Case no 320/93

IN THE SUPREME COURT OF SOUTH AFRICA
(APPELLATE DIVISION)

In the matter between:

STANDARD CHARTERED BANK OF CANADA Appellant

and

NEDPERM BANK LIMITED Respondent

CORAM: CORBETT CJ, VAN HEERDEN, KUMLEBEN, VAN DEN HEEVER, HARMS JJA.

DATES OF HEARING: 15 & 16 August 1994

DATE OF JUDGMENT: 30 September 1994

J U D G M E N T

/ CORBETT CJ:.

CORBETT CJ:

The appellant, Standard Chartered Bank of Canada, was incorporated under Canadian law with its head office in Toronto. It has various branches in Canada, one of them being located in Vancouver. It is a member of the Standard Chartered Bank group, the holding company of the group being Standard Chartered Bank of London, a company incorporated by Royal Charter. The holding company has various subsidiaries around the world, some of them being wholly-owned and others partly-owned. The Standard Chartered Bank of Canada is a wholly-owned subsidiary. For convenience I shall refer to the appellant as "Stanchart"; to the London office of the holding company as "Stanchart (London)"; to the head office of the Canadian bank as "Stanchart (Toronto); and to the Vancouver branch as "Stanchart (Vancouver)".

3 The respondent is Nedpenn Bank Limited. Formerly and during the period with which this case is concerned it was known as Nedbank Limited. It is a bank duly incorporated under the law of South Africa and it has its principal place of business in Main Street, Johannesburg. It operates through various branches in South Africa, one of them being at Braamfontein, Johannesburg. I shall refer to the respondent as "Nedbank".

Another main actor in this case is Triomf Fertilizer (Richards Bay) (Pty) Ltd. ("Triomf RB"). It was at the material times a wholly-owned subsidiary of Triomf Fertilizer Ltd, a public company quoted on the Johannesburg Stock Exchange, which also had its head office in Braamfontein. The Triomf companies produced a phosphate-based fertilizer which was marketed in South Africa and overseas. In 1985 they enjoyed a 24 per cent share of the South African market. Production took place at factory premises at Richards Bay, owned and operated by Triomf RB. In order to manufacture its

product Triomf RB required sulphur, which it imported from various overseas countries, including Canada.

This appeal arises from an action instituted by Stanchart against Nedbank in the Witwatersrand Local Division in which Stanchart claimed damages and other ancillary relief for a misstatement alleged to have been made negligently by Nedbank. The action, which was heard by Roux J, failed and was dismissed with costs. With the leave of this Court, Stanchart now appeals.

The facts

The facts of the matter are, to a large extent, not in dispute and may be summarized as follows.

One of the suppliers of sulphur to Triomf RB was a Canadian corporation known as Cansulex Limited ("Cansulex"). Cansulex had been formed by a consortium of leading international oil companies, who did not wish to be seen trading with South Africa, as

the vehicle for conducting such a trade. In exporting sulphur to Triomf RB in South Africa Cansulex had since about 1982 made use of banking facilities provided by Stanchart (Vancouver). In order to understand how such facilities were granted and maintained it is necessary to know something about the organization of the Stanchart group.

The Canadian subsidiary, Stanchart, and its various branches operated as if they were divisions of the holding company. One of the directors of Stanchart was appointed by Stanchart (London) and control was exercised through him. There were various levels of authority. The managing director of Stanchart, appointed by Stanchart (London), was authorised to approve transactions up to a certain sum and he could delegate his discretion up to certain levels to the Canadian branches of the bank. Any transaction which exceeded his authority would have to be referred to Stanchart (London) for approval.

6 Where a customer of the bank wished to be accorded a credit facility up to a certain prescribed level on a continuing basis (known as a "line of credit") the branch concerned would formulate the requirement on a form (known as "form 6048") which would contain the details relating to the customer, his financial position and the nature of the facility requested. The form 6048 would have to be accompanied by the latest audited financial statements of the customer and a bank report on the customer. If the bank manager concerned was satisfied that the application for the credit facility was in order and should be granted, he would do so, provided that the level of the facility fell within his discretion. If it did not, then he would submit it to higher authority, i e Stanchart (Toronto), with a favourable recommendation. Stanchart (Toronto) could then approve the line of credit if it was satisfied to do so and the application was within its level of authority. If Stanchart (Toronto) was satisfied with the application, but it exceeded its level of authority, it would pass it on

to Stanchart (London) with an appropriate recommendation. Approval would then depend on the decision of the London office.

A credit line, once granted, normally endured for a year and if required for longer had to be renewed annually. Renewal involved the same procedure as an application for a new facility.

This case is principally concerned with events which occurred in the second half of 1985. At that stage the credit facilities duly authorized and granted to Cansulex in respect of its dealings with Triomf RB (and another purchaser of sulphur in South Africa) were regulated by a written agreement between Stanchart and Cansulex dated 22 October 1984 ("the facility agreement"). Here I should mention that Cansulex shipped consignments of sulphur from Vancouver to Triomf RB at Richards Bay in terms of bills of lading and drew on Triomf RB for the purchase price. In terms of the facility agreement Stanchart undertook to discount bills drawn on Triomf RB in respect of such sulphur exports with recourse to

Cansulex. The agreement further provided, inter alia, that after the discounting of a bill and when authenticated advice had been received from the collecting bank that the bill had been accepted by the drawee (Triomf RB) and provided that no notice of dishonour of a prior bill had been received, recourse to Cansulex was to be "released". In the event of the dishonour of any bill by the drawee, no further releases of recourse to bills currently outstanding and discounted under the facility for that particular drawee was to be provided, despite any subsequent acceptance, until the entire matter had been resolved to the satisfaction of the bank. The discounting of bills under this facility was to be secured by a letter of hypothecation.

The agreement placed an overall limit of US$5 000 000 on the facility and further provided that "individual exposure" to a drawee at any one time be limited in the case of Triomf RB to US$2 000 000, with usances of up to 180 days as from the date of bill of lading. The facility was to be subject to "periodic review not less

than annually" and was to be available "at the sole discretion of the bank".

In terms of this facility agreement, therefore, the essential modus operandi was for Cansulex, having shipped a consignment of sulphur to Triomf RB from Vancouver and having drawn on Triomf RB for the purchase price and other amounts due, to tender the unaccepted bill of exchange to Stanchart (Toronto) for discounting and, presumably, at the same time to provide a letter of hypothecation in respect of the documents of title. Pending acceptance of the bill by Triomf RB Stanchart would have a right of recourse against Cansulex, but once Triomf RB had accepted the bill and provided that no notice of dishonour of a prior bill had been received, the right of recourse was waived. This appears to have been in line with previous credit facilities granted to Cansulex in respect of its South African trade.

As the arrangements reflected in this agreement

brought Stanchart into a direct legal relationship with Triomf RB, once the latter had accepted the bill of exchange discounted and held by Stanchart, this line of credit could only be established and maintained if and so long as Stanchart was satisfied with the financial position of Triomf RB, as well as that of Cansulex. Accordingly with the original establishment of the line of credit a 6048 application was made in respect of both companies; and the same procedure applied to annual renewals.

A review of the line of credit to Cansulex in respect of its transactions with Triomf (and other parties in South Africa) was due at 31 July 1985. In the succeeding months Stanchart (Vancouver), and more particularly the then branch manager, Mr N M Peters, were under considerable pressure from Toronto and London to submit the usual application based on form 6048 for the renewal of this facility. One factor which evidently held up the process was the lack of up-to-date financial statements in regard to Triomf RB and the Triomf group

as a whole. This was due to the fact that the Triomf group had changed the end of its financial year from 31 December to 30 June, with the result that until the financial statements for the 18 months ended 30 June 1985 were published, the latest financial information on the group was contained in the set of accounts for the year ended 31 December 1983. In addition, there seems to have been some delay in the production of the 30 June 1985 statements as they only became available eventually some time in December 1985.

By November 1985 the submission of the review (or renewal) application had become extremely urgent and Stanchart (Vancouver) had reached the point where the officials concerned thought that the review might have to be undertaken without the latest financial statements. The bank, however, needed a bank report on Triomf RB for purposes of the review process. In evidence at the trial Mr Peters explained the difference between a "full general" bank report and a "special" bank report concerning a company. The former

would entail a report on the general financial standing of the company; the latter would relate to information concerning a particular amount or type of transaction. What was required in this instance was a full general report.

On 18 November 1985 Stanchart sent a telex to the Johannesburg branch of the Standard Bank of South Africa Limited ("Standard"), which appears to have acted on Stanchart's behalf in South Africa, asking for Standard's assistance in obtaining, inter alia,

an up-to-date bank report on Triomf and indicating that Triomfs bank was the Braamfontein branch of Nedbank ("Nedbank (Braamfontein)"). In pursuance of this request, Standard sent a telex to Nedbank (Braamfontein) on 20 November 1985:

> "PSE SUPPLY EXTREMELY URGENT FULL GENERAL REPORT ON TRIOMF REPLY EXTREMELY URGENT PER RETURN TLX AT VERY LATEST TODAY.....URGENT."

On the next day Standard received the following telex in reply from

Nedbank (Braamfontein):

> "TRIOMF FERTILIZER RICHARDS BAY CO PTY LTD IS ONE OF THE LARGEST FERTILIZER MANUF. IN THE COUNTRY EXPERIENCES MANAGES HOLDING COMPANY IS QUOTED AND FIGURES ARE
>
> AVAILABLE AS IN THE REST OF THE FERTILIZER INDUSTRY THE COMPANY HAS SUFFERED SETBACKS. BUT THEY ARE TRADING NORMALLY AND WOULD IN THESE CIRCUMSTANCES BE REGARDED AS GOOD TO THEIR NORMAL COMMITMENTS IN THE; COURSE OF BUSINESS."

On 22 November 1985 Standard telexed the content of this report to Stanchart (Vancouver). It constitutes the fons et origo of Stanchart's action against Nedbank.

At about the same time Stanchart (Vancouver) received a bank report on Cansulex. The bank which gave it described Cansulex as a "valued customer" and stated that all dealings were

satisfactory and that the company was considered "responsible" for all its normal business commitments. Stanchart (Vancouver) then proceeded with the preparation of the documentation for the annual review for the purposes of renewing this line of credit. The bank | reports in respect of both Cansulex and Triomf RB were considered to be favourable and they were included amongst the documents submitted with the review application by Stanchart (Vancouver) to Stanchart (Toronto) on 29 November 1985. This application carried the recommendation of the responsible officials at Stanchart (Vancouver). On 7 January 1986 Stanchart (Toronto) appears to have processed the application and on 15 January 1986 forwarded it to Stanchart (London) with the recommendation that, in view of the stale nature of the financial statements, the facility be renewed only until 31 March 1986. In the meanwhile the line of credit remained in place.

Despite the forwarding of the renewal application to

Toronto, Stanchart (Vancouver) continued to press for the up-to-date financial statements relating to Triomf RB. On 17 December 1985 Standard notified Stanchart (Vancouver) that it was obtaining the latest balance sheet for Triomf RB and would forward it as soon as possible. According to Mr Peters, however, the financial statements had not been received by 20 January 1986, when he left Stanchart (Vancouver) to assume a position at head office in London.

On 25 November 1985 the group advances department at Stanchart (London) had issued a group administrative circular for the information of branches, dealing with the topic of "Business with South Africa" and the guidelines to be adopted in this connection. Paras. 2 to 5 of this circular read as follows:

> "2. We are presently not able to entertain any new business which would result in an increase in our overall total direct cross-border exposure on South Africa, i.e. where the direct obligor is an entity, either corporate or personal, resident in South

Africa.

3. Overdrafts etc.

Approved short-term facilities for normal working capital and trade-related purposes available on a committed basis to entities either corporate or personal resident in South Africa may continue in place. We have, however, written separately to some administrations in respect of facilities and the administrations concerned should be guided accordingly.

4. Committed facilities to entities outside South Africa where the risk on South Africa is only of a secondary nature may also continue. Indeed there may be new business opportunities in this category, particularly where short term facilities are concerned which are not dependent for servicing on a source within South Africa.

5. Export Bills

Export bills covering trade transactions with South Africa may only be negotiated or advanced against where full recourse to drawers (outside South Africa) is retained. "

17 On 9 January 1986 Cansulex shipped a cargo of sulphur in Vancouver for carriage to Richards Bay and delivery to Triomf RB and drew on the latter for an amount of US$2 697 122,50, payable 180 days after the date of the bill of lading (i eon 8 July 1986) to the order of Cansulex, this sum being the purchase price and other amounts due in respect of the sulphur. On 14 January 1986 and acting in terms of the existing line of credit Stanchart (Vancouver) at the request of Cansulex discounted the bill and Cansulex was credited with an amount of US$2 580 628,46 (the discounted value of the bill) through Stanchart (Toronto). Thereafter, on 30 January 1986, the bill was accepted by Triomf RB; and on the same date the shipping documents were delivered by Nedbank, acting on behalf of Stanchart, to Triomf RB.

When the bill of exchange was presented for payment on 8 July 1986 it was dishonoured. Notice of dishonour was duly given. Shortly thereafter, on 14 July 1986, Triomf RB was placed under

provisional liquidation on its own application. On 11 September 1987 and in terms of sec 311 of the Companies Act the Supreme Court (Witwatersrand Local Division) sanctioned a compromise between Triomf RB and its creditors and the provisional liquidation order was discharged. Stanchart had in the meanwhile proved a claim in liquidation for the amount of the dishonoured bill and in due course it received, in respect of its claim and in terms of the sanctioned compromise, dividends of R618 606,01 and R108 647,63. There were no further dividends paid and at the time of trial there was no prospect of any further dividends.

Stanchart's Case in Summary

In short, Stanchart's case against Nedbank, as presented in the Court below and on appeal to us, was that the bank report on Triomf RB dated 22 November 1985 and furnished to Stanchart (Vancouver) via Standard misstated the financial position of Triomf

RB; that in so misstating the position Nedbank acted negligently; that this negligent misstatement was unlawful vis-a-vis Stanchart; that as a result of the incorrect bank report Stanchart discounted Cansulex's bill of exchange drawn on Triomf RB and suffered loss when the bill was dishonoured and the full amount thereof proved irrecoverable from Triomf RB.

The Issues

Nedbank joined issue generally on all aspects of Stanchart's case and also raised the question of contributory negligence on the part of Stanchart. The issues are therefore:

(1) whether the bank report of 22 November misstated Triomf RB's financial position;

(2) whether in the circumstances Nedbank acted negligently;

(3) whether Stanchart suffered loss as a result of the furnishing of the bank report;

(4) whether in furnishing this report Nedbank acted unlawfully vis-

a-vis Stanchart; and

(5) whether Stanchart was guilty of contributory negligence and if so what the consequence of this should be.

The onus in respect of the first four issues was clearly upon Stanchart; and on Nedbank in respect of the fifth.

In addition, two further questions which arose are firstly whether any judgment for damages that might be given in favour of Stanchart should be expressed in United States dollars or in rands; and secondly whether Stanchart is entitled to interest and, if so, how this should be computed.

1 intend to deal with each of these issues in turn, but before doing so 1 wish to refer briefly to the course taken by the trial in the Court a quo.

The Trial At a pre-trial conference held on 28 February 1992

shortly before the commencement of the trial, it was agreed that all documents discovered by either party were what they purported to be and were admissible in evidence without formal proof, unless objection was made in respect of any particular document. At the trial two bundles of discovered documents were handed in. Stanchart's bundle labelled exhibit "A", consisted (in the appeal record) of 814 pages; while Nedbank's bundle, labelled exhibit "B", ran to 868 pages. Each bundle was numbered and the documents referred to by the letter A or B (as the case may be) and the number.

In presenting Stanchart's case its counsel relied heavily, in certain respects, on documents to be found in these bundles and the inferences to be drawn from them. In his opening address Mr Solomon, senior counsel for Stanchart, spent almost the first two days reading to the Court extracts from various documents in these bundles and indicating what, in his submission, they established. In addition, the evidence of Mr Peters, of Mr Avery, his successor in office, and

Mr Smallwood, the general manager in London responsible for Canada in 1985/86, was led. Nedbank's counsel, on the other hand, handed in certain documents emanating from Standard, but called no viva voce evidence. As I shall indicate, it was submitted that certain inferences could be drawn from the failure to call any of Nedbank's officials as witnesses.

The Alleged Misstatement.

In my view, the evidence clearly established that in 1985 Triomf RB was in a parlous financial position and that during the course of the year the situation deteriorated progressively. The correctness of the financial statements of the company for the period 1 January 1984 to 30 June 1985 was admitted on behalf of Nedbank at the pre-trial conference, as also were the corresponding financial statements for the Triomf group. As to Triomf RB, the balance sheet shows issued and authorized capital of R80 000 000 in the form of

ordinary shares and a preferential share capital of R10 000 000. The income statement shows a turnover (for the 18 months) of R251 403 000, as compared with R349 618 000 for the 12 months ended 31 December 1983: a very substantial decline. The income statement also shows a net operating loss of R22 060 000 and total loss for the period amounting to R103 613 000. This latter figure includes a currency exchange loss of R64 827 000. After adjustments for dividends paid on preference shares and an export allowance had been made, this resulted in the accumulated loss of the company, as shown in its balance sheet, increasing from R14 502 000 in the previous accounting period to R117 506 000 as at 30 June 1985. The balance sheet also discloses current assets of R63 105 000 and current liabilities of R68 218 000, a shortfall of R5 113 000, which indicates that the company was by then unable to finance its current liabilities from its own current assets.

This last-mentioned conclusion is substantiated if regard

be had to various internal notes and memoranda emanating from Nedbank and forming part of Exh "B". These show that Triomf RB enjoyed an agreed credit facility with Nedbank of R100 000 000, but that by October/November 1985 this facility had been exceeded by borrowings to the tune of over R40 000 000; that Nedbank was very concerned about the apparent inability of Triomf RB to reduce its borrowings and remain within its credit facility; and that Nedbank was constantly urging Triomf RB to do so. As evidence of this concern, are the facts that at this time Nedbank insisted on monitoring Triomf s accounts on a daily basis and exercising strict control over them. Triomf RB needed the bank's approval for the issue of cheques of any significance.

The bank kept a close watch on all transactions and requests for letters of credit, etc. In some instances cheques were held back in order to reduce the bank's exposure and in others applications for letters of credit were refused.

From many of these documents the bank's concern at what it perceived to be a worsening situation is graphically apparent. It is clear that the entire fertilizer industry in this country was, for various reasons, in a depressed state. Costs were rising and sales were declining. By November 1985 Triomf RB had been forced to suspend production at one of its factories and the other was working to half capacity. This was in contrast to the position in January 1985 when both factories were in full production.

It is clear that at this stage Triomf RB was totally dependent on Nedbank in order to continue trading. It was being propped up by the bank. It is also clear that Nedbank was becoming increasingly nervous of the situation and was wondering how long it could and should continue to support Triomf RB and the group as a whole. As counsel for Nedbank conceded before us. Triomf RB was then "commercially insolvent" and at any moment Nedbank "might pull the plug" (to use counsel's expression).

Reference may be made to a few Nedbank documents by way of illustration. B286 is an inter-departmental memorandum, from the advances department to the general management of the bank. It is dated 29 October 1985. It is to be inferred from it that another department of the bank had requested that a foreign bill in favour of Cansulex and accepted by Triomf RB in the sum of USS453 000 (R 1,423 million) be paid. Various officials seem to have appended their comments. The official who appears to have initiated the memorandum remarks (in the left-hand column):

> "This is the item which Standard Bank Richards Bay sought our report. Suggest we pay in view of that."

Here I may digress to explain that on about 25 October 1985 the Richards Bay branch of Standard had requested Nedbank for a full general report on Triomf RB and a report as to whether it was "good for" Rl,45 million, which amount was to be paid on 29 October

1985; and that in response thereto Nedbank reported to Standard as follows (see exhibits B277 and B282):

> "Triomf Fertilizer Richards Bay Co (Ply) Ltd is one of the largest fertilizer manufacturers in the country. Experienced management. Holding company is quoted and figures are available.
>
> Within the context of their activities Rl,45 million is a reasonable amount, i e they are regarded as good for the amount if in the normal course of business."

Despite the discrepancy in figures, it is clear that this is the bank report referred to in B286. Against the above-quoted comment in B286 another official (I am deducing this from handwriting) wrote (in the right-hand column):

> "I really have no feeling for increasing the exposure but I fear that the non-payment via Std would be disastrous."

Lower down in the left-hand column a third official made the

comment:

> "I am getting very nervous about this. Fail to understand how Mr Triomf could have told me that we should see a reducing tendency when he pleaded with me to make a payment when account was ± R28 million over the top. Either he is misleading us, or his financial management leaves a lot to be desired.
>
> !
>
> I fail to see how we can continue in this manner.
>
> We need an in-depth discussion investigation."

And against this comment there are, in the right-hand column, the following remarks by a fourth official:

> "1 fear we have no option, but o/stds [outstandings] are high - at R134m (as they are). Its at least R34m too much. I've already asked that deposit situation (re collections and discounts) be investigated".

The next page in the bundle (B288) contains the following cryptic, but significant, notes:

"I refuse to be put under pressure in this manner by these people. First the LC's now the bill. Tell him we'll RD unless they collect their debtors very smartly.

Did he keep his promise with regard to the LPC's?"

Who the officials are who wrote these comments only Nedbank knows and it did not choose to disclose this in evidence or put them in the witness-box. The inference to be drawn from them, prima facie at any rate, is, however, clear. The bank was very worried about Triomf RB's progressive descent into debt; the bank was querying the ability of the management of Triomf RB and even its bona fides; the bank was entertaining thoughts of not meeting Triomf RB's paper unless the situation improved; and generally the bank was wondering how long it could continue to support Triomf RB.

As 1 have indicated, Triomf s financial statements for the 18 months ended 30 June 1985 were published only in December.

Preliminary results appear, however, to have become available early in November 1985. An internal Nedbank memorandum shows that it had the draft balance sheet by 14 November 1985. The bank was aware of the losses incurred during this accounting period, including the foreign exchange loss, which was described by an official in a memorandum as "astronomical". In another memorandum dated 16 October 1985 another official of the bank, reporting on an interview with the person representing Triomf RB, commented:

> "We are presently approaching a very critical stage in our relationship with clients."

Finally, there is a revealing internal memorandum (B376), dated 20 November 1985, recording the reaction of a bank official to the request for a bank report on Triomf which gave rise to the report in issue. I quote it in full:

"Branch phoned to advise that they have received a report request on Triomf Richards Bay.

No amount is asked for, simply a full general report.

Enclosed is the reply we gave to Standard Bank Richards Bay last month.

I expect we shall have to indicate that clients are in uncomfortable circumstances.

It will be recalled that the amount previously arising on the earlier report call was not paid on due date. In fact paid several days later."

The reply to this (B378) reads:

"Deleting the last paragraph say:

As in the rest of the Fertilizer Industry, the company has suffered setbacks, but they are trading normally and would in these circumstances be regarded as good for their normal commitments in the course of business."

Having regard to the aforegoing, I am of the opinion that

the bank report furnished by Nedbank on 22 November 1985 was inaccurate and misleading. By no stretch of imagination could Triomf RB be described as "trading normally". It had sustained heavy losses; it was manufacturing at a greatly reduced capacity; it was wholly dependent on borrowings from the bank in order to stay in business; and the bank was greatly perturbed about Triomf s precarious financial position and was wondering how long it should continue to keep it going. In my view, the further statement that Triomf RB "would in these circumstances (which would include 'trading normally') be regarded as "good to (sic) their normal commitments in the course of business" was similarly misleading. They were unable to meet their normal commitments in the course of business from their own resources. They could only do so with bank support. Their credit facilities at the bank were stretched far beyond the agreed maximum. The bank was very perturbed at the situation and wondering how long it could continue to prop up Triomf RB. In some instances financial

commitments were not met on due date.

It was argued on behalf of Nedbank that so long as the bank continued to support and provide credit for Triomf RB the report was completely accurate. For the reasons already stated I cannot accept this argument. It was also argued that by referring to "setbacks" the report sufficiently alerted the reader of the report to the financial position of Triomf RB. I do not agree. It seems to me that, to the reader, any warning that there might be in the reference to "setbacks" would be neutralized by the rest of the report, particularly the reassuring words which follow.

For these reasons, I hold that the report misstated the true position concerning Triomf RB and that the first issue must be resolved in favour of Stanchart.

Negligence It is Stanchart's case that if the report misstated the true

state of affairs, then Nedbank was guilty of, at least, negligence in issuing the report in those terms. This appears to me to be correct. It is true, as emphasized by Mr Browde on behalf of Nedbank, that the request for a bank report was marked "urgent" and that Nedbank was expected to furnish the report the same day. In the circumstances, it was not required of Nedbank to make a thorough investigation of Triomf s financial affairs; and had the averment of negligence been based upon a failure to do so, it would, in my opinion, not have been substantiated. But that is not Stanchart's case. Its case is that, as indicated in the portion of this judgment dealing with the incorrectness of the bank report, Nedbank's officials had a comprehensive and intimate knowledge of Triomfs financial affairs and that a skilled banker in Nedbank's position, acting reasonably, would not have furnished the report in question. I agree.

It may be asked - and this point was made by counsel for Nedbank - what was Nedbank to do, bearing in mind the relationship

of banker and customer and the duty of confidentiality owed by the banker? It was not suggested, nor could it in my view have been validly suggested, that the relationship between banker and customer justified the giving of a false bank report to a third party. It seems to me, therefore that the bank had either to give a true report (i e a report which truly reflected its knowledge of the position) or decline to give a report. It also had the option, to which I will refer again later, of attaching a disclaimer of liability or responsibility to its report; but, of course, this would not have afforded protection had the bank known that its report was untrue (cf. Commercial Banking Co of Sydney v R H Brown & Co [1972] 2 L1 L R 360, a decision of the High Court of Australia).

It was submitted by Mr Browde that in the circumstances all that the bank was obliged to do was to give an honest answer and that the question of negligence did not arise. For this submission he relied on certain remarks made in the leading English case of Hedley

Byrne & Co Ltd v Heller & Partners Ltd [1963] 2 All ER 575 (HL) at 594 E - 595 B. Whether the report in the present case constituted an honest answer to the request may be open to some doubt. Nedbank certainly had a material interest in providing a favourable report. An internal document dated 21 June 1985 indicates that Nedbank then thought that the financial position of Triomf RB was so "sensitive" that it (Nedbank) could not allow another bank to be "privy to" the information which it had. In another internal memorandum (undated but probably circulated at the beginning of September 1985) it was stated that the overall position was "not comfortable" and that Nedbank was acutely aware of the need to avoid unfavourable comment in the event of this becoming "public knowledge". In the circumstances it seems probable that an unfavourable report on Triomf RB by Nedbank would have brought the supply of raw materials to the former to a virtual halt. That would have put an end to Triomf RB at a stage when Nedbank still harboured some hope of reducing its

overall exposure to the company.

Stanchart's counsel, however, disclaimed any reliance on dishonesty or fraud and I refrain from pursuing this aspect of the matter. As regards the remarks (by Lord Morris) in the Hedley Byrne case, these were of a tentative nature and I am not persuaded that current English law limits a banker's potential liability for a misstatement in this way. As I read the English authorities (which are collected in Clerk & Lindsell on Torts, 16th ed, under the general editorship of R W M Dias at 452 ff; see also the second cumulative supplement, at 31-3), provided that the necessary circumstantial requirements are present a banker, like various other persons or bodies, may in a commercial situation owe a duty to exercise care when giving advice to another. This is certainly, in my view, the position under our law.

1 find, therefore, that the requirement of negligence was established.

Loss and Causation

In evidence Mr Peters stated that he read the report furnished by Nedbank on 22 November 1985 as being a favourable one and on the strength of it he forwarded the application for the renewal of the relevant line of credit to Toronto, with the recommendation that the renewal be granted; and also in the meanwhile extended the line of credit pending the final decision on the application by head office. He further stated that had the report been an unfavourable one or had Nedbank refused to give a report he would not have been able to recommend the renewal of the line of credit and would have cancelled it immediately.

On this basis Stanchart contends that but for the negligent misstatements contained in the report, the line of credit would have been discontinued; that in that event Cansulex's bill of US$2 697 122,50 would not have been discounted by Stanchart (resulting in the payment to Cansulex of USS2 580 628,46); and that

Stanchart would not have suffered the loss which it did as a result of the dishonour of the bill and its inability to recover in full on the bill. Accordingly, so the argument runs, the giving of the favourable bank report was a factual cause of Stanchart's ultimate loss. (Cf. the similar line of evidence and reasoning in the case of International Shipping Co (Pty) Ltd v Bentley 1990 (1) SA 680 (A), at 694 I - 695 D.)

I see no reason not to accept this evidence of Mr Peters and the line of argument based upon it. It depends, of course, partly on the proposition that had Nedbank given a frank and, within the limitations of the brevity with which such reports are normally couched, an accurate report on Triomf RB, the report would as a matter of probability have been an unfavourable one and would have been viewed as such by Stanchart. I think that the proposition is well-founded. I have described at some length the financial position of Triomf RB as it was about the time of the furnishing of the report

and Nedbank's knowledge and perceptions in that regard. I am convinced that Nedbank, acting reasonably and with the skill and care of a banker, would inevitably have produced a report which, whatever its precise terms, would have conveyed some indication of Triomf s precarious financial position and would have been regarded by Stanchart as an unfavourable report.

During the cross-examination of Mr Peters, counsel for Nedbank obtained from him concessions that if Triomf RB was continuing to buy sulphur and pay for it and use it in the process of manufacture, they were trading normally; and that had he known that Triomf RB had suffered the losses which it did during the financial period ended 30 June 1985, in the circumstances that existed at the time he received the report, this would have made no difference. It is not very clear what Mr Peters meant by this latter concession, but in any event I do not regard this evidence as detracting materially from the proposition that had the report accurately reflected the true

position it would have been an unfavourable one and would have been so regarded by Stanchart. At no time in cross-examination was the global picture of Triomfs financial situation put to Mr Peters; nor was he asked whether, if the report had somehow reflected all this, he would have regarded it as a favourable one or not.

My conclusion is that the untrue report issued by Nedbank was a factual cause of Stanchart's loss. In other words, it was a conditio sine qua non of such loss. That, however, does not conclude the enquiry. It is still necessary to determine legal causation, i e whether the furnishing of the untrue report was linked sufficiently closely or directly to the loss for legal liability to ensue, or whether the loss is too remote. The principles applied in such an inquiry have recently been expounded by this Court in the cases of S v Mokgethi en Andere 1990 (1) SA 32 (A), at 39 D - 41 B; International Shipping Co (Pty) Ltd v Bentley, supra, at 700 E - 701 G; and Smit

v Abrahams, as yet unreported, dated 16 May 1994, at pp 22-5, 32-3, 36-7, 39-40 of the typescript. As appears from these judgments, the test to be applied is a flexible one in which factors such as reasonable foreseeability, directness, the absence or presence of a novus actus interveniens, legal policy, reasonability, fairness and justice all play their part.

In applying this general test there are two matters upon which I propose to concentrate: firstly, the apparent disregard of the group administrative circular dated 25 November 1985 (which I shall refer to by its exhibit number "A299") when the bill in question was discounted on 14 January 1986; and secondly, the question of reasonable foreseeability. These matters have some bearing on both causation and unlawfulness and I shall deal with them under separate heads.

The Group Administrative Circular ("A2991")

43 The relevant portion of A299 has been quoted. The guideline in para 5, headed "Export Bills", is to the effect that export bills covering trade transactions with South Africa may only be negotiated or advanced against where full recourse to drawers (outside South Africa) is retained. Prima facie this would appear to apply to the discounting of the bill in question, but, as we know, the discounting was done on the basis that once the bill was accepted by the drawee (Triomf RB) the right of recourse was waived. Nedbank's counsel pointed to this and argued that had Stanchart (Vancouver) not overlooked or ignored this guideline the right of recourse against Cansulex (the drawer) would have been retained with the result that upon the dishonour of the bill Stanchart could have recovered the amount of the bill from Cansulex and would thus not have suffered any loss.

Stanchart's witnesses were asked about this in evidence. It appears from their testimony that at the time of the discounting Mr

Peters (the responsible official at the time) was of the opinion that para 3, and not para 5, of A299 applied in the case of the established credit line granted to Cansulex in respect of its dealings with Triomf RB and other purchasers of sulphur in South Africa. He interpreted para 3 as applying to existing facilities and para 5 as referring to future customers or customers requiring future facilities.

Mr Avery arrived at the Vancouver branch of the bank during the first week of January 1986, but formally took over from Mr Peters some two to three weeks later. During that period, while familiarizing himself with the operations at the bank, he became aware of the discounting of the bill in question on 14 January 1986. He was aware of A299 and was surprised that the bill had been discounted in terms of the existing credit line. He had discussions with Mr Peters and a Mr Brown, the president of Stanchart (in Toronto). They came to the conclusion that there was some confusion as to the interpretation of A299 and it was decided to seek clarification from head office in

London. Group advances in London apparently took the view that para 5 applied and that full recourse would have to be retained as against Cansulex in its transactions with Triomf RB; and this view was conveyed to Toronto and Vancouver. When informed of this, Cansulex adopted the attitude that inasmuch as Stanchart had unconditionally discounted the bill in terms of the agreed line of credit (as set forth in the facility agreement) it was contractually bound to release Cansulex from recourse once the bill was accepted by the drawee (Triomf RB) and provided that there had been no dishonouring of prior bills in the interim (which there had not been). This attitude on the part of Cansulex was regarded by Vancouver and Toronto to be "not unreasonable" and London eventually accepted that there was such a commitment to Cansulex and agreed that the bill in question should be allowed to go through on a non-recourse basis. London did this on the recommendation of Mr Smallwood, who saw it as "purely a country risk problem": he had no reason to be concerned about the

"client risk" aspect. As Mr Smallwood viewed the position, the Vancouver branch had misread the circular, A299, but the error was "understandable": a number of other branches had misinterpreted the circular in the same way, assuming that para 5 applied only to totally new transactions.

The circular, A299, is certainly not a model of clarity and it does not surprise me that it was the cause of fairly widespread confusion within the bank. The unconditional discounting of the bill in question, in conflict with the intent of A299, may have been an error of judgment, but 1 would hesitate to class it as a careless or negligent act. Once the bill was unconditionally discounted, then it seems to me that in terms of the facility agreement Stanchart was contractually obliged to release Cansulex on acceptance of the bill by Triomf RB.

All these events, and more particularly the unconditional discounting of the bill, apparently in contravention of A299, constitute

a concomitant factual cause of Stanchart's loss. I shall consider later what effect, if any, it has in regard to the question of legal causation.

Reasonable Foreseeability

What should reasonably have been foreseen by Nedbank, acting through its officials, as the possible consequences of the furnishing of an untrue bank report to Standard in November 1985, depends partly on what the bank knew, or must have known, at the time about the relationships between Standard, Oansulex, Stanchart and Triomf RB. Since none of the Nedbank officials gave evidence, their state of knowledge must be a matter of inference from the other evidence, mainly the documents before the Court, and also from the very fact that the officials from whom some of the documents emanated did not enter the witness-box.

The evidence shows that on about 30 January 1986 the bill in question, together with the shipping documents, was presented

by Standard (Richards Bay branch) to Nedbank (Richards Bay branch) for acceptance by Triomf RB. From the bill and the shipping documents Nedbank would have known that the bill related to the purchase price of a shipment of sulphur to Triomf RB by Cansulex and that the bill had been discounted by Stanchart. It would also have been aware of the fact that Standard had presented the bill and the documents on behalf of Stanchart. Nedbank's knowledge of the roles played by Cansulex, Stanchart and Standard in this transaction appears, prima facie at any rate, from two documents emanating from Nedbank, viz A440, which is an advice of acceptance dated 3 February 1986 and addressed to Stanchart (Vancouver), and A441, a letter dated 3 February 1986 addressed to Stanchart (Vancouver) which reads:

> "We refer to the above mentioned Collection for US$2,697,122.50 in favour of Triomf Fertilizer Richards Bay (Pty) Ltd. Order Cansulex Limited and advise that we have adopted this Collection

> from Standard Bank Richards Bay.
>
> The Bill has been accepted by Triomf Fertilizer and on due date 8 July 1986 we will settle the Collection in terms of your Covering Schedule."

The language of this communication does not seem altogether apt, but Nedbank's appreciation that Cansulex, Stanchart, Triomf RB and Standard were involved in this transaction and of their respective roles is clearly to be inferred.

The same inference is to be drawn from two other documents emanating from Nedbank (B493 and B494). These are inter-departmental memoranda (dated 31 January 1986) referring to the bill in question and stating that it is in respect of sulphur imported from Canada, that the drawer is Cansulex, that the bill is payable to Stanchart and that it has been accepted by Triomf RB. B493 contains the following statement:

> ".. Bill in the past presented by Standard Bank Richards Bay. We recently gave a bank report to them. This is enclosed."

The fact that the writer associates the bank report given to Standard Bank Richards Bay (clearly the report of 22 November 1985) with the transaction for the purchase of sulphur from Cansulex by Triomf RB involving, in their respective roles, Stanchart and Standard, is, in my view, highly significant.

There had been numerous previous transactions on the same lines. The line of credit in respect of exports of sulphur to Triomf RB had been established in August 1982 (A124) and was based upon a bank report on Triomf obtained in June 1982 from Nedbank through the agency of Standard. The same procedure seems to have been adopted in subsequent years.

In evidence Mr Peters stated, under cross-examination, that there had been many such transactions in the past, i e collections

through Standard on Triomf "of this type" (referring to the bill in question); that Stanchart had in the past directed several requests for banker's reports on Thomf to Nedbank via Standard; and that Nedbank was aware of the fact that Stanchart (Vancouver) was discounting bills drawn on Triomf RB. The cross-examiner did not challenge these statements, nor did he put a contrary version to the witness.

I have already referred to the bank report which was obtained by Standard, acting on behalf of Stanchart, in late October 1985 and to the memorandum B286 (dated 29 October 1985) which followed shortly thereafter. From the comments in B286 it is clear that Nedbank associated the report with a purchase transaction involving Cansulex as seller. No doubt, too, Nedbank would have been aware of the fact that, as usual, the bill had been discounted by Stanchart.

Under cross-examination Mr Avery agreed that in the

normal course a bank report would not be given directly to someone who is not a banker; that consequently if banker A seeks a full general report from banker B with regard to a customer of bank B, the latter would realise and understand that banker A may be acting on behalf of a third party; and that banker B would know that the report was required either because the third party was contemplating doing business with the customer or granting him credit or because banker A himself was considering taking over the bank account of the customer.

In the circumstances of the present case, as I have outlined them, it seems very unlikely that Standard would have contemplated taking over Triomf RB as a customer or that Nedbank would have thought that this was the reason for the request for the bank report in November 1985. The probability is that Nedbank realised that in requesting the report Standard was acting on behalf of a third party who was contemplating doing business with Triomf RB

or granting it credit in some way. As I have indicated, the evidence shows that at that time Nedbank must have been aware of the business modus operandi whereby Cansulex sold sulphur to Triomf RB, drew on the latter for the price and discounted the bill with Stanchart; and of the fact that Standard acted on behalf of Stanchart, both in the carrying out of such transactions and in the obtaining of bank reports. Admittedly Standard did not disclose on whose behalf it was acting when requesting the report in question and Nedbank would not necessarily have known that it was Stanchart. Nevertheless, Nedbank must have realised that among the persons on whose behalf Standard could be acting, a possible, indeed a likely, party was Stanchart. Furthermore, Nedbank knew the role which Stanchart played in transactions with Triomf RB and would, or should, have foreseen that if the report failed to disclose Triomf RB's precarious financial position, Stanchart might, in reliance on the report, do business with Triomf RB, in the sense of discounting a bill drawn on and to be

accepted by Triomf RB, and might suffer loss should Triomf RB collapse financially.

In delict the reasonable forseeability test does not require that the precise nature or the exact extent of the loss suffered or the precise manner of the harm occurring should have been reasonably foreseeable for liability to result. It is sufficient if the general nature of the harm suffered by the plaintiff and the general manner of the harm occurring was reasonably foreseeable. (See Burchell, Principles of Delict, at 92 ff and the authorities there cited).

Applying that general approach to the facts of the present case, I am of the opinion that the loss suffered by Stanchart as a result of the incorrect report furnished by Nedbank on 22 November 1985 was reasonably foreseeable by Nedbank.

Legal Causation Taking all the facts of the case into account I am of the view that

legal causation was established in this case. As I have indicated, the loss suffered by Stanchart was of the general category which was reasonably foreseeable at the time when the incorrect bank report was given by Nedbank. There was no undue lapse of time to break, or even strain, the chain of causation. The bill in question was discounted approximately 7 weeks after the bank report was given. It is true that the actual loss only became a fact six months later, but that was because of the usance of the bill. In reality the loss was sustained when Stanchart purchased what turned out later to be a worthless asset, viz a bill which the drawee was unable to meet on due date.

The fact that, apparently in conflict with the group administrative circular (A299), the bill in question was discounted on a non-recourse basis does not, in my view, render Stanchart's loss too remote. This factor, admittedly, made Stanchart generally more vulnerable to loss in that it prevented Stanchart from recouping its

loss, flowing from the dishonour of the bill by the drawee, from the drawer. And it may well be that this particular factor was not reasonably foreseeable by Nedbank at the relevant time. Nevertheless, the untrue bank report remained a prime and material causal factor throughout. The disregard of A299 was at most a concomitant cause, rendering Stanchart more vulnerable, and I do not think that the fact that it may not have been foreseeable should exempt Nedbank from liability. Moreover, as I have stressed, the law does not require the exact manner of the loss occurring to be reasonably foreseeable.

Nedbank's counsel pointed to the informal, terse and uninformative nature of the request for a bank report, the short time allowed the bank for its response and the magnitude of the claim; and argued that in the circumstances it was not fair to hold the bank liable for the loss suffered by Stanchart. 1 am not sure whether this argument was advanced with reference to the issue of causation or that of unlawfulness, but in any event I do not think that it can prevail. A

bank report is, and should be regarded as, a serious matter, with the potential for serious consequences to the party requiring it and acting upon it. I do not think that the short time allowed in fact prejudiced Nedbank: it was fully conversant with Triomf RB's financial situation. But even if it did feel prejudiced it was not obliged to respond immediately: it could have asked for time. And finally, it could have protected itself against a negligent report by a disclaimer of liability, as is apparently a common practice amongst banks.

A further point raised by counsel for Nedbank, which seemed to have relevance to causation, was that in discounting the bill in question (the face value of which was USS2 697 122,50) Mr Peters acted in contravention of the line of credit agreement which limited "individual exposure" to any one drawee, in the case of Triomf RB, to USS2 000 000. 1 do not think that this point leads anywhere. Clearly it was open to Stanchart to waive this requirement and according to the evidence it did so. There is no reason to reject this

evidence.

Having carefully weighed all the relevant factors and circumstances and applying the flexible test referred to above, I hold that Stanchart established that its loss was caused by Nedbank's negligent misstatement.

Unlawfulness The question here is whether Nedbank in furnishing the false bank report to Standard acted unlawfully, ie in breach of a legal duty owed to Stanchart not to furnish a false bank report. The various factors which are taken into consideration by our courts in deciding whether or not such a duty exists in a particular instance appear from cases such as the pathfinding decision of this Court in Administrator, Natal v Trust Bank van Afrika Bpk 1979 (3) SA 824 (A); and also Simona & Co (Pty) Ltd v Barclays NationalAbdoW Band Ltd

1984(2) SA 888 (A), at 913 F - 914 C; International Shipping Co

(Pty) Ltd v Bentley, supra, at 694 D - I; Bayer South Africa (Pty)

Ltd v Frost 1991 (4) SA 559 (A), at 568 D-F, 574 I - 575 D. In the present case the following factors seem to me to be important:-

(1) The context in which the statement was made.

The statement was made in response to a serious request, in a strictly business context, for a full bank report. The request was not a casual enquiry; nor was the report given in circumstances where it was clear that it was not to be taken seriously. Indeed quite the contrary was the case.

(2) The nature of the statement

The statement, i e the report, related to matters in respect of which Nedbank, as Triomf RB's banker, had particular knowledge and the expertise to make a statement or express an opinion. Indeed, it was uniquely placed to do so. Moreover, the giving of a bank report on

a customer is part of the normal business of a banker.

(3) The purpose of the statement and Nedbank's knowledge thereof

The purpose of obtaining the bank report was to enable Stanchart to decide whether to continue Cansulex's line of credit, specifically insofar as transactions with Triomf RB were concerned. Although it has not been shown that Nedbank knew that this was the purpose, it is to be inferred, as I have already indicated, that as a matter of probability Nedbank realised that Standard's request for the report was made on behalf of some third party who was contemplating doing business with Triomf or granting it credit in some way.

(4) Reliance by third party on report

Nedbank must have realised that this third party would rely on the report in deciding whether to do business with Triomf RB or give it

credit and could suffer loss if the report incorrectly gave a favourable account of Triomf RB's financial position.

(5) Relationship between the parties There was no direct contact or dealing between Stanchart or Nedbank in regard to this report and it is this fact, mainly, that gives rise to difficulty on this aspect of the case. Nevertheless, as I have found, Nedbank must have realised that the probable recipient of the report was a third parly contemplating business with Triomf RB or giving credit in some way to Triomf RB; amd that among the persons on whose behalf Standard might be acting a possible, indeed likely party, was Stanchart (see the section on foreseeability above). This renders the relationship between the parties, if not a direct one, at least a reasonably close one.

(6) Public policy, fairness etc

There are, in my view, no considerations of public policy or fairness or equity to deny Stanchart relief in this case. This is not the kind of case where a finding in favour of the plaintiff raises the spectre of limitless liability or places an undue or unfair burden upon the bank. As I have already emphasized, the bank could have refused to give the report or it could have protected itself against the consequences of a negligent report by a disclaimer.

In all the circumstances it seems to me that under our law a case for unlawfulness has been made out. Counsel for respondent, relying on certain English authorities (principally Caparo Industries plc v Dickman and Others [1990] 1 All ER 568 (HL)), argued, however, that in the present case Nedbank owed no duty of care to

Stanchart and that, therefore, the requirement of unlawfulness was absent. 1 hesitate to propound how an English court would decide the question of the existence of a duty of care on the facts of the present case. Indeed it would be somewhat presumptuous of me to attempt to do so. After reading the relevant English decisions, however, I am not persuaded that they provide persuasive support for the argument of respondent's counsel.

The starting point in English law is the Hedley Byrne case (supra), which factually bears a resemblance to the present one in that it also related to enquiries by a bank directed to the defendant merchant bank concerning the financial position of X Ltd, a customer of the defendant. The enquiries were made on behalf of the plaintiff, an advertising firm, which was a customer of the enquiring bank and

which wished to do business with X Ltd. The defendant gave favourable responses to these enquiries, but with disclaimers of responsibility. Relying upon these replies, the plaintiff entered into advertising contracts with X Ltd and subsequently suffered economic loss when X Ltd went into liquidation. For the purposes of deciding the appeal in the House of Lords it was assumed that there had been negligence in the furnishing of these favourable reports. Striking out in a new direction and disapproving certain earlier decisions, the House of Lords decided that, but for the disclaimer, the circumstances of the case might have given rise to a duty of care on the part of the defendant. Portion of the headnote in the All England Reports reads as follows:

> "If, in the ordinary course of business or professional affairs, a person seeks information or advice from another, who is not under contractual or fiduciary obligation to give the information or advice, in circumstances in which a reasonable man so asked would know that he was being trusted, or that his skill or judgment was being relied on, and the person asked chooses to give the information or advice without clearly so qualifying his answer as to show that he does not accept responsibility, then the person replying accepts a legal duty to exercise such care as the circumstances require in making his reply; and for a failure to exercise that care an action for negligence will lie if damage results...."

(See also Mclnery v Lloyds Bank Limited [1974] 1 Lloyd's Rep 246 (CA); Box v Midland Bank [1979] 2 Lloyd's Rep 391 (QBD); Cornish v Midland Bank p/c (Humes, third party) [1985] 3 All ER 513 (CFA); all cases dealing with the liability of a banker for negligent advice given, in terms of the Hedley Byrne principles.)

It is not necessary to analyse the reasoning in the various

judgments in (he Hedley Byrne case for the general effect of that decision, considered in the light of subsequent relevant authority, was clearly set forth in the Caparo case (supra). It appears from the latter decision, which related to the liability of auditors negligently certifying a company's accounts, that for the imposition of a duty of care in tort, and particularly in cases of negligence resulting in pure economic loss, English law has adopted three basic criteria, viz foreseeability of damage, proximity of relationship and that the attachment of legal liability in the circumstances be fair, just and reasonable. (See also White and another v Jones and others [1993] 3 All ER 481 (CA), at 487 g - 488 f.)

With regard to the test of proximity, as applied to a case of negligent misstatement, Lord Oliver of Aylmerton stated in the Caparo case, supra, at 589 c - g, the following:

"The point that is, as it seems to me, significant in the present context, is the unanimous

approval in this House of the judgment of Denning LJ in Candler's case [1951] 1 All ER 426 at 434, [1951] 2 KB 164 at 181, in which he expressed the test of proximity in these words: 'Did the accountants know that the accounts were required for submission to the plaintiff and use by him?' In so far as this might be said to imply that the plaintiff must be specifically identified as the ultimate recipient and that the precise purpose for which the accounts were required must be known to the defendant before the necessary relationship can be created, Denning LJ's formulation was expanded in the Hedley Byrne case, where it is clear that, but for an effective disclaimer, liability would have attached. The respondents there were not aware of the actual identity of the advertising firm for which the credit reference was required nor of its precise purpose, save that it was required in anticipation of the placing of advertising contracts. Furthermore, it is clear that 'knowledge' on the part of the respondents embraced not onlv actual knowledge but such knowledge as would be attributed to a reasonable person placed as the respondents were placed. What can be deduced from the Hedley Byme case, therefore, is that the necessary relationship between the maker of a

> statement or giver of advice (the adviser) and the recipient who acts in reliance on it (the advisee) may typically be held to exist where (1) the advice is required for a purpose, whether particularly specified or generally described, which is made known, either actually or inferentially, to the adviser at the time when the advice is given, (2) the adviser knows, either actually or inferentially, that his advice will be communicated to the advisee, either specifically or as a member of an ascertainable class, in order that it should be used by the advisee for that purpose, (3) it is known, either actually or inferentially, that the advice so communicated is likely to be acted on by the advisee for that purpose without independent inquiry and (4) it is so acted on by the advisee to his detriment. That is not, of course, to suggest that these conditions are either conclusive or exclusive, but merely that the actual decision in the case does not warrant any broader propositions."

This formulation has been relied on subsequently (see eg James McNaughton Papers Group Ltd v Hicks Anderson & Co (a firm) [1991] 1 All ER 134 (CA), at 143 b-d; Morgan Crucible Co

plc v Hill Samuel Bank Ltd and others [1991] 1 All ER 148 (CA), at 158 b-e) and appears to express the essence of the Court's decision. (See also Clerk & Lindsell, second cumulative supplement, at 32-3.) Where Lord Oliver speaks of the purpose being made known inferentially to the adviser, to the adviser knowing inferentially that his advice will be communicated to the advisee and to the adviser knowing inferentially that the advice is to be acted upon, it seems clear that he is referring to such knowledge as would be attributed to a reasonable person in the circumstances in which the adviser was placed (see Caparo case, supra, at 589 e and James McNaughton Papers Group case (supra), at 144 h-j).

Applying the formulation to the facts of the present case, as I have found them to be, it would seem that in terms of English law the necessary proximity existed. Nedbank knew, actually or inferentiallv, that the bank report was required for the purpose of

determining the financial stability and creditworthiness of Triomf RB; that its advice would be communicated to someone, a client of Standard (who may well have been Stanchart), intending to do business with Triomf RB or rely upon its creditworthiness; and that the advice so communicated was likely to be acted on by such person (the advisee) for that purpose without independent enquiry. And, of course, in this case it was so acted upon. In the light of the further findings regarding foreseeability and the absence of any reason based on public policy, fairness or equity to deny relief, I am not persuaded that, if English law were to be applied, a different result would be reached in this case.

For these reasons I hold that unlawfulness was established in this case. This means that Stanchart was entitled to succeed in its claim for damages, subject to the question of contributory negligence.

Contributory Negligence

In its plea Nedbank pleaded that Stanchart had been guilty of contributory negligence in that it permitted the credit granted to Cansulex to remain in place, discounted the bill drawn on Triomf RB and relinquished its right of recourse against Cansulex -

(i) when a reasonable businessman would in the circumstances have done none of these acts;

(ii) without first seeking and obtaining sufficient information concerning Triomf RB to ensure that it was prudent to do so;

(iii) without first obtaining and examining detailed information concerning the financial position and trading results of Triomf RB; and

(iv) without first ensuring that the information contained in the report was still applicable.

In further particulars for trial Nedbank stated that amongst the

information concerning Triomf RB which Stanchart ought to have obtained and studied before discounting the bill was that to be found in the June 1985 financial statements. This and the alleged disobedience of the group administrative circular (A299) were the two matters relied upon by Mr Browde on appeal to establish contributory negligence. The evidence of Mr Peters was to the effect (as I have already mentioned) that the June 1985 financial statements had not been received in Vancouver by 20 January 1986 and were thus not available there when the bill was discounted. Nedbank, upon whom the onus rested, did not establish any negligence in this regard. As to the group administrative circular, the alleged disobedience of this was not pleaded as a ground of contributory negligence and I do not think that Nedbank can now rely upon this. In any event, I am not

persuaded that the disregard of the circular amounted to contributory negligence.

Accordingly I hold that contributory negligence does not arise in this case.

Two matters relating to the relief to be granted to Stanchart remain to be considered. They are: (i) whether this Court can, and should, award Stanchart damages in United States dollars, and (ii) whether Stanchart is entitled to interest on damages as a separate claim.

Damages Awarded in Dollars?

As a result of Nedbank's negligent misstatement Stanchart suffered a loss, which it computes on the basis of the amount for which it discounted the bill of exchange, less dividends paid (in terms

of the compromise) on its claim in the liquidation of Triomf RB. In its statement of claim Stanchart seeks to be paid damages for this loss expressed in US dollars. This raises two questions: (a) whether it is competent for this Court to award delictual damages in a foreign currency, and (b) whether, on the facts in this case, an award in US dollars should be made.

In the case of Voest Alpine Intertrading Gesellschaft MBH v Burwill and Co SA (Pty) Ltd 1985 (2) SA 149 (W) the Court found that the plaintiff had suffered damages for breach of contract, for which the defendant was liable, in a certain amount of US dollars and went on to consider the question as to what was the correct date for this amount to be converted into rand for, as the Judge (Nestadt J) put it (at 150F) -

> "[n]ot only is defendant entitled to pay in rand, but this Court is obliged to give judgment only in rand, not in a foreign currency (though I have not been able to find the source of this rule)."

It further appears that it was not argued by plaintiffs counsel that the Court had the power to give judgment in a foreign currency (at 152 C-D). In the result the Court decided that the conversion date was the date of the breach of contract giving rise to the claim for damages.

The questions as to whether our Courts have the power to grant judgment in a foreign currency and, if so, when it should do so have been considered in a number of matters decided since Voest's case: see Murata Machinery Ltd v Capelon Yams (Pty) Ltd 1986 (4) SA 671 (C); Elgin Brown and Hamer (Pty) Ltd v DampskibsselskabetTorm Ltd 1988 (4) SA 671 (N); and Barclays Bank of Swaziland Ltd v Mnyeketi 1992 (3) SA 425 (W). To these may be added the decision of the Zimbabwe Supreme Court in Makwindi Oil Procurement (Pvt) Ltd v National Oil Co of

Zimbabwe (Pvt) Ltd 1989 (3) SA 191 (ZSC). The general conclusion reached by these decisions, guided to some extent by recent English authority, is that the Court is empowered in an appropriate case to give judgment in a foreign currency. The arguments and authorities supporting this proposition are fully set forth in the various judgments, and in this connection I would refer particularly to the full and lucid exposition by Stegmann J in the Barclays Bank of Swaziland case (Mpra), and it is not necesary for me to repeat them. I am in general agreement with this conclusion and am satisfied that our Courts do have the power to grant judgment in a foreign currency.

In none of the South African cases referred to above was the claim one for delictual damages. They related to money claims due on a contract, damages for breach of contract and to the enforcement of a foreign judgment. The Zimbabwean case, however, concerned damages for misrepresentation. I can see no reason for dealing differently with claims for delictual damages and accordingly

hold that in a case such as the present the Court has the power to give judgment in a foreign currency.

In the case of Malilang and Others v MV Houda Pearl 1986 (2) SA 714 (A), 1986 (3) SA 960 (A) this Court, sitting as a court of appeal in an Admiralty matter, held that it was not empowered to grant judgment in a foreign currency. As was made clear, however (see 1986 (3) SA at 967 J), this ruling related strictly to Admiralty proceedings in terms of the Colonial Courts of Admiralty Act of 1890 and would not necessarily apply to proceedings under the Admiralty Jurisdiction Regulation Act 105 of 1983. A fortiori it has no application outside the Admiralty field.

With regard to the question as to when the Court should exercise its power to grant judgment in a foreign currency, the leading English case of The Despina R [1979] 1 All ER 421 (HL) is helpful and instructive. In that case there were two appeals before the House of Lords, one concerning damages for tort and relating to a vessel

named "The Despina R" and one concerning damages for breach of contract and relating to a vessel named "The Folias". It is to the former appeal that I shall refer. The Despina R had been involved in a collision with another vessel off Shanghai and repairs to the Despina R had been carried out in Shanghai, Yokohama and Los Angeles. It was held that damages could be recovered in a currency other than sterling; and on that basis the question was in which currency the court's award should be made. Apart from sterling, there were, firstly, the currencies in which the repair expenses had been incurred (the Chinese currency, RMB, Japanese yen and US dollars), termed by the Court "the expenditure currency"; and, secondly, the currency in which the loss was effectively felt or borne by the plaintiff, having regard to the currency in which it generally operated or with which he had the closest connection, which was called "the plaintiffs currency" and in this case was US dollars. In considering these alternatives, Lord Wilberforce said (at 427 c-d) -

> "My Lords, in my opinion, this question can be solved by applying the normal principles which govern the assessment of damages in cases of tort (I shall deal with contract cases in the second appeal). These are the principles of restitutio in integrum and that of the reasonable foreseeability of the damage sustained. It appears to me that a plaintiff, who normally conducts his business through a particular currency, and who, when other currencies are immediately involved, uses his own currency to obtain those currencies, can reasonably say that the loss he sustains is to be measured not by the immediate currencies in which the loss first emerges but by the amount of his own currency, which in the normal course of operation, he uses to obtain those currencies. This is the currency in which his loss is felt, and is the currency which it is reasonably foreseeable he will have to spend."

Lord Russell of Killowen expressed his viewpoint thus (at 432 e-f):

> "In this case the plaintiffs business was conducted in US dollars, it being managed in New York. The other foreign currency was necessarily acquired in exchange for US dollars. The true loss of the

> plaintiffs was a loss of US dollars, and in pursuit of the remedy of restitutio in integrum, or full and proper compensation, I conclude that the claim and judgment should be for the US dollars lost. It may be said that there is in any given case support in simplicity for a system by which you take as the relevant foreign currency the currency of direct disbursement; but that simpliciry may lead away from a true and fair assessment of the damage sustained by the claimant."

The Court decided in favour of the plaintiffs currency, viz U S dollars.

1 should here digress to explain that in English law the term restiutio in integrum is sometimes used, in the context of tort, to express the broad general principle by which damages for the tortious act are assessed. As Earl Jowitt stated in the case of British Transport Commission v Gourley [1955] 3 All ER 796 (HL) at 799 D-E (a claim for damages for personal injuries) -

> "The broad general principle which should govern

> the assessment of damages in cases such as this is that the tribunal should award the injured party such a sum of money as will put him in the same position as he would have been in if he had not sustained the injuries (see per Lord Blackburn in Livingstone v Rawyards Coal Co (1) (1880), 5 App Cas at p 39). The principle is sometimes referred to as the principle of restitutio in integrum.

(See also McGregor on Damages, 15th ed (1988), paras 10 and 11.)

The same general principle obtains in our law of delict, though it is not usual to refer in this connection to restitutio in integrum. As Rumpff CJ put it in Dippenaar v Shield Insurance Co Ltd 1979 (2) SA 904 (A). at 917 B -

> "In our law, under the ler aquilia, the defendant must make good the difference between the value of the plaintiff's estate after the commission of the delict and the value it would have had if the delict had not been committed".

(See also De Jager v Grunder 1964 (1) SA 446 (A), at 449 E and 456 G; Erasmus v Davis 1969 (2) SA 1 (A), at 9 A.)

In a subsequent English case, The "Lash Atlantico", [1987] 2 Lloyd's Rep 114 (CA), Kerr LJ, having referred to various passages in the speeches in The Despina R (supra), including those which I have cited, said (at 118):

> "Have the plaintiffs established that their loss falls to be measured in dollars? In my judgment they plainly have, because the passages which I have read are redolent of the fundamental consideration that one has to have regard to the currency in which the relevant commercial operations were normally carried out."

(See also Bingham J in Société Francaise Bunge SA v Belcan NY:

The Federal Huron [1985] 3 All ER 378 (QBD), at 383 c.)

In the Elgin Brown case (supra) Leon J, delivering the judgment of the Full Bench of Natal (Broome J and Friedman J concurring) and having referred to The Despina R, stated (at 674 I - J):

> "In this case we are dealing with a situation where the main heads of the actual loss suffered by the plaintiff either in the sense of money actually expended or in the sense of money not received was suffered in a foreign currency. That was the currency in which the plaintiffs loss 'was felt'. That being so, the only way in which the plaintiff can be compensated properly for its loss is to grant judgment in a foreign currency. When judgment is given in a foreign currency it is necessarily implicit that it may be satisfied in South Africa by payment in the foreign currency or by the payment of its equivalent in rand when paid."

When one turns to the facts of the present case, it is apparent that the

loss suffered by Stanchart was basically in US dollars, the currency in which the bill of exchange was expressed and which was paid or credited to Cansulex when the bill was discounted. This was the currency in which its loss was "felt". The type of transaction which led to the loss had on previous occasions, it would seem, always been done in US dollars and, having regard to Nedbank's state of knowledge about this transaction and Stanchart's involvement (as previously elaborated), I am of the view that a loss in dollars was reasonably foreseeable. In oral argument before us Mr Browde. very fairly (and in my opinion very correctly) conceded that, if the Court was empowered to grant judgment in a foreign currency, he could not advance any argument that in this case the judgment should not be in the foreign currency suggested, viz US dollars.

I accordingly conclude that the damages to be awarded in this case should be expressed in US dollars. It is implicit in any order to this effect that the judgment debt may be satisfied in South Africa

by payment in the foreign currency or by the payment of its equivalent in rand when paid. (Cf Elgin Brown case, at 674 J; and see also the English cases of Miliangos v George Frank (Textiles) Ltd [1975] 1 All ER 1076 (CA), at 1086 b; The Despina R [1977] 3 All ER 874 (CA), at 902 f. Any other conversion date could render meaningless the award in the foreign currency.

In their heads of argument and in oral argument before us appellant's counsel asked that in the event of the appeal succeeding and the Court holding that the damages be expressed in US dollars, we should make a declaratory order to that effect and give a direction that in the event of the parties being unable to reach agreement on the quantum of capital, they should be entitled to set the matter down before the Witwatersrand Local Division for determination thereof. A similar declaration was asked for in regard to a claim for the payment of interest, if successful. This accords with an agreement entered into between the parties during the course of the trial in the

Court a quo, and will be acceded to.

The Interest Claim Generally, under our common law a debtor is not liable for interest on a monetary debt unless and until he is in mora, i e in wrongful default in making payment. In the case of Victoria Falls & Transvaal Power Co Ltd v Consolidated Langlaagte Mines Ltd 1915 AD 1, 31-3, it was held that on a claim for unliquidated damages only ascertainable as to the amount after "a long and intricate investigation" the defendant could not be taken to be in mora, and therefore could not be held liable for interest on the damages prior to judgment, since the law did not attribute mora to a debtor who did not know and could not ascertain the amount which he had to pay. In the Victoria Falls case Innes CJ nevertheless guarded himself by saying (at 32):

> "I do not say that under no circumstances whatever could such damages carry interest. Cases may possibly arise in which though the claim is unliquidated the amount payable might have been ascertainable upon an inquiry which it was reasonable the debtor should have made. Such cases, should they occur, may be left open."

An exception to the general rule that a claim for unliquidated damages does not carry interest is where the parties have fixed by agreement the amount of the claim and thereby rendered it liquidated. Mora then commences when the creditor demands payment of the agreed sum or, failing demand, serves summons on the debtor (see West Rand Estates Ltd v New Zealand Insurance Co Ltd 1926 AD 173, at 181-3).

The question left open by Innes CJ in the passage from his judgment in the Victoria Falls case quoted above, namely whether a creditor can be awarded interest on unliquidated damages from a date prior to judgment where he could reasonably have ascertained the

amount payable, remains unanswered as far as this Court is concerned (see Union Government v Jackson and Others 1956 (2) SA 398 (A), at 416 B-G; Russell NO and Loveday NO v Collins Submarine Pipelines Africa (Ply) Ltd 1975 (1) SA 110 (A), at 155 B-D; Adampol (Pty) Ltd v Administrator, Transvaal 1989 (3) SA 800 (A), at 816 F-817C). I shall return to this point later.

In its statement of claim Stanchart claimed, as a separate prayer, payment of an amount calculated at rates of interest reflected in an annexure (B) on the sum of USS2 580 628,46 (alternatively R6 087 234,38) from 14 January 1986 to 12 October 1988; on the sum of USS2 333 538,68 (alternatively R5 468 628,37) from 13 October 1988 until 30 June 1989; on the sum of USS2 333 538,68 (alternatively R5 468 628,37) from 1 July 1989 to date of payment. Annexure B is a schedule reflecting the three month London Interbank Lending Rates (LIBOR) prevailing from time to time, as from January 1986 to June 1989. In the alternative interest was claimed on the sum

of US$2 333 538,68 (or alternatively on R5 468 628,37) at the rate prescribed pursuant to the Prescribed Rate of Interest Act from the date of judgment to date of payment. In the particulars of claim it was alleged that the LIBOR rates were the rates at which Stanchart could have invested or lent the moneys in question. In the course of the trial certain agreements were reached in regard to the LIBOR rates but it is not necessary to detail these.

In argument before us appellant's counsel made it clear that this interest was claimed as an item of special damages, distinct from mora interest. It was submitted that the time had come for the law to take account of what counsel termed "commercial realities" and to eliminate the iniquity of the loss sustained by a claimant for damages being deprived of his money prior to final judgment and payment pursuant thereto. Mr Browde's riposte, for which there seems some justification, was to the effect that by delaying action against Nedbank for nearly three years (the combined summons was

issued only on about 4 July 1989) Stanchart was part-author of its loss of interest.

Be that as it may, I do not think that there is any basis, in a case such as this, for an award of interest as special damages. Appellant's counsel were not able to cite any authority in support of this claim and I know of none. The allowance of such a claim would, as I see it, run counter to the principles of law relating to the award of interest upon amounts claimed as damages to which I have alluded above. It cannot be allowed. If this conclusion be thought to be contrary to commercial realities and inequitable, then the only remedy is appropriate legislation. I express no opinion, however, upon the desirability of such a change in the law.

As something of an afterthought (so it seemed to me) appellant's counsel argued that interest prior to judgment could be awarded as mora interest as from the date of service of the combined summons. I shall assume that such a claim is covered by the

particulars of claim. Assuming also that there are exceptions to the rule laid down in the Victoria Falls case (supra), this claim for interest by Stanchart could only be entertained if at some stage prior to the service of the combined summons the main claim became liquidated so that Nedbank knew exactly what it had to pay by way of damages in order to discharge its liability and so could be placed in mora. In my view, the main claim did not become so liquidated. Until the full extent of the dividends payable to Stanchart was ascertained (which was evidently on an unknown date after the commencement of the action) the amount of the damages payable could not be calculated.

In all the circumstances, I am of the view that, even if there are exceptions to the rule in the Victoria Falls case, this is not one of them. The claim for mora interest can, therefore, not be allowed. As to post-judgment interest, this is governed by sec 2 of

the Prescribed Rate of Interest Act 55 of 1975.

Order Accordingly, the following order is made:-

(1) The appeal is allowed with costs, such costs to include those incurred in the employment of two counsel.

(2) The order of the Court a quo is set aside and there is substituted the following:

"An order -

(a) Declaring that defendant (Nedbank) is liable to plaintiff (Stanchart) in damages for negligent misstatement, such damages to be expressed in US dollars; and that this liability may be satisfied in South Africa in US dollars or by the payment of its equivalent in rand at the time of payment;

(b) Directing that in the event of the parties being unable to reach agreement on the quantum of damages payable in US dollars, they shall be entitled to set the matter down

before the Witwatersrand Local Division of the Supreme Court for the determination of such quantum; and

(c) Ordering defendant to pay plaintiff's costs, including the costs incurred in the employment of two counsel."

M M CORBETT

VAN HEERDEN JA)
KUMLEBEN JA) CONCUR

J U D G M E N T

VAN HEERDEN JA

agree with the judgment of the Chief Justice and in particular with his conclusion that the damages awarded in this case should be expressed in US dollars. As pointed out by him, it is implicit that the judgment debt may be satisfied by the payment of the rand equivalent of the US currency at the date of payment.

It is true, of course, that in our law damages must be assessed at the date of delict. This means that the loss must be converted into money at that date. However, although foreign currency as a rule is not legal tender in this country, it is nevertheless also money - in contradistinction to a commodity - and there does not appear to be a compelling reason militating against an award of US dollars where the loss was directly incurred in that currency. On the contrary, in such a case it would be somewhat artificial to require a conversion of the loss into rands at the date when the loss was suffered. In sum, appellant's monetary loss was 2 580 628,46 US dollars (minus, of course, the dividends later received by it), and it is therefore entitled to payment of that amount or, at the election of the respondent, its rand equivalent.

VAN HEERDEN JA

JUDGMENT

HARMS JA:

HARMS JA:

Save in relation to one aspect, I am in full agreement with the judgment of the Chief Justice. My disagreement relates to the question whether, in this case, it would be correct to order the respondent to pay to the plaintiff damages expressed in US dollars, with the rider that the liability may be satisfied in South Africa in US dollars or by the payment of its equivalent in rand at the time of payment

The plaintiff formulated its claim for damages in the alternative. The main claim was made up of the amount for which the draft was discounted (US$ 2 580 628,46) less the amounts recovered as a result of the compromise. They were R 618 606,01 (allegedly received on 12 October 1988) and R 108 647,63 (received on a date unknown, but prior to trial). The alternative claim was for the rand equivalent of the US $2 580 628,46 at the date when the draft was discounted, less the compromise dividends.

The effect of the order proposed by the Chief Justice is to uphold the main claim.

It may, for purposes of this judgment, be assumed that a South African court is entitled to grant judgment in a foreign currency and that, to that extent, the decision in Voest Alpine Intertrading Gesellschaft MBH v Burwill and Co SA (Pty) Ltd 1985 (2) SA 149 (W) was incorrect. A typical instance where that could occur would be where the defendant bound himself in contract to such a performance (Murata Machinery Ltd v (Capelon Yarns) Ltd 1986 (4) SA 671 (C). It is simply an application of the rule that a party must perform according to his promise (cf Van der Merwe v Viljoen 1953 (1) SA 60 (A)). I am also prepared to accept that, in enforcing a foreign judgment, our courts are entitled to express an order in foreign currency to be converted at the date of payment (Barclays Bank of Swaziland Ltd v Mnyeketi 1992 (3) SA 425

(W)), on the

ground that any other order could alter the effect of the foreign judgment. The only problem with this assumption is that if the provisions of the Enforcement of Foreign Civil Judgments Act 32 of 1988 were to apply to the judgment debt, the judgment must be registered as if it were a judgment for the amount in the currency of the Republic, calculated at the rate of exchange prevailing at the date; of the foreign judgment (sec 3 (4)). A similar provision applies in respect of foreign arbitral awards (sec 2 (2) Recognition and Enforcement of Foreign Arbitral Awards Act 40 of 1977). It can further be that, depending on the nature of a breach of contract and the contemplation of the parties in relation to damages, that damages for the breach may be calculated in a foreign currency.

The reason for the propriety of these orders is that they are all orders ad factum praestandum. They are not orders for the payment of 'money'

debts because, as I shall endeavour to indicate, foreign currency is not for purposes of our law money.

The judgment in Elgin Brown & Hamer (Pty) Ltd v Dampskibsse-Iskabet Torm 1988 (4) SA 671 (N), however, went further: it held that if a loss in such a case was 'felt in a foreign currency the court has a discretion (at 674F) to express its order in that currency and that it is implicit in this type of order that the judgment 'may be satisfied in South Africa by payment in the foreign currency or by the payment of its equivalent in rand when paid' (at 674I-J). I have a number of difficulties with the reasoning in that judgment. First, it is unclear what the nature of the loss was. It was merely stated that it related to money actually expended or money not received. The court also relied on a passage from Van Leeuwen Censura Forenis in which the author stated that, in the case of a contract of loan for consumption, the debtor has to return what he has

bargained for. In this respect Van Leeuwen stated no more than was stated in the Murata case (supra); he was not dealing with breach of contract and his statement had no bearing on the issue. More specifically, Van Leeuwen did not indicate it to be a principle of Roman-Dutch law that in matters involving foreign exchange the creditor should receive what he had bargained for (per Stegmann J in the Barckyas Bank of Swaziland case at 43IE). Even if Van Leeuwen can be read to have laid down this broad principle, it can only apply to the case where the defendant is called upon to perform in terms of 'what he had bargained for', i e, in a claim for specific performance. Another matter is the so-called discretion. I do not know whence this discretion arose, nor under what circumstances it should be exercised in favour of or against a party (who, presumably, has substantive rights).

Money as currency is 'that which passes freely from hand to hand throughout the community in final discharge of debts' Moss v Hancock [1899] 2 QB 111 at 116). Only South African currency issued by the Reserve Bank has this attribute (sec 14, 15 and 16 of the South African Reserve Bank Act 90 of 1989). Foreign currency has not. A person who wishes to obtain foreign currency must purchase it from an authorised dealer. The dealer may only sell it on die; terms and subject to the conditions imposed by the Reserve Bank. Had it been possible to trade freely in this country in and with foreign currency, the position may well have been different but under present circumstances foreign currency appears to me to be goods and not money. The statement in Elgin Brown that it is implicit in an order expressed in foreign currency that it may be satisfied in South Africa by payment in that currency is, on the face of it, obviously correct. Whether that is legally possible in the light of the

Exchange Control Regulations, I have my reservations. The point is, however, that the order cannot be enforced in that 'implied' form. The fact that the order may be satisfied in its equivalent in rand appears to me to point indubitably to the conclusion that the order is not for the payment of money. I also know of no other instance where a defendant can comply with a court order by performing in an 'equivalent'.

Turning then to delictual claims, the Zimbabwe Supreme Court recently had occasion to consider the matter and it propounded a rule similar to that formulated in the Elgin Brown case supra. (See Makwindi Oil Procurement (Pvt) Ltd v National Oil Co of Zimbabwe (Pvt) Ltd 1989 (3) SA 191 (ZSC).) It accepted the invitation to follow what it called the innovative lead taken by the English courts (in the cases referred to by Corbett CJ) and it held that '(f)luctuations in world currencies justify the acceptance of the rule not only that a court order may

be expressed in units

of foreign currency, but also that the amount of the foreign currency is to be converted into local currency at the date when leave is given to enforce the judgment' (at 1971-J). It may be noted in passing that the judgment, although duly considered on this aspect, was in the event obiter.

In the absence of binding or convincing local authority, I believe that the matter should be decided with reference to some of the basic principles relating to aquilian liability. Conscious of stating the obvious, the following needs to be stressed :

(1) The purpose of an aquilian claim is to compensate the victim in money terms for his loss. Bell J pointed out as long ago as 1863 that when damages are due by law they are to be awarded in money because money is the measure of all things (The Wynberg valley Railway Company v Eksteen 1 Roscoe 70 at 75). (He qualified the general proposition but his qualification is not in the present context germane.) This rule still

stands

Santam Versekeringsmaatskappy Bpk v Byleveldt 1973 (2)SA 146 (A) 150A-C; Southern Insurance Association Ltd v Bailey NO 1984 (1) SA 98 (A) 111D-F; 7 LAWSA par 1 and 17).

(2) Damages are assessed at the date of the delict (Philip Robinson Motors (Pty) Ltd v N M (Pty) Ltd 1975 (2) SA 420 (A) 428F-G; 429E). It is in respect of claims for specific performance that a later date may be the date to consider (ibid).

(3) There is a clear distinction between aquilian relief and restitutio in integrum(cf Zimmermann The Law of Obligation p680). The underlying principles of the one cannot simply be engrafted upon the other (as was done in Makwindi Oil supra at 199D).

(4) The principle of nominalism underlies the law of delict. It means

that a debt sounding in money has to be paid in terms of its nominal value irrespective of any fluctuations in the purchasing power of currency (SA

Eagle Insurance Co Ltd v Hartley 1990 (4) SA 833 (A) 839G-H; and compare Voet 12.1.24 and sec 2 of the Currency and Exchanges Act 9 of 1933).

It is convenient to illustrate the application of these principles with reference to a few examples: (a) A clerk of a stockbroker steals share scrip of a client and disposes of it. The client's claim for damages is calculated as at the day of the theft by determining the value of those shares on that day. (b) Similarly, if the plaintiff suffered a loss of a specific number of Krugerrand, his delictual claim will be for the value of those coins in rand as at the day of the wrong. It does not matter whether he felt his loss in gold coins, (c) A plaintiff banker deals in the ordinary course of his business in foreign currency and keeps substantial amounts of dollars in his vault. The defendant, a client, enters the vault in order to visit his safety deposit box. He is aware of the nature of the banker's business. He

negligently starts a fire and $lm dollar notes are destroyed. There can be no doubt that the defendant will be liable to pay as damages an amount in rand, calculated in rand as at the day of the fire.

Returning to the facts of the instant case, I fail to see why, simply because the plaintiff is a foreign plaintiff, these basic principles do not apply and why he should be treated differently. The argument that to do otherwise would mean that the plaintiff may be denied the amount of his actual loss (eg Elgin Brown case supra at 674G-H) misses the point - it is inherent in the law of delict and the principle of nominalism that a plaintiff may, at the end of the day, be out of pocket. In any event, any loss flowing from the depreciation of the local currency is not caused by the wrong (High and Pickering 1994 SALJ 270 at 282) and it seems to me to be unjust to condemn a defendant to the payment of damages which he had not caused. The argument advanced by Van Heerden JA in his judgment

concurring with that of that of the Chief Justice, namely that foreign currency is also money and not a commodity, must, with respect, also apply to my example (c). And once it applies to that example, why does it not apply to example (b)? I therefore agree as a matter of principle with Nestadt J (in the Voest case supra at 151B-C) that fluctuations in the value of currency - in casu since the date of the delict - have to be ignored.

This conclusion renders it strictly unnecessary to consider the reasoning of the English courts simply because their conclusion is in conflict with the principles of our law. However, if I understand the English rule correctly, the plaintiff is entitled to payment in the currency in which he normally conducts his business and not in the currency in which he sustained his loss. It was on this basis that the plaintiff was non-suited in Makwindi Oil supra (at 198E-199G). The appellant is a Canadian bank. No evidence was produced to show that it conducts its business normally in US

dollars. The fact that its immediate loss was felt in that currency is, on the Makwindi Oil approach, irrelevant. It seems to me that on this further ground the relief sought cannot be granted.

In conclusion, I am also not aware of any compelling reasons why, as a matter of public policy, our law has to adapt in this regard in order to conform with English law. One reason I can surmise is that it will bring our law in line with international trends. On the other hand, I do not know to what extent the rule has been accepted - if at all - in civil law countries. This is a relevant consideration because the issue relates to the principles underlying the law of delict and not the law of tort. Another reason may be that international trade requires such an adaptation. Against that it may be argued that the rule may well work within a more stable currency environment and in a developed economy. Whether South Africa can afford the luxury of this sophisticated rule, has not been shown. It has been

indicated that the rule has not found favour with the Legislature and it appears to me to be unacceptable to have one rule applying to admiralty cases, certain foreign judgments and foreign arbitral awards and another to all other cases. (It is in a sense ironical that the rule in damages claims was introduced into the English law in admiralty claims). The rule furthermore introduces an element of uncertainty and it enables a plaintiff to detrimentally affect the position of the defendant by means of delaying the proceedings. This is illustrated by the facts of this case: summons was issued on the last possible day, namely three years after the loss was suffered. It is already more than eight years since the dishonour of the bill. Another element of unfairness is this: strong currencies have low rates of interest and weaker currencies high rates. The order proposed will mean that the statutory interest payable on the judgment debt (calculated as from

the date of Roux J's judgment, namely 19 March 1992) will be the relatively high South African rate calculated on dollars.

The plaintiff suffered its loss when the bill was dishonoured i e on 8 July 1986. At that stage the rand:dollar exchange rate was 2,458. The plaintiffs loss was accordingly (2,458 x 2 580 (528,46) less (618 606,01 + 108 647,63) or R 5 615 931,09 and in my view the order of the court a quo should consequently be substituted with an order for payment of that amount.

LTC HARMS JA

VAN DEN HEEVER JA concurs