler." Appellant filed a plea in which he denied that Van de Ghinste had signed the document as nominee acting on behalf of the company, but subsequently, at the pre-trial conference, it was agreed by the parties that "Van de Ghinste was acting as nominee on behalf of Jamy Fishing and Drying Corporation (Pty) Ltd. when the shares referred to in that paragraph (paragraph 3 of the Particulars of Claim) were purchased." Counsel said that ex facie the original document only Van de Ghinste was liable, but since it was now admitted that the company was the true

purchaser .....

purchaser, the identity of the purchaser was no longer an issue between the parties. That being so, it was inconceivable that when the letter of 22 May 1970 was written on behalf of the company by the Appellant, the parties had intended that the company would bind itself as surety for its own indebtedness as purchaser.

In reply Mr. Viljoen contended that the letter in question could be interpreted linguistically on the well established principles laid down in Delmas Milling Co. Ltd. v du Plessis 1955 (3) S A 447 (A.D.) and that being so the Court should not look beyond the document. However, it must be borne in mind that this Court has held that it can be informed of the background circumstances under which a contract was concluded so as to enable it to understand the broad context in which the words to be interpreted, were used. Thus in Van Rensburg en Andere v Taute en Andere 1975 (1) S A 279 (A.D.) at p.303 WESSELS J.A., in interpreting a servitude agreement stated:

"Die .....

"Die hof kan blykbaar ook ingelig word oor die agtergrondsomstandighede waaronder kontraksluiting plaasgevind het, maar slegs om die breë konteks, waarin die woorde wat vertolk staan te word, gebesig word, beter te kan begryp. Kyk, bv., Jaga v Dönges, N.O. and Another; Bhana v Dönges, N.O. and Another, 1950 (4) S A 653 (A A) per SCHREINER A.R., op bl. 662G-H. Hoewel die Hof in Jaga se geval die uitleg van 'n statuut behandel, is die benadering tot uitleg wat deur SCHREINER A.R., aan die hand gedoen word, na my mening ewewel van toepas= sing in die onderhawige geval. Ek het reeds hierbo na die tersaaklike agtergrondsomstan= dighede verwys."

I apprehend that the relationship in which the parties stood to one another at the time of contracting is a background circumstance which can and should be taken into account in interpreting this document.

In having regard to this circumstance I am fortified in the conclusion to which I have come on this issue - the contract was not one of suretyship.

I turn .....

I turn now to a consideration of the issue relating to prescription. Counsel contended that even if the undertaking given by the Appellant were not one of suretyship, the claim must fail for the reason that by August 1974, when summons was issued, the claim had become prescribed. It was a Scylla and Charybdis argument; whatever legislation was applied - Proclamation 13 of 1943 of South-West Africa, or the Prescription Act, 68 of 1969 - Respondent's claim must come to grief. It was conceded that if the provisions of the 1969 Prescription Act applied to the undertaking given by List, the claim was prescribed since the period of prescription was a mere three years. It was also common cause that three dates were of significance in the determination of the problem:

1. The date on which the undertaking was given - 22 May 1970.

2. The date on which the Prescription Act of 1969 came into operation and repealed the Proclamation, 13 of 1943 - 1 December 1970.

3. The date for making payment - 1 January 1971.

Section 21 of the Act provides that it shall apply to the territory of South-West Africa, while section 22 repeals the laws mentioned in the schedule to the Act; among the laws so mentioned is the whole of Proclamation No. 18 of 1943 of the Administrator of South-West Africa. However, the repeal of the Proclamation is not unqualified; in terms of section 22 the repeal is subject to the provisions of section 16(2) of the Act, and that section preserves certain rights by providing that:

> "(2) The provisions of any law -
>
> (a) which immediately before the commencement of this Act applied to the prescription of a debt which arose before such commencement; or
>
> (b) .....
>
> shall continue to apply to the prescription of the debt in question in all respects as if this Act had not come into operation."

It follows that if the debt arose prior to 1 December 1970 the question whether or not that debt is prescribed must be determined by reference to the provisions

of the .....

of the Proclamation and if the debt arose on or after that date the provisions of the Act must be applied. The critical question then, is - when did the debt arise?

In seeking to give an answer to this question counsel pointed out that the date on which a debt arises usually coincides with the date on which it becomes due, but that that is not always the case. The difference relates to the coming into existence of the debt on the one hand and the recoverability thereof on the other hand. See Apalamah v Santam Insurance Co. Ltd., & Another 1975 (2) S A 229 (N) at 232. It is a distinction which is recognised by the Legislature in the 1969 Prescription Act; section 12 provides that prescription begins to run "as soon as the debt is due", whereas section 16 which relates, not to the running of prescription, but to the application of the Act, significantly refers to "a debt which arose".

Counsel for the Appellant accepted as correct the finding of the Judge a quo that the debt

became due on 1 January 1971, but submitted that the debt arose on the same date as that on which it became due. He argued that the two dates coincided because the under=taking given by List on 22 May 1970 was conditional - conditional in the sense that only on the non-payment of the purchase price by some third party by 31 December 1970, would the debt arise. In developing his argument counsel drew attention to the finding of the Judge a quo who had held that the debt was "not an accessory under=taking, but an original promise to pay in a certain event, i.e. if you have not been paid by the end of December 1970". This counsel said, was in effect a finding that the undertaking was subject to a suspensive condition, that being so the debt would arise only if and when the condition was fulfilled, that was after 31 December 1970 and the period of prescription prescribed by the 1969 Act must accordingly be applied.

The undertaking which the Appellant gave in the letter of 22 May is pleaded in paragraph 5 of the

Particulars ....

Particulars of Claim in a somewhat misleading form. It was not "the amount owing to him by Van de Ghinste at the end of December" that the Appellant undertook to pay. What the Appellant said was "I guarantee that the purchase price due to you ..... will be paid to you by the end of December ....." (my underlining).

The words of the letter were not couched in conditional language nor was the obligation suspended until the year had run out. The obligation arose when List wrote the letter; only payment was suspended. As was pointed out by SOLOMON C.J., in Union Share Agency Investment Ltd. v Spain 1928, A.D., 74 at p. 80:

> "The distinction between the indebtedness being subject to the happening of an event and the payment being so subject is a vital one and should not be overlooked."

At the time when List gave his undertaking, instalments on the purchase price were already in arrear and due and the last instalment of one million Belgian Francs was .....

was about to fall due. The total amount to be paid, arrear instalments and interest, would be calculated on 31 December. It would be for the Appellant to raise the defence that the debt had been fully discharged by payment or had, for any other reason, ceased to be due. As was said by RAMSBOTTOM J., in Inglestone v Pereira 1939 W.L.D. 55 at 71:

> "When a person by a written contract promises to pay money on a future date, then in my opinion the promisee is entitled to demand payment when the date arrives, and it is for the defendant to prove any defence which he may put forward to excuse payment."

I am accordingly satisfied that this was a debt which arose before 1 December 1970 when the Prescrip= tion Act came into force; from this it follows that the provisions of the South-West African Proclamation must be applied in order to determine whether or not the debt is prescribed.

In .....

In contrast to the 1969 Act, which contains no definitions, a "written contract" is defined in Procla= mation 18 of 1943 (and in the earlier Prescription Act, No. 18 of 1943, which is virtually in identical terms to the Proclamation) as including:

> "..... a contract of which the terms to be proved in order to establish the claim in issue are in writing if such writing is admissible in evidence."

The Court a quo accepted, correctly, that the letter written by List on 22 May was a written contract for the purposes of the Proclamation. The periods of prescription are set out in section 3 of the Proclamation and read as follows:

> "3.(2) The periods of extinctive prescription shall be the following:
>
> (c) three years in respect of
>
> (iii) the price of movables sold and delivered, mate= rials provided or board or lodging supplied (whether such price is due under a written or an oral contract);
>
> (d) six years ....

(d) six years in respect of written contracts, including bills of exchange and other-liquid documents but excluding mortgage bonds unless a shorter period is applicable under any provision of paragraph (c)."

Mr. Williamson submitted that the six year prescriptive period relating to written contracts applied in this case and that the contrary submission, namely that the three year period applicable to the price of goods sold and delivered, was without foundation.

Both counsel were prepared to accept that the Court a quo had correctly found that the shares in the fishing vessel which formed the subject of the original contract of sale, were movables, but that finding does not, in my view, take the matter any further. The undertaking which was given by the Appellant in May 1970 was, as I have said, original or primary; it created a fresh obligation independent of the contract of purchase and sale which preceded it, and did not purport to sell or deliver goods,

nor did it seek to impose the obligations of a purchaser and seller on the parties. It is true that there is reference to the purchase price in the letter but that is merely for the purpose of identifying the transaction and so that the amount payable thereunder may be ascertained. It is clear that the Respondent incurred no obligation whatever in terms of the undertaking. It was no more than a unilateral contract conferring on the Respondent the right to receive payment of an ascertainable sum of money by a certain date and imposing on the Appellant a correspon= ding obligation.

Moreover, even if the undertaking could be construed as a contract for the price of movables sold and delivered, the Appellant must fail since the fact of delivery was neither pleaded nor proved. Indeed the indications are to the contrary - see paragraph 3 to the Reply to Defendant's request for further Particulars, where it is alleged that Jungers refused to transfer the shares in the fishing vessel.

Mr. Viljoen .....

Mr. Viljoen sought to contend that when the Legislature used the words "the price of goods sold and delivered" it was using a stock legal phrase which meant no more than a contract of purchase and sale; he said that it was never intended to make delivery of the goods sold, a pre-requisite for the application of section 3(2)(c)(iii). Such an interpretation implies a departure from the literal meaning of the words used by the lawgiver and is not justified in this case, particularly when regard is had to the other transactions enumerated in this sub-paragraph: "movables delivered," "materials provided," and "board and lodging supplied", (my underlining). In any event it is not suggested that the language of the statute is not clear, nor that there is any necessity to ignore the literal meaning of the words "and delivered". I refer to the oft-quoted passage cited by STRATFORD J.A., in Bhyat v Commissioner for Immigration 1932 A.D. 125 at 129:

> "The words of a statute never should in interpretation be added to or subtracted from, without almost a necessity."

As I am satisfied that no case has been made out for the deletion of the words "and delivered" from this sub-paragraph, I conclude that Mr. Viljoen's contentions on the prescription issue must fail.

The question of the rate of interest applicable has lead to confusion and error, no doubt, because so many varying rates of interest were adverted to in the pleadings and in the argument. Initially in the Particulars of Claim, interest on the sum of R41 865,00 at the rate of 9% p.a. a tempore morae was claimed. In the amended Particulars of Claim, interest was claimed on the sum of R33 937,94 "at the rate of 12% p.a., alternatively 11% p.a., further alterna= tively 9% p.a., from the 1st of January, 1970 (sic) to date of payment." At the pre-trial conference, the parties agreed that "the bank rate of interest at all material times was 9% p.a." At the trial, counsel for the Appellant apparently argued that no interest whatsoever was payable or claimable as the undertaking (exhibit "A") was silent in

regard .....

regard to interest, but the Judge a quo rejected this argument and held that the words "the purchase price due to you" must include interest. He held further that it was common cause that the maximum rate of interest was 12% and not 13% as stipulated in the agreement of 10 October 1969, and since 13% exceeded the permissible maximum of 12%, interest must be calculated at the legal rate. In order to determine the legal rate, he relied on the provisions of the Prescribed Rate of Interest Act 55 of 1975, and said that it was common cause that as from 16 July 1976 the prescribed or legal rate of interest was determined at 11% and not at the lower rates of 6% and 8% which previously applied. Appellant was accordingly ordered to pay Respondent the sum of R33 937,94 with interest thereon at the rate of 11% p.a. from 1 January 1971 to date of payment.

On appeal, counsel were agreed that the Court a quo had erred in awarding interest to Respondent

at the .....

at the rate of 11% in terms of the Prescribed Rate of Interest Act since it had been held by this Court in Katzenellenbogen Ltd. v Mullin 1977 (4) S A 855,(A) that the provisions of that Act were not retrospective and that they came into force only on 16 July 1976.

Counsel for the Appellant submitted that as his client had not bound himself in the undertaking to pay interest in terms of the 1969 agreement, the correct order as to interest a tempore morae would be that he should be ordered to pay interest on the amount of R33 937,94 at 6% p.a. from 1 January 1971 to 15 July 1976 and at 11% p.a. from 16 July 1976 to date of payment.

This submission was challenged by Mr. Williamson and with good cause. I am not persuaded that the Prescribed Rate of Interest Act has any application to this matter, either before or after 16 July 1976 since the prescribed rate of interest provided for in that enactment applies only where a debt bears interest and the

rate .....

rate thereof is not governed inter alia by agreement (section 1(1) of Act 55 of 1975). When he signed the letter of 22 May, the Appellant gave an undertaking - he guaranteed payment by the end of December 1970 of the purchase price due to Respondent in respect of the purchase of the joint interest in the fishing vessel in question. In order to determine the purchase price due, it was necessary to look at the provisions of the earlier agreement (Annexure B). In terms of that agreement 4 million Belgian Francs was payable in 4 equal instalments on 1 July 1969, 31 December 1969, 30 April 1970 and 31 July 1970. Moreover it was a further term of the agreement that:

> "Failing payment on the dates agreed upon the amounts owing will be subject to 8% interest annually capitalizable quarterly. Should payments be delayed for more than three months the interest rate will increase up to 13%"

During 1969 and 1970 (the exact dates are not pleaded) two instalments were paid totalling

1 663 373 Belgian ...

1 663 373 Belgian Francs, but no further payments were made and at 31 December 1970 the balance owing to Respondent was 2 336 627 Belgian Francs together with interest, and since payment had been delayed for more than three months it followed that the interest rate was increased to 13%. I have drawn attention to the fact that when Van de Ghinste incurred the obligation to pay Respondent 4 million Belgian Francs together with interest for the purchase of the fishing vessel, he acted as nominee of the Jamy Fishing and Drying Corporation (Pty) Ltd., a fact which was admitted at the pre-trial conference.

The Company, as purchaser must accordingly have incurred the liability to pay both purchase price and interest. The further obligation incurred by the Company in terms of Annexure "A" to make payment by the end of December 1970, manifestly included the obligation to pay the interest provided for in the earlier agreement. There can be no doubt that the obligation of the Appellant ex facie Annexure "A" was, in the words of counsel,

"identical...

"identical and co-extensive" with that of the Jamy Fishing and Drying Company; it follows that the Appellant must be likewise liable for the payment of interest at the rate prescribed in the 1969 agreement.

The conclusion then, is that Respondent was entitled to receive interest at the rate of 13% per annum. The Court a quo awarded interest to the Respondent at the rate of 11% per annum and since Respondent has waived the additional 2% to which he was entitled, the rate of interest will remain unaltered.

The appeal is accordingly dismissed with costs, such costs to include the appearance of two counsel.

M.A. DIEMONT

WESSELS, JA)
KOTZÉ, JA) Concur
VILJOEN, AJA)

(385/77) (S.W.A.)
M.E.G.

IN THE SUPREME COURT OF SOUTH AFRICA.

APPELLATE DIVISION.

In the matter between

KARL WERNER RUDOLPH LIST .....APPELLANT

and

PIERRE JUNGERS .....RESPONDENT

Coram: WESSELS, MULLER, KOTZé, DIEMONT,JJA., et VILJOEN,A.J.A.

Heard: 5 March 1979.

Delivered: 28 March 1979.

J U D G M E N T.

MULLER,JA.

I have read the judgment of my Brother DIEMONT. Except as hereinafter stated, I agree with the findings in the said judgment.

In ...../2

In my view the respondent's claim became prescribed before summons was issued in terms of the Prescription Act, No. 68 of 1969.

The guarantee given by the appellant to the respondent on 22 May 1970 reads as follows:

> "Dear Sir,
>
> On behalf of this company and on my own behalf, I hereby warrant and guarantee that the purchase price due to you in respect of the purchase of your joint interest with Mr. van de Ghinste in the 108 units in the 'Maria Martina', will be paid to you by the end of December 1970.
>
> Yours faithfully,
>
> Jamy Fishing and Drying Corporation (Pty.) Ltd.
>
> signed K.W.R.List
> K.W.R.List."

At the time when this guarantee was given extinction of debts by prescription in South-West Africa was governed by Proclamation 13 of 1943 (S.W.A.).

The Prescription Act, 68 of 1969, which also applies

in...../3

in the territory of South-West Africa (see section 21 of the Act), came into force on 1 December 1970 and repealed Proclamation 13 of 1943 (S.W.A.).

It was common cause at the trial and also before us on appeal that, if Act 68 of 1969 is applicable to the present claim, the same would be prescribed inasmuch as a period of more than three years expired between 1 January 1970 (the date upon which the debt undertaken by the appellant became due and payable) and the date upon which summons was issued.

The crisp question in the present case therefore is whether the Act applies or whether the Proclamation applies. The answer is to be sought in Section 16 of the Act, as amended, the relevant provisions of which are as follows:-

"16 Application of this Chapter -

(1) Subject to the provisions of subsection 2(b) the provisions of this

Chapter..../4

Chapter shall ----------
---
apply to any debt arising after the commencement of this Act.

(2) The provisions of any law -

(a) which immediately before the commencement of this Act applied to the prescription of a debt which arose before such commencement; or

(b) ----------
shall continue to apply to the prescription of the debt in question in all respects as if this Act had not come into operation."

In view of the aforementioned provisions the question is when did the appellant's debt arise? The guarantee was given on 22 May 1970 but is that the date on which the debt arose? I do not think so. The appellant did not unconditionally undertake to pay the balance of the debt due by Van de Ghinste. He warranted and guaranteed that that debt, or so much as would be owing at the end of December 1970, would be paid. Which could only mean that appellant

would..../5

would, in the event of Van de Ghinste not having paid the full debt due by him at the end of December 1970, himself pay the amount then outstanding.

In this regard the following was stated by RAMSBOTTOM,J., in Inglestone v. Pereira, 1939 W.L.D. 55 at p. 62 - 63 :

> "Where the existence of the obligation to pay, i.e. the debt, is dependent upon the fulfilment of a condition, there is no obligation until the condition has been fulfilled; and where the document shows that the obligation is conditional, in this sense, then it does not appear from the document itself that any obligation has ever come into existence, the document is not a liquid document and provisional judgment cannot be given. Where, however, the document shows the existence of an obligation by the debtor but payment is claimable on the happening of some simple event, e.g. that notice demanding payment has been given or that the debtor has made default, the happening of that event can be proved by extrinsic evidence if put in issue, but unless put in issue, is proved by simple allegation in the summons - see Spain's case at page 78.

The..../6

> The distinction is between a document which shows an existing debt and one which shows that the debt is subject to the happening of an event, and if this distinction is borne in mind, then I think that the various cases to which I was referred, with one or two exceptions to which I shall refer later, become clear."

And later, at p. 65, the learned Judge said:

> "There is an important distinction, to my mind, between an undertaking which is conditional upon the happening of an event such as the performance of an act by the other party and an unconditional undertaking which is given in consideration of a promise made by the other party that he will perform an act in the future."

The decision in Inglestone v. Pereira (supra) was referred to with approval by WESSELS, J.A., in Rich and Others v. Lagerwey, 1974 (4) S.A. 748 (A), at pp. 757 -758.

Caney: The Law of Suretyship, 2nd Edit., at p. 33 says:

> "In the following cases a guarantee or undertaking to pay in the event of the existing debtor not doing so,

there...../7

> there being no guarantee or undertaking that he would do so, was held in such instance not to be a suretyship but an original or primary undertaking made on the condition of non-payment by the debtor."

There then follows a list of cases decided in various divisions of the Supreme Court. And later, at p. 65, the learned writer says, again with reference to the said cases,

> "In the sense in which the word ('guarantee') is used in relation to suretyship, it implies an undertaking to pay the debt of another in case of his default, but primarily it is an undertaking that the debtor himself will pay his debt. Where a person has done no more than 'guarantee' or undertake to pay in the event of the debtor not doing so, this is not a suretyship but an original undertaking made on the condition of non-payment by the debtor."

I think that that is precisely what the appellant did in the present case, he guaranteed payment of a debt owing by another. In other words he undertook that, in the event of Van de Ghinste not paying by a certain date,

he..../8

he would pay the balance then outstanding. And,indeed, that is what the learned Judge a quo found in that part of his judgment dealing with the nature of the undertaking by the appellant. There the learned Judge said:

> "With the principles established in these various decisions in mind, I now turn to the undertaking in this case. On the face of it, it is a simple and unambiguous document. There is no specific reference therein to a principal debtor and indeed it can be paraphrased as follows:-
>
> > 'I promise to pay you the purchase price of your joint interest with Mr. van de Ghinste in the 118 units in the 'Maria-Martina', if the sum due to you is not paid by another by December 31st, 1970.'
>
> This, in my view, is not an accessory undertaking, but an original promise to pay 'in a certain event', i.e. if you have not been paid by the end of December 1970."

However, when the learned Judge a quo came to consider the question of prescription and had, in view of the provisions of section 16 of Act 68 of 1969, to decide when the debt in question arose, his approach was different. He then said,

and...../9

and I quote from his judgment,

> "I think the example given during argument is sound and convincing. In June A promises to donate to B a particular property should B pass his examinations at the end of the year, which promise B accepts. It is true that the obligation to transfer the property can only arise in the future or it may never arise. Nevertheless, B has acquired a right in June and should A seek to dispose of the property before the end of the year, B could interdict him.
>
> In my opinion the obligation or debt created by the undertaking in this case arose on the date it was signed namely 22 May, 1970, which was the date when the contract was concluded and not on the date such obligation or debt was due namely 1st January, 1971."

The learned Judge is, of course, correct in his statement that, as soon as the conditional guarantee was given, a right enured in favour of the respondent. See in this regard De Wet and Yeats: Kontraktereg en Handelsreg, 4th Edit., at pp. 135 to 136 where the learned authors state:

"Voor...../10

"Voor vervulling of ontbreking van die voorwaarde bestaan daar 'n toestand van onsekerheid. Hierdie onsekerheid bestaan juis omdat partye dit so gewil het. Die ooreenkoms is egter 'n voldonge feit wat nie weggeredeneer kan word nie. Die voorwaarde raak hoegenaamd nie die bestaan van die ooreenkoms nie, en ook nie die kategorie waarin die ooreenkoms val nie, nl. of dit 'n koopkontrak, of 'n huurkontrak, of wat ook al is nie. Deur die ooreenkoms verbind partye hulle. Die een kan hom dus aan hierdie ooreenkoms net so min onttrek sonder die ander se toestemming as wat hy hom aan enige ander ooreenkoms kan onttrek. Uit die ooreenkoms ontstaan voorwaardelike verbintenisse; dit is immers wat partye beoog het. Die skuldeiser kan nou wel nie die prestasie onvoorwaardelik vorder nie, want dan vorder hy meer as waartoe hy geregtig is, maar aan die ander kant het hy tog 'n voorwaardelike reg op die prestasie. Hierdie voorwaardelike reg bestaan werklik, en het wel deeglike regsgevolge. Die voorwaardelike skuldeiser kan reeds voor vervulling van die voorwaarde 'n geding voer ter beskerming van sy voorwaardelike reg. Die voorwaardelike verbintenis kan ook die voorbeeld wees van geldelike sekerheidstelling; dit vererf positief en negatief op die skuldeiser en skuldenaar se

erfgename...../11

> erfgename; dit is onder lewendes oordraagbaar; dit word deur die insolvensiewetgewing in beskerming geneem. Die voorwaardelike verbintenis kan egter nie voor vervulling van die voorwaarde voldoen word nie. Presteer die voorwaardelike skuldenaar tog, mag hy met die condictio indebiti terugvorder."

But until the condition was fulfilled, namely, that the debt had not been met by Van de Ghinste by the end of December 1970, there could be no debt by the appellant which could be subject to prescription. To test the correctness of the view just expressed one should, I think, have regard to the provision of section 16(2)(a) of Act No. 68 of 1969. There was no provision in Proclamation 13 of 1943 (S.W.A.) which could apply to the guarantee of the appellant except upon fulfilment of the condition in question. Until the condition was fulfilled the Proclamation could have had no application. And the reason for that is, that, because the guarantee given was conditional, no debt could arise which would, except on fulfillment of the condition, be subject to prescription.

For.../12

For the reasons aforestated it is my view that the court a quo erred in finding that

> "the Prescription Act, 68 of 1969 has no application thereto ----- but that the provision of Proclamation 13 of 1943 (S.W.A.) apply."

The court should, in my judgment, have held that the matter was governed by Act 68 of 1969 and that, in terms of that Act, the debt in question was prescribed. It follows that, in my judgment, the appeal should succeed with costs.

G.V.R.MULLER, J.A.

KARL WERNER RUDOLPH LIST

v

PIERRE JUNGERS