CASE NO. 24093

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

EX PARTE MINISTER OF JUSTICE IN

RE:

NEDBANK LTD v ABSTEIN DISTRIBUTORS (PTY) LTD AND OTHERS

AND

DONELLY v BARCLAYS NATIONAL BANK LTD

CORAM: CORBETT, CJ, NESTADT, VIVIER, STEYN,

JJA et NICHOLAS, AJA

HEARD: 10 MARCH 1995

DELIVERED: 30 MARCH 1995

J U D G M E N T

STEYN JA/

STEYN JA:

This is a matter submitted by the Minister of Justice for determination by this Court under section 23 of the Supreme Court Act, 59 of 1959. The section provides that

> "Whenever a decision in civil proceedings on a question of law is given by a provincial or local division which is in conflict with a decision in civil proceedings on a question of law given by any other such division, the Minister may, after consultation with the South African Law Commission, submit such conflicting decisions to the appellate division and cause the matter to be argued before that division, in order that it may determine the said question of law for the future guidance of all courts."

The submission is as follows:

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2.1 In Nedbank Ltd v Abstein Distributors (Pty) Ltd and Others, 1989 (3) SA 750(T), it was held (at page 754 D-E) that a clause in a deed of suretyship, which

reads as follows:

> '... that the indebtedness of the said debtors) to the said bank shall at any time be determined and proved by written certificate of a general manager or the manager for the time being of any branch of the said bank, and such certificate shall be binding on me/us and be conclusive proof of the amount of my/our indebtedness and will be valid as a liquid document against me/us in any competent Court...'

was to be regarded as contra bonos mores and therefore void in accordance with the judgment in SASFIN (PTY) LTD v BEUKES, 1989 (1) SA 1(A). For the sake of convenience the above-quoted clause and any similarly worded clause will be referred to as a 'conclusive proof clause'.

2 2 In DONELLY v BARCLAYS NATIONAL BANK LTD, 1990(1) SA 375 (W), it was held that a conclusive proof clause in a deed of suretyship, which reads as follows:

> 'I/We hereby agree and declare that the amount due, owing and payable (hereinafter referred to as 'the indebtedness') by the debtor and by me/us hereunder to the bank at any time (including interest and the rate of interest) shall be determined

> and proved by a certificate signed by any manager or accountant of the bank. It shall not be necessary to prove the appointment of the person signing any such certificate, and such certificate stating the amount of the indebtedness of the debtor and of myself/ourselves hereunder shall be binding on me/us and shall be conclusive proof that the amount of my/our indebtedness hereunder is due, owing and payable at the date of signature thereof, which certificate shall be valid as a liquid document against me/us in any competent court for the purposes of obtaining provisional sentence or summary judgment against me/us thereon.'

was not rendered bad in law by the judgment in SASFIN (PTY) LTD v BEUKES, supra. In arriving at this Ending the Court stated, inter alia, that it could find no indication in the judgment of SASFIN (PTY) LTD v BEUKES, supra, that it has such an extensive meaning that any conclusive proof clause in any contract is contrary to public policy and therefore bad and unenforceable (at pages 393 F-H).

3.

The decisions in NEDBANK LTD v ABSTEIN DISTRIBUTORS AND OTHERS, supra, and DONELLY v
BARCLAYS NATIONAL BANK LTD, supra, are in conflict

on a question of law, viz whether a conclusive proof clause in favour of a creditor in any contract per se offends against public policy, or not.

4.

As a result of the aforementioned conflicting decisions the South African Law Commission has been consulted, and it has recommended that the question referred to in paragraph 5, below, should be submitted to the Appellate Division for determination.

5.

In the aforementioned premises, the aforesaid conflicting decisions are submitted to the Appellate Division so that the matter can be argued in order that a determination be made on the following question of law for the future guidance of all courts, viz:

> 'Which of two conflicting interpretations of the decision of the Appellate Division of the Supreme Court of South Africa in the matter of SASFIN (PTY) LTD v BEUKES, 1989 (1) SA 1 (A) relating to the validity of a so-called 'conclusive proof clause' in favour of a creditor in an agreement correctly reflects the law, namely -
>
> (a) the interpretation of the Court in NEDBANK LTD

v ABSTEIN DISTRIBUTORS(PTY)LTD AND OTHERS, 1989(3) SA 750(T), that such a clause is contra bonos mores and therefore void regardless of the context of the agreement in which it finds itself; or

(b) the interpretation applied in DONELLY V BARCLAYS NATIONAL BANK LTD, 1990 (1) SA 375(W), where the Court found no indication in the judgment in the SASFIN-case of the proposition advanced by the defence in the DONELLY-case that any such clause in any contract between any parties is contrary to public policy and therefore bad and unenforceable."'

In this judgment the expression "conclusive proof clause" will have the same meaning as that set out in par 2.1 of the submission. SASFIN (PTY) LTD v BEUKES, 1989 (1) SA 1 (A), will be referred to as Sasfin and the aforementioned two conflicting decisions as Nedbank and Donelly respectively.

The question of law submitted in effect poses this inquiry, viz; in which of the two decisions is the Sasfin judgment correctly interpreted?

The correctness of the Sasfin decision is not here in issue. It is clearly accepted as correct in the submission. All this Court is asked to do is to determine which of the two conflicting decisions (if either) correctly stated the effect thereof.

In Sasfin it was held that a deed of cession executed by the debtor, Beukes, in favour of the financier, Sasfin (Pty) Ltd and certain of his creditors, was unconscionable, incompatible with the public interest and, therefore, void. A number of clauses in the deed were examined and found to be contrary to public policy. Clauses 3.24.1 and 3.24.2 were among those so found. Their terms, as set out in the majority judgment (p 11 E-I), are the following:

> "3.24.1 (T)he amount owing to the creditors by me/us at any time, the fact that it is due and payable, the rate of interest payable thereon, (and) the date from which interest is reckoned,... shall be deemed to be determined and proved by a certificate under the signature of any of and director of any of the creditors. It shall not be necessary to prove the

appointment of the person signing any such certificate. 3.24.2 Such certificate shall -

3.24.2.1 be binding upon me/us and

3.24.2.2 be conclusive proof of the amount due, owing and payable by me/us to the creditors and of the facts stated therein; and

3.24.2.3 be deemed to be a liquid document for the purpose of obtaining provisional sentence and/or any other judgment or order against me/us; and

3.24.2.4 constitute sufficient particularity for the purposes of pleading and trial in any action instituted by you against me/us; and

3.24.2.5 constitute sufficient proof to enable the creditors to

3.24.2.6 discharge any onus which may be cast upon it/them in law in any action; and

3.24.2.7 obtain any judgment or order;

The creditors shall, accordingly, not be obliged to tender any additional evidence over

> and above and/or in addition to such certificate at any hearing in any action or proceedings for a judgment or order." [The italicizing is Sasfin's]

There were two judgments in Sasfin. The majority and minority of the Court were however ad idem on the aforementioned finding in respect of clauses 3.24.1 and 2. The majority finding is in these terms (pp 14I-15D, 1989 (1) SA):

> "In terms of clause 3.24.1, the amount owing by Beukes to Sasfin at any time, the fact that it is due and payable and the rate of interest thereon
>
> > 'shall be deemed to be determined and proved by a certificate under the signature of any of the directors of any of the creditors'.
>
> The effect of the provisions of clause 3.24.2 is that such

certificate cannot effectively be challenged on any ground save fraud. It constitutes the sole memorial of Beukes' indebtedness, and is conclusive proof of such indebtedness and the amount thereof. These clauses purport to oust the Court's jurisdiction to enquire into the validity or accuracy of the certificate, to determine the weight to be attached thereto or to entertain any challenge directed at it other than on the ground of fraud. As such they run counter to public policy (cf Schierhout v Minister of Justice 1925 AD 417 at 424). Although perhaps not per se contrary to public policy, the provisions of clause 3.24.3.1 are indicative of the extreme lengths to which the deed of cession goes in curtailing the rights of Beukes. Clause 3.24.3.1 provides, inter alia,

> 'I/we hereby irrevocably appoint and authorise any of the directors of any of the creditors who signs any certificate issued in terms of 3.24.1 also to be my/our agent in rem suam for the purpose of signing and issuing such certificate. In signing and issuing such certificate the signatory shall be deemed to act also as my/our agent for the purposes thereof.'

Not content with the far-reaching consequences of the certificate as spelt out in clause 3.24.2, the deed of cession goes as far as to deem it that of Beukes' agent!"

In the minority judgment the following is said (at p 23 CD):

"(4) Klousule 3.24.2

> Ek stem saam dat die klousule in stryd met die openbare beleid is. Daar is 'n duidelike onderskeid tussen 'n bepaling wat meebring dat 'n sertiflkaat van 'n skuldeiser prima facie bewys van die omvang van 'n skuld is, en een wat aan die sertifikaat onweerlegbare bewyswaarde verleen. Ek deel egter nie my Kollega se twyfel aangaande klousule 3.24.3.1 nie. Indien dit alleen gestaan het, sou dit slegs meegebring het dat 'n sertifikaat prima facie bewys van die respondent se verskuldigheid sou daarstel. 'n Skuldenaar kan immers bewys dat 'n erkenning deur hom of sy verteenwoordiger aangaande die bestaan of omvang van 'n skuld verkeerdelik gemaak is. Vgl Du Plessis v Van Deventer 1960 (2) SA 544 (A)."

Sasfin (Pty) Ltd did not claim payment from Beukes and no such certificate was ever issued. Clause 3.24 however clearly provides that if and when issued, the author of the certificate would be a creditor of Beukes.

The central issue here is whether the Sasfin decision enunciated a general principle to the effect that in any contract a conclusive proof clause providing for a certificate of balance of which

a creditor is the author is contrary to public policy or whether it was an "ad hoc finding", restricted to the particular facts of that case.

In Nedbank the court opted for the former interpretation and in Donelly for the latter.

In Nedbank the plaintiff bank proceeded against certain sureties for payment of the overdraft debt owed it by the principal debtor which had been liquidated. The sureties pleaded i a that a conclusive proof certificate signed by the bank manager was contra bonos mores and void. Having dealt i a with Nedbank Ltd v Van der Berg and Another 1987 (3) SA 449 (W) and Standard Bank of SA Ltd v Neugarten and Others 1987 (3) SA 695 (W), Le Roux AJ proceeded as follows at 753F-754E:

> "Both counsel referred to the recent case of Sasfin (Pty) Ltd v Beukes 1989 (1) SA 1 (A). In that case various clauses in a deed of cession were found to be against public interest and the deed therefore void. One of the clauses found to be objectionable was one providing for a conclusive certificate of indebtedness. The relevant clause was dealt with at 14J-15D,

where Smalberger JA said: (The above-quoted passage is here set out.)

Mr Maritz argued that the particular clause was found to be void not in isolation but in conjunction with and having regard to all the other offending clauses. This he infers, inter alia, from the sentence reading 'although not per se contrary to public policy, ...' in the passage quoted above.

On my reading of this passage the learned Judge of Appeal merely wanted to indicate how harsh the consequences of the certificate were. One cannot infer from that reference an intention to convey that, standing alone, clause 3.24.2 would not be void. Any doubt is, however, removed when one has regard to the minority judgment at 23C where Van Heerden JA, in dealing with clause 3.24.2, states: (The above-quoted passage is here set out.)

Mr Maritz further submitted that because the Judges of Appeal, despite having been referred to the two WLD cases mentioned above, did not refer to them in the judgment specifically, those decisions are not overruled. However, those cases are not confirmed either. They are simply not mentioned. I am inclined to the view that, in accordance with the judgment in the Sasfin case, the clause under discussion must be regarded as contra bonos mores and therefore void."

The judgment in Donelly was delivered in an appeal from a magistrate's court decision. The plaintiff bank had obtained

judgment against a surety in the amount of the overdraft debt owed it by the principal debtor. Shortly before the hearing of the appeal a defence was raised that the conclusive proof clause in issue "was contrary to public policy and as such illegal and unenforceable".

Kriegler J dealt as follows with this defence and with the import of the Sasfin judgment, firstly at 381D-382A:

> "In casu Donelly seeks to raise a question of public policy. We would be remiss if we did not entertain the argument in support of that contention. It is proper that it should be adjudicated upon. Moreover, to my knowledge, this is the third time in as many weeks that this self-same defence has been raised. In each instance it was purportedly based on the as yet unreported Appellate Division judgment in the case of Sasfin (Pfy) Ltd v Hendrik Johannes Stephanus Beukes, delivered on 19 September 1988, case no 149/87.
>
> It seems that that judgment has come to be regarded as a free pardon for recalcitrant and otherwise defenceless debtors. It is decidedly not that. The judgment should be read in context and as a whole. First and foremost one should note, at p 12 of the typescript, an important caveat in the majority judgment of Smalberger JA. It is to this effect:

> 'One must be careful not to conclude that a contract is contrary to public policy merely because its terms (or some of them) offend one's individual sense of propriety and fairness. In the words of Lord Atkin in Fender v St John-Mildmay [1938] AC 1 at 12 'the doctrine should only be invoked in clear cases in which the harm to the public is substantially incontestable and does not depend upon the idiosyncratic inferences of a few judicial minds.'

It should also be emphasised, before turning to deal with the particular facts of the Sasfin case, that the maxim pacto sunt servanda is still a cornerstone of our law of contract. Nothing said or implied in the Sasfin case in any way serves to derogate from that important principle. Also, as was pointed out at p 13 of the judgment, 'public policy generally favours the utmost freedom of contract'.

It is clear from a reading of the judgments in the Sasfin case that the Court was there concerned with a most unusual contract."

Having quoted the relevant portions of clause 3.24 (as set out in Sasfin) the learned Judge proceeded as follows on pp 382F-384J:

"Having read the clause in its entirety, one is not surprised at

the words of the learned Judge of Appeal. However, one then looks at the whole of the judgment to see whether there is any warrant therein, express or implied, for the proposition now advanced on behalf of Donelly by Mr Kruger. That proposition is that the Appellate Division ruled in the case of ,Sasfin (Pty) Ltd v Beukes that any certificate of balance clause in any contract between any parties providing that the certificate would be conclusive proof of the amount of an indebtedness, is contrary to public policy and therefore bad and unenforceable.

I can find no indication in the judgment of such a wide statement. 1 would indeed have been surprised if the Appellate Division had intended so to do without at the same time dealing with innumerable cases in which such certificates of balance have been held to be good. I refer only to the two most recent ones, namely Nedbank Ltd v Von der Berg and Another 1987 (3) SA 449 (W) and Standard Bank of SA Ltd v Neugarten and Others 1987 (3) SA 695 (W).

To my mind the learned Judges, both in the majority and minority judgments, made it plain that their respective findings as to fatal non-compliance with the dictates of public policy were based on principle but applied to the peculiar terms of the contract before it.

The Appellate Division is not unaware of the existence of certificate of balance clauses containing such a conclusive proof provision in innumerable deeds of suretyship and mortgage bonds. If the Sasfin judgments were to say what Mr Kruger

leads in them, the result would be that vast numbers of default judgment, summary judgment and provisional sentence claims dealt with in this Division and in the Transvaal Provincial Division would be rendered bad in law if the contention put forward by Mr Kruger were good.

I would also find it most surprising if the Appellate Division had in Sasfin v Beukes impliedly held but omitted to declare unequivocally that an established banking practice, that has existed for many years, here and in the United Kingdom, is bad in law. In this regard I would refer to the case of Bache and Co (London) Ltd v Banque Vernes et Commerciale Paris SA [1973] 2 L1LR 437. In that case the Court of Appeal dealt with a certificate of balance clause in a contract between commodity brokers on the London Commodity Exchange and a French bank that had issued a guarantee. Lord Denning, McGaw LJ and Scarman LJ, in three separate judgments, had no difficulty in confirming that such certificates which would serve as conclusive proof were not bad in law. In particular Lord Denning, at 440, drew attention to the fact that one of the reasons why such a certificate is not bad is that the debtor is at liberty, should he subsequently discover that the certificate was wrong, to institute the appropriate action. In the course of argument I put to Mr Kruger whether he contended that that would not apply in a case such as the instant one. He was constrained to concede that it would apply.

Moreover, we are not dealing here with a money-lender who has

taken complete control of the debtor's book of a professional man and thereafter is empowered to deal with the debtors without any recourse to the professional man. What we have here is a banker/client relationship in which the terms of the overdraft facility were clearly spelt out. We have here a banker/client relationship between a recognised, reputable commercial bank of more than a century's standing in this country, which issued regular bank statements to the principal debtor. Those bank statements were before the court a quo. Two of them are before us. It is clear that they are in the standard form, reflecting credits and debits and identifying them.

It is also clear on the evidence of this case that the surety sought to be bound by the certificate of balance clause containing the conclusive evidence provision was not a stranger to the principal debt. Donelly was the controlling director or one of the two controlling directors and shareholders of the principal debtor. He was one of the two signatories on the principal debtor's banking account. It cannot be suggested that Donelly did not know full well precisely what was going on in that banking account from time to time.

Moreover, it is clear from the manner in which the trial was conducted that there was never any challenge of any substance to the accuracy of the certificate. There was not one word from either Donelly or his wife in support of such a challenge and, apart from the peripheral snippet of cross-examination as to the rate of interest referred to above, Greyling's evidence was not

challenged at all.

In my view this case differs toto caelo from Sasfin v Beukes and there is no principle laid down in that case which is applicable to the certificate of balance clause in this case."

In Nedbank and Donelly the factual position was in all material respects the same, viz that of a bank proceeding against a surety or sureties for payment of the amount of an overdraft owing to the bank by the principal debtor. The different decisions in those two cases were consequently determined by the conflicting interpretations of the Sasfin judgment, and not by the nature and effect of the respective facts.

An important common feature in Sasfin, Nedbank and Donelly was that the conclusive proof clause in each case provided that the amount owing to the creditor by the debtor would be proved by a certificate of which the creditor was the author.

In Nedbank Ltd v Van der Berg and Another 1987 (3) SA 449 (W), relied upon by Kriegler J, the certificate of balance was

issued under the hand of an employee of the bank in pursuance of the conclusive proof clause there in issue. The creditor was therefore in effect the author of the certificate. It was contended "that the term regarding the certificate might be contra bonos mores", but it was held (at 451-452) that the objection was met by what was said in Astra Furnishers (Pty) Ltd v Arend and Another 1973 (1) SA 446 (C) at 450 A-D. There, however, it was provided in the deed of suretyship (on which the plaintiff company's claim against the surety (second defendant) was based) that the surety undertook "to accept a certificate by the auditors of Astra Furnishers (Pty) Ltd as to the amount/s payable [by the principal debtor] as being the correct amount due and payable by myself. The author of this certificate was a third party and it can be equated to one signed by an engineer or architect. It is also at least arguable that the clause provided for nothing more than prima facie proof of the amount due. Astra Furnishers was consequently not a sound precedent for the Van der Berg decision.

(Astra Furnishers was upset on appeal but not on this point vide: Arend and Another v Astra Furnishers (Pty) Ltd 1974 (1) SA 298

(C)

In Standard Bank of SA Ltd v Neugarten and Others 1987 (3) SA 695 (W) the conclusive proof clause also provided that the amount due be proved "by a certificate signed by any manager ... of the bank". Here also the creditor was in effect the author of the certificate. Hemming J however upheld the clause in these terms at 700 A-D2:

> "No evidence would be necessary to resolve the dispute about the extent of applicant's claim if the 'certificate of indebtedness' is absolutely conclusive. The clause underlying the issue thereof spells out incontrovertibility of its evidential content. Cf S v Moroney 1978 (4) SA 389 (A). Unqualified finality strengthens the argument that applicant has become the exclusive judge of its own cause. But the submission that the underlying contract is because of such a result or for any other reason 'unconscionable' and invalid is against the weight of available relevant overseas authority. There such a final

> certificate has been regarded as being substantially on a par with determinations made by (non-employees), eg arbitrators or architects, and the underlying clause as being designed not to oust the jurisdiction of the Court but as an evidentiary device, optionally available, to avoid the necessity of itemized proof of individual debits. Dobbs v National Bank of Australasia Ltd 1935 CLR 643, a decision of the Australian High Court; Bache & Co (London) Ltd v Banque Vernes et Commerciale de Paris SA 1973 Lloyd's LR 437; Corbin Contracts (1962) s 1432 at 387. I respectfully regard the reasoning as sound."

The "overseas authorities" relied upon by the learned Judge were, however, by virtue of the reasoning therein on this aspect, not cogent authorities. In the Dobbs case, which was an appeal from the Supreme Court at New South Wales, the plaintiff bank sued a surety for payment of the amount owed it by the principal debtor. The bank relied on a conclusive proof clause. The defendant denied the correctness of the amount stated in the certificate which, in accordance with the said clause, had been signed by a manager of the bank.

The Court dismissed this objection. It dealt therewith in

these terms at 651-653:

> "The eighth clause is as follows:- 'A certificate signed by the manager or acting manager for the time being of your head office or of any other office of your bank at which the banking account of the customer shall for the time being be kept stating the balance of principal and interest due to you by the customer shall be conclusive evidence of the indebtedness at such date of the customer to you.' This clause does not purport to impose upon the bank the necessity of obtaining the certificate it describes. It is not a qualification of the undertaking to pay contained in the first clause. It does not make a certificate a condition precedent to recovery. The promise remains a promise to pay the amount owing; it does not become a promise to pay the amount owing if certified or a promise to pay only what is certified as owing. The bank could recover without the production of a certificate if, by ordinary legal evidence, it proved the actual indebtedness of the customer. But the clause, if valid, enables the bank by producing a certificate to dispense with such proof. It means that, for the purpose of fixing the liability of a surety, the customer's indebtedness may be ascertained conclusively by a certificate. It was contended, however, for the appellant that, upon its true construction, the clause did not make the certificate conclusive of the legal existence of the debt but only of the amount. It is not easy to

see how the amount can be certified unless the certifier forms some conclusion as to what items ought to be taken into account, and such a conclusion goes to the existence of the indebtedness. Perhaps such a clause should not be interpreted as covering all grounds which go to the validity of a debt; for instance, illegality, a matter considered in Swan v. Blair [(1835) 3 Cl. 4 Fin. 610, at pp 632, 635, 636]. But the manifest object of the clause was to provide a ready means of establishing the existence and amount of the guaranteed debt and avoiding an inquiry upon legal evidence into the debits going to make up the indebtedness. The clause means what it says, that a certificate of the balance due to the bank by the customer shall be conclusive evidence of his indebtedness to the bank. Upon this construction the appellant contends that the clause is void. The contention is based upon the view that it attempts to oust the jurisdiction of the Court upon an issue essential to the guarantor's liability and to substitute for the judgment of the Court the determination or opinion of an officer of the bank. This argument appears to us to involve a misunderstanding of the the principle upon which it professes to rely. It confuses two different things. A clear distinction has always been maintained between negative restrictions upon the right to invoke the jurisdiction of the Courts and positive provisions giving efficacy to the award of an arbitrator when made or to some analogous definition or ascertainment of private rights upon which otherwise the Courts might have been required to adjudicate. It has never been the policy of the law to

> discourage the latter. The former have always been invalid. No contractual provision which attempts to disable a party from resorting to the Courts of law was ever recognized as valid. It is not possible for a contract to create rights and at the same time to deny to the other party in whom they vest the right to invoke the jurisdiction of the Courts to enforce them……
>
> Parties may contract with the intention of affecting their legal relations, but yet make the acquisition of rights under the contract dependent upon the arbitrament or discretionary judgment of an ascertained or ascertainable person. Then no cause of action can arise before the exercise by that person of the functions committed to him. There is nothing to enforce; no cause of action accrues. But the contract does not attempt to oust the jurisdiction (Scott v. Avery [(1856) 5 HLC 811; 10 ER 1121]; Caledonian Insurance Co. v. Gilmour [(1893) AC 85]).
>
> What no contract can do is to take from a party to whom a right actually accrues, whether ex contractu or otherwise, his power of invoking the jurisdiction of the Courts to enforce it."

The Court then considered the nature and effect of arbitration and concluded as follows at p 654:

> "But it was never considered that the Court's jurisdiction was

ousted by an award, notwithstanding that it concluded the parties with respect to matters which otherwise would be determined by the Court. It is therefore a mistake to suppose that the policy of the law exemplified in the rule against ousting the jurisdiction of the Court prevents parties giving a contractual conclusiveness to a third person's certificate of some matter upon which their rights and obligations may depend. In Ex parte Young; In re Kitchin [(1881) 17 Ch D at p 672], James L.J. says:- 'If a surety chooses to make himself liable to pay what any person may say is the loss which the creditor has sustained, of course he can do so, and if he has entered into such a contract he must abide by it.'

There are many familiar kinds of contracts containing provisions which make the certificate of some person, or the issue of some document, conclusive of some possible question. The most conspicuous example, perhaps, is the certificate of the engineer or architect under contracts for the execution of works or the construction of buildings.

For these reasons we think the certificate of the officer of the bank is conclusive upon the parties of the amount and existence of the customer's indebtedness."

It is clear from the above passages that the Court equated a bank manager (or for that matter, a particular person in the employ

of the bank) with an arbitrator, engineer or architect, on the ground that they are "ascertained or ascertainable" persons. It did not, however, consider the position where such a person is an employee of the plaintiff. Where such an employee signs a conclusive proof certificate, the creditor is in effect the author thereof. It is an entirely different position where the author of the certificate is an independent third person, as was pointed out by Smalberger JA in Ocean Diners (Pty) Ltd v Golden Hill Construction CC 1993 (3) SA 331 (A) at 342F-343B.

In the Banque Vernes case the plaintiffs were commodity brokers who relied upon a conclusive proof clause in claiming from the bank (Banque Vernes et Commerciale de Paris SA) the amount owing by the principal debtor, Oversea Trading Company. Judgment had been given against the surety. He appealed against that order. The terms of the conclusive evidence clause there in issue were set out in the judgment as follows (438 col (2)):

"Notice of default shall from time to time, be given by you to us, [— That is by the London brokers to us, the French bankers —] and on receipt of any such notice, we [— the French bankers —] will forthwith pay to you the amount stated therein as due, such notice of default being as between you and us conclusive evidence that our liability hereunder has accrued in respect of the amount claimed."

Lord Denning, MR dealt as follows (pp 439 col 2 - 440 col 1) with the question of the validity thereof:

"The question is whether that conclusive evidence clause is conclusive against the party who signs the guarantee. Is he compelled to pay under it even though he alleges that the accounts are erroneous? As matter of principle I should think the clause is binding according to its terms. In Halsbury's Laws of England, vol. 15 at p. 278, it is said that

... the tendering of evidence which by statute or by agreement of the parties is declared to be conclusive, precludes evidence to the contrary, which is inadmissible, unless the evidence adduced is inaccurate on the face of it or fraud is shown ...

Mr. Libbert, on behalf of the French bank, urges that such a clause is invalid because it is contrary to public policy. He suggests that it is an attempt to oust the jurisdiction of the Court

by preventing the Court from itself inquiring into the rightness or wrongness of the amount. Alternatively he says that it is contrary to public policy because it makes the brokers judges in their own cause, and therefore it should be held by the Courts to be invalid.

Mr. Libbert very helpfully drew our attention to what seems to be the nearest case on the point. It is in the High Court of Australia:Dobbs v. National Bank of Australasia Ltd, [1935] 53 C.L.R. 643. ...

Mr. Libbert accepts the decision in that case; but he seeks to distinguish this present case because he says that in that case the certificate was to be given by the manager or officer of the branch at which the customer kept his account. Such a person was comparable to a named architect or an engineer. But in the present case, he said, it was no definite or nominated person. It was just the brokers themselves who gave the certificate for their own benefit. I cannot accept this distinction. The brokers must act by a manager in the office, just as a bank does. So here it seems to me the notice of default given by the English brokers is perfectly good. There is no public policy against it. On the contrary, public policy is in favour of enforcing it. The evidence shows that 'it is customary within the trade for a member of the association, dealing with a principal who is foreign, or whose reserves are uncertain, to demand a bank guarantee, not only to protect himself against his principal's

possible impecuniosity, but also so as to be able to put himself in funds straight away in the event of his being called upon to honour his personal liability on his principal's behalf. This was such a guarantee and was called upon only when the plaintiffs were themselves called upon to account to the clearing house which they did.'

Such being the commercial practice, it is only right that brokers should be able to turn to the French bank and say: 'On our giving you notice of default, you must pay.'

The French bank can in turn recover the sum from their own customer, the French trading company. No doubt they have taken security for the purpose.

This does not lead to any injustice because if the figure should be erroneous, it is always open to the French trading company to have it corrected by instituting proceedings against the brokers, in England or in France, to get it corrected as between them.

I would only add this: this commercial practice (of inserting conclusive evidence clauses) is only acceptable because the bankers or brokers who insert them are known to be honest and reliable men of business who are most unlikely to make a mistake. Their standing is so high that their word is to be trusted. So much so that a notice of default given by a bank or a broker must be honoured. It ranks as equivalent to, if not higher than, the certificate of an arbitrator or engineer in a

building contract. As we have repeatedly held, such a certificate must be honoured, leaving any cross-claims to be settled later by an arbitrator. So if a banker or broker gives a notice of default in pursuance of a conclusive evidence clause, the guarantor must honour it, leaving any cross-claims by the customer to be adjusted in separate proceedings.

In my opinion the Judge was quite right in giving full effect to the conclusive evidence clause."

At p 441 col (1), Megaw LJ, concurring, added the following:

"It is in my judgment not arguable that this clause in this contract offends against public policy. I would merely add this: it emerges from the judgment of Mr. Justice Starke in the case in the High Court of Australia Dobbs v. National Bank of Australasia Ltd. to which my Lord has referred, the passage in question being on p. 657, that in that well-known volume, the Encyclopaedia of Forms and Precedents, as long ago as, at any rate, the year 1925, there was included as a standard form of guarantee a guarantee which, for present purposes, is in this same form. Not only does that go back to 1925: it continues in the current edition of the Encyclopaedia of Forms and Precedents: the words are somewhat different from the present guarantee, but, for the reasons which my Lord has given, not

materially or relevantly different. Further, we have been told by Mr. Lloyd that within very recent times a guarantee given to a Swiss bank carrying on a part of its business in London, is substantially in the form which appears in the Encyclopaedia of Forms and Precedents."

And finally, at p 441 col (1) in fin - col (2), Scarman LJ said this:

"On the point of construction I would respectfully adapt to this case language used by Mr. Justice Simonds in a very different case. In Kerr v. John Mottram,Ltd, [1940] 1 Ch. 657, Mr. Justice Simonds, at p. 660, said:

> ... I have no doubt that the words 'conclusive evidence' mean what they say; that they are to be a bar to any evidence being tendered to show that the statements in the minutes are not correct ...

Applying that language to the facts of this case, it is, I think, clear beyond dispute that the words 'conclusive evidence' in this contract of guarantee are to be a bar to any evidence being tendered to show that the statements in the notice of default were not correct.

On the question of policy I do not wish to add anything to what has already been said by my Lord, the Master of the Rolls, and

> Lord Justice Megaw. Had I the slightest doubt about the effect of the clause, I think it would have been right to have accepted the submission of Mr. Libbert that there was a triable issue; but there is nothing in the clause which precludes a subsequent adjustment as between the English broker and the French customer of the bank. The result of that adjustment, if it takes place, will ultimately enure to the benefit of the bank, always assuming that the bank has used its opportunities to regulate its relationship with its customer in a businesslike way."

In the judgment delivered by Lord Denning a broker's "manager in the office" is equated with a bank manager, architect or engineer for purposes of a conclusive certificate of balance. I respectfully disagree with the reasoning of the learned Master of the Rolls. What I said above in this connection applies here and need not be repeated.

I likewise disagree with his statement that "this commercial practice (of inserting conclusive evidence clauses) is only acceptable because the bankers or brokers who insert them are known to be honest and reliable men of business who are most unlikely to

make a mistake". It is common knowledge by now that banks have computerised their operations. The reliability of a computer, no matter how sophisticated, depends not only on the quality and condition of the instrument itself, but also on the quality and performance of the operator thereof. Mistakes do occur. That banks indeed do make mistakes is illustrated by what occurred in Neugarten supra, where the bank admitted that the rate of interest had been incorrectly stated in the certificate of balance.

The identity of the creditor (and for that matter, the debtor), is to my mind irrelevant to the validity or otherwise of a conclusive proof clause. Were that ever to be allowed to be a relevant consideration, we would soon find ourselves in the legal quagmire so graphically and correctly described by a full bench of the Cape Provincial Division in Standard Bank of SA Ltd v Wilkinson 1993 (3) SA 822 (C). In dealing with the decision in Pangbourne Properties Ltd v Nitor Construction (Pty) Ltd and Others 4

Commercial Law Digest 314 at 316-317, (subsequently reported in 1993 (4) SA 206 W at 212) the Court expressed itself as follows at 830G-831B:

> "In the Pangbourne Properties case supra, Marais J opined (at 316-7) that what seemed important in deciding whether a contract of suretyship was immoral and/or contrary to public policy were the circumstances surrounding the contract and the relationships between the various actors. He sought to distinguish the case of the surety who enters into a suretyship agreement in which he binds himself for the debts of a newly-founded company with no assets and a share capital of R100 and the case of a surety who is only a friend or relative of the debtor and is persuaded to sign because a financial institution will not as a matter of policy lend to a debtor unless a surety is provided.
>
> We can, with respect, see no justification for the distinction. In both cases the surety enters into the agreement freely and voluntarily. It is true that in one instance the surety is really guaranteeing his own debt. He will benefit from the loan. In the other he will not. It may well be that to help a friend or relative who possibly would not otherwise obtain a much needed loan, he is persuaded to enter into the agreement. But he does not have to. He does so of his own free will (see Voet (loc cit); Proksch v Die Meester en Andere (Loc cit)).

> If once clauses come to be judged, as suggested by Marais J, against the purpose of the contract, its setting and the relationship between the parties, creditors will come to be faced by a multiplicity of defences by 'recalcitrant debtors' and sureties seeking to have their agreements, freely and voluntarily entered into, declared contra bonos mores. It will, we fear, give rise to a plethora of litigation based upon the 'last resort' defence of public policy. It will also no doubt, in such event, produce the many conflicting decisions on individual clauses that presently exist."

Which creditors, after all, are to be regarded as "honest and reliable" (Denning MR) or as "recognised and reputable" (Kriegler J) and which not? In a useful article in the South African Law Journal vol 110 (1993) Prof Kerr deals with this subject as follows on pp 672-673:

> "5 Are recognized reputable commercial institutions in a privileged position?
>
> Banks are among the most frequent litigants in cases such as those under discussion, as reference to decisions mentioned above shows. ...

> Kriegler J in Donelly's case at 384F-G referred to the respondent as 'a recognised, reputable commercial bank of more than a century's standing in this country'. I agree that such institutions can be trusted to give accurate certificates in the vast majority of instances; but (a) there is a small minority of instances in which such an institution can make a mistake: see the Standard Bank case, discussed in the next section of this note; (b) there are new banks recently established; and (c) there are persons or institutions other than banks and members of stock exchanges (or other exchanges, as in the Bache and Co (London) case) that are as worthy of trust. There is, as far as I am aware, no South African case (apart from the reference in Donelly's case at 384F, already quoted) in which it is stated, or from which it can be inferred, that a distinction is to be drawn between different kinds of creditors, and I am unable to suggest any, as I am of the opinion that there should be no such distinction in law (cf Standard Bank of SA Ltd v Wilkinson 1993 (3) SA 822 (C at 830F-832E)."

In Donelly Kriegler J relied upon the fact that the debtor, Donelly, knew full well precisely "what was going on" in the account in question (384H).

But the fact that the surety was not a stranger to the principal debt, is to my mind equally irrelevant. If he has sufficient knowledge of that debt he may well be in a good position to detect an error in the calculation of the amount stated in the certificate. But would he on that score be entitled to attack the accuracy of a certificate issued under a conclusive proof clause? I think not. That much appears from what was said in Dobbs and Banque Vernes supra, and from the meaning of the expression "conclusive proof" as explained in S v Moroney 1978 (4) SA 389 (A). Van Winsen AJA said the following at p 406 F-H:

> " 'Sufficient proof of a fact connotes proof which in the absence of countervailing evidence may be accepted by a court as establishing such fact. 'Conclusive proof of a fact connotes proof which a court is obliged to accept, to the exclusion of all countervailing evidence, as establishing such fact. When a statutory enactment prescribes that a document or a certificate by its production to a court constitutes 'sufficient proof of some stated fact or conclusion the effect of such enactment is that

> such document or certificate can in the absence of countervailing evidence constitute proof of such fact. 'Sufficient proof', unless the context in which it is used compels another conclusion, is equivalent to prima facie proof. However, where the enactment provides that a document or certificate will on production constitute conclusive proof of some stated fact then the effect of the enactment is to create a presumptio juris et de jure that the document or certificate establishes incontrovertibly the truth of that fact. No evidence may be led to contradict it. The distinction between 'sufficient' and 'conclusive' in relation to 'proof or to 'evidence' is well established."

This passage to my mind applies equally to a conclusive proof clause in contracts, Cf Nedbank Ltd v Van der Berg and Another, supra, at 451 H-J. On the other hand, the validity of such a clause will not be established by the failure of the debtor to question accounts, statements, etc, before commencement of litigation. Such failure does not necessarily amount to an acknowledgement of indebtedness in the amount claimed, and may be due to a variety of reasons.

In Neugarten Flemming J said at p 701 A that "((h)aving

had regard also to the decision in Senekal v Trust Bank of Africa Ltd 1978 (3) SA 375 (A) at 382 G-H, in the present case a pro tanto giving effect to the clause will be done for reasons which will appear)" The passage quoted is the following:

> "There might be several items to which such a certificate relates, some of which may appear to be unassailable while others may either be shown to be inaccurate or appear to be of dubious reliability, or might require some modification or adjustment. I can find no reason why in such circumstances the certificate is to be entirely disregarded merely because it is found or thought to be inaccurate or unreliable in certain respects."

The certificate in the Senekal case was, however, one of prima facie proof. Different considerations apply to such a certificate.

The possibility of recovery by a surety of amounts wrongly reflected in the certificate as owing by him, was one of the considerations relied upon by Kriegler J in Donelly, as appears from the quotation from his judgment, supra. He relied upon the judgment

of Lord Denning MR in the Banque Vernes matter. For convenience of reference that passage in Kriegler J's judgment, which appears at p 384 D-E of the report, is here repeated. It is as follows:

> "In particular Lord Denning, at 440, drew attention to the fact that one of the reasons why such a certificate is not bad is that the debtor is at liberty, should he subsequently discover that the certificate was wrong, to institute the appropriate action. In the course of argument I put to Mr Kruger whether he contended that that would not apply in a case such as the instant one. He was constrained to concede that it would apply."

In my opinion that is not a cogent consideration. It is difficult to conceive what the "appropriate action" could be. An action would of course lie against the principal debtor. But a surety is usually, and almost always, called upon to pay because of the principal debtor's inability to do so. It would almost invariably be throwing good money after bad were the surety to sue the principal debtor for the amount he, the surety, had been obliged to pay. By virtue of the

conclusive proof clause he would be debarred from proceeding against the creditor where his claim is based on a merely negligent mistake in calculating the amount stated in the certificate, where such mistake is not apparent on the face of such certificate.

In his afore-mentioned article Prof Kerr deals with this question as follows at 674-675:

> Christie 422, quoted with approval in the Bankorp case at 378C-D, lists 'mistake' as separate from 'inaccuracy on the face of the certificate', and Corbin on Contracts loc cit lists 'mistake', without referring to inaccuracy on the face of the certificate; while on the other hand Halsbury loc cit says only 'unless the so-called conclusive evidence is inaccurate on its face, or fraud can be shown'. The relevant document in the Standard Bank case is not quoted in the report in full, but it appears that one can infer that nothing on its face indicated that the calculation of interest was incorrect - it was evidence that did that: see section 6 of this note. It follows that our law appears to be that a so-called conclusive-proof clause can be challenged on the ground of mistake which does not appear on the face of the document. A fortiori, a mistake

> that does appear on the face of the document can ground a challenge.
>
> When evidence was heard in the Standard Bank case it became apparent that the mistake in the certificate was acknowledged. The court pointed out at 702D-G that once that stage had been reached there would be bad faith on the applicant's part if it proceeded with the action, and an exceptio doli could be raised by the respondent."

(Section 6 of the article is entitled "Can a creditor in whose favour a conclusive-proof clause exists make a mistake?", and reference is made therein to Neugarten.)

That a creditor can make a mistake in a certificate under a conclusive proof clause is undoubted. Humanum est errare. But to my mind a debtor can only avail himself of a non-fraudulent inaccuracy or mistake in a conclusive proof certificate if the creditor admits the non-fraudulent error. As set out above, that was the position in Neugarten. The reason therefor is that such an admission destroys the conclusiveness of the certificate and renders the conclusive proof clause inoperative. It is only in such a case that "a

so-called conclusive-proof clause can be challenged on the ground of mistake which does not appear on the face of the document".

A debtor could, however, challenge such a certificate on the ground that it is not the certificate provided for in the clause in issue. Extraneous evidence would be admissible to prove such fact. Should the challenge be successful there would be no valid certificate and, therefore, no conclusive proof of the amount owing. But that would not release the surety from his debt.

The debtor would also, to my mind, not be able to found his action against the creditor on the absence of an underlying liability, for the reason that proof of the amount owing, as stated in such a certificate, includes proof of liability. This appears from the above-quoted passages in the judgment in Dobbs, supra. Here also, for the sake of convenient reference, the particular passage, which appears at p 651 of the report, is repeated. It is in these terms:

> "It was contended, however, for the appellant that, upon its true

construction, the clause did not make the certificate conclusive of the legal existence of the debt but only of the amount. It is not easy to see how the amount can be certified unless the certifier forms some conclusion as to what items ought to be taken into account, and such a conclusion goes to the existence of the indebtedness."

In a separate judgment in Dobbs, Starke J added the following at p 657:

"It was contended that, upon a proper construction of the clause, the certificate was conclusive only of amount and not of liability. The words, however, are 'conclusive evidence of the indebtedness ... of the customer to you': That provision involves a consideration not only of the items that should go into the account, but of the liability of the appellant in respect of them."

In Donelly the clause in question provided i a that "such certificate stating the amount of the indebtedness of the debtor and of myself ... shall be conclusive proof that the amount of my ... indebtedness hereunder is due, owing and payable ...". It is clearly to

the same effect as the clause in Dobbs, supra, and the above-quoted remarks are, therefore, also applicable to the Donelly clause.

In Donelly Kriegler J also relied upon the basic rule pertaining to contracts that agreements are to be observed, as militating against conclusive proof clauses being regarded as contra bonos mores even where the creditor is the author of the certificate of balance issued under such a clause. This is apparent from the following passage in his judgment at 381 H-I:

> "It should also be emphasised, before turning to deal with the particular facts of the Sasfin case, that the maxim pacta sunt servanda is still a cornerstone of our law of contract. Nothing said or implied in the Sasfin case in any way serves to derogate from that important principle. Also, as was pointed out at p 13 of the judgment, 'public policy generally favours the utmost freedom of contract'. "

This, in my opinion, is also not a sound consideration, as appears from the following comment thereon by Prof Kerr in his said article at p 671:

> "At 381H-I the learned judge drew attention to the fact that 'the maxim pacta sunt servanda is still a cornerstone of our law of contract'. This is readily agreed; but the maxim applies only to agreements that are lawful contracts: see the authorities referred to in Contract chapter 7, especially at 150-1. Hence one cannot use the maxim as a ground for upholding an agreement which is alleged by one of the parties not to be a contract or for upholding a clause which is alleged to be against public policy."

Nothing more need be said about it.

In all the abovementioned decisions where the creditor was actually or in effect the author of a conclusive proof certificate, the relevant clause was upheld on the ground that the jurisdiction of the courts was not excluded. That was held to be so by virtue of the fact that such a clause did not exclude fraud and mistake ex facie the certificate from such jurisdiction. Those are, however, matters which will not usually be present in claims under such clauses. The area where disputes are most likely to occur, viz non-fraudulent mistakes by the creditor in arriving at the amount owing, which is set out in the

certificate of which he is the author, is, however, excluded from the courts' jurisdiction. It is precisely in that area where injustices are most likely to occur and where a debtor most needs the protection of the courts. In a note entitled "Conclusive Nature of a Certificate of Balance Revisited" in 1990 SAW 414-415, Advocate Hutchinson puts the point well in the following passage at 415:

> "In Bache & Co (London Ltd v Banqwe Vernes et Commerciale de Paris SA [1973] 2 Lloyd's LR 437 Lord Denning MR said (at 440) that 'this commercial practice' (in certain conclusive-evidence clauses) 'is only acceptable because the bankers or brokers who insert them are known to be honest and reliable men of business who are most unlikely to make a mistake'. In substance this was one of the same considerations raised by Kriegler J in distinguishing Donelly's case from Sasfin's. This reasoning, however, only tends to strengthen the case for declaring such clauses as contra bonos mores. If a certificate is inaccurate in the nature of things, its inaccuracy would more likely stem from a bona fide human error and not fraud. Reputability is no guarantee against such an error, and it is precisely for this reason that the court's jurisdiction to adjudicate on such an issue should not be ousted."

This passage is a fortiori applicable in a case where the creditor concerned is the author of the certificate of balance.

It is interesting to note that in the United States of America conclusive evidence clauses in contracts are held to be void by virtue of the serious limitation of the court's jurisdiction. In Williston on Contracts 3rd ed vol 14 p 906, par 1723 (1972) the following is, for example, said:

> "A provision in a contract of indemnity that the surety's voucher or certificate of expenditures shall be conclusive evidence of the indebtedness of the principal to the surety is held illegal;[8] but a contractual provision that certain acts or certain papers shall constitute prima facie evidence of liability or of a specified fact is not an illegal interference with the power of the courts over evidence."

In note 8 to this paragraph reference is made to a judgment of the Kansas Supreme Court of February 8 1930 in the matter of Fidelity and Deposit Company of Maryland v Davis. That was an appeal

from a District Court. The report of that case is i a to be found in the

American Law Reports (Annotated) vol 68 at 321. The headnote to that judgment (at 321) reads as follows:

> "A clause in a contract of indemnity given by a principal to his surety, reading as follows ...
>
> > 'And I further agree that all vouchers and other evidence of payment of any such loss, liability, costs, damages, charges or expenses of whatsoever nature incurred by the company or its attorneys shall be taken as conclusive evidence against me and my estate, of the fact and extent of my liability to the company',
>
> is contrary to public policy, and is void."

At p 323 col (2) of the report the following is said in the judgment:

> "Both sides admit that this Court has never decided upon the question of the validity of the 'conclusive evidence' clause, supra."

After examining certain decisions of other courts and disagreeing with an article by Wigmore in vol 16 of the Illinois Law Review, the Court

proceeded as follows at p 325 col (2):-

> "The agreement under consideration is more than a mere enlargement of contractual rights, or the establishment of a rule of evidence. It provides that the plaintiff may by his own ex parte acts, conclusively establish and determine the existence of his own cause of action. In short, he is made the supreme judge in his own case. ...
>
> In the present case the attempt is to provide that, after the alleged cause of action has accrued, the plaintiff shall be the sole and exclusive judge of both its existence and extent. Such an agreement is clearly against public policy."

This reasoning is in my estimation equally applicable to the type of contract here under consideration. It must be noted, however, that there is a division of opinion in the American courts on this question, (vid Williston op cit p 906 note 8 under "Contra")

Kriegler J found in Donelly that this Court's decision in Sasfin that the relevant conclusive evidence clause was contra bonos mores was based not only on principle but also on the "peculiar terms' of the deed of cession and, therefore, in essence, an ad hoc decision

not intended to be of general application. This emerges clearly from the following (already quoted) passage in his judgment at 383 F-I:

> "Having read the clause in its entirety, one is not surprised at the words of the learned Judge of Appeal. However, one then looks at the whole of the judgment to see whether there is any warrant therein, express or implied, for the proposition now advanced on behalf of Donelly by Mr Kruger. That proposition is that the Appellate Division ruled in the case of Sasfin (Pty) Ltd v Beukes that any certificate of balance clause in any contract between any parties providing that the certificate would be conclusive proof of the amount of an indebtedness, is contrary to public policy and therefore bad and unenforceable.
>
> I can find no indication in the judgment of such a wide statement. I would indeed have been surprised if the Appellate Division had intended so to do without at the same time dealing with innumerable cases in which such certificates of balance have been held to be good. I refer only to the two most recent ones, namely Nedbank Ltd v Van der Berg and Another 1987 (3) SA 449 (W) and Standard Bank of SA Ltd v Neugarten and Others 1987 (3) SA 695 (W).
>
> To my mind the learned Judges, both in the majority and minority judgments, made it plain that their respective findings as to fatal non-compliance with the dictates of public policy were based on principle but applied to the peculiar terms of the

contract before it." [My underlining]

In Ocean Diners, supra, Smalberger JA commented as follows at 342 D-G on Sasfin (wherein he wrote the majority judgment):

> "The remaining defence pleaded relates to the validity and enforceability of clause 25.7. Mr Duminy argued that, if the words 'conclusive evidence' in clause 25.7 meant (as they obviously do) 'finally decisive of the matter in issue' (ie the value of the works), the provision was contrary to public policy as it ousted the Court's jurisdiction to enquire into the accuracy and validity of the matter. This argument was founded on passages in the judgments of this Court in Sasfin(Pty) Ltd v Beukes 1989 (1) SA 1 (A) at 14I-15B and 23C-D. The remarks there made must be seen in their proper context. What rendered the particular provision under consideration in the passages referred to contrary to public policy was the authorship of the certificate sought to be relied upon against the debtor ('any of the directors of any of the creditors'), coupled with the conclusive nature thereof, seen in the context of the peculiar terms of the contract with which this Court was there dealing."

It is to be noted that whilst he clearly indicated in this passage that the

prime consideration in assessing clauses 3.24 (1) and (2) 2 was the authorship of the certificate of balance (the creditor or creditors of the surety) he seems to suggest that that was not the only reason for adjudging the section concerned to be contra bonos mores. One must, however, view a gloss of this nature with circumspection. The learned Judge was not there speaking on behalf of his colleagues who concurred in his judgment (and even less, for that matter, on behalf of the minority who concurred in assessing sec 3.24 to be bad in law). He was also clearly not reconsidering the assessment of that section. The said passage can, therefore, not be seen as anything more than a form of explanatory comment on the Sasfin finding.

Consequently, one must go back to the Sasfin judgments and establish from an analysis of them what the process of reasoning was and on what grounds clauses 3.24 (1) and (2) 2 were judged to be bad in law.

The passages in both judgments dealing with that section

do not suggest that anything other than the content and effect thereof was taken into consideration in assessing the section to be contra bonos mores.

On a perusal of both judgments it is to my mind clear that the court considered a number of suspect clauses in the deed of cession, assessed each such clause separately, then considered the cumulative effect of the clauses found to be contra bonos mores on the validity of the deed of cession as a whole, and came to the conclusion that the deed was thereby invalidated. I am strengthened in this view by the following passage from the majority judgment at p 17 D-H:

> "Most, if not all, of the clauses which offend against public policy are fundamental to the nature and scope of the security which Sasfin obviously required. They contain provisions which are material, important and essential to achieve Sasfin's ends; they go to the principal purpose of the contract, and are not merely subsidiary or collateral thereto. If those clauses were severed one would be left with a truncated deed of cession

containing little more than a bare cession. No doubt Beukes would have contracted without the offending clauses, as they served only additionally to burden, and not to benefit, him. But would Sasfin have been prepared to forego its substantially protected rights and contracts on that basis? This is a matter peculiarly within Sasfin's own knowledge. Yet, significantly, nowhere does it appear on the papers what Sasfin's attitude would have been in this regard. It seems to me that on the probabilities one may readily infer that without the rights and protection afforded by the offending clauses in the deed of cession, Sasfin would not have entered into either it, or the discounting agreement. (By saying this I am not suggesting that the invalidity of the deed of cession would bring down the discounting agreement— objectively determined the latter is not dependent for its validity upon the former.) More particularly is this so when one has regard to the cumulative effect of the invalid clauses. I am fortified in this view by the fact that Sasfin sought to enforce the deed of cession as a whole, notwithstanding that Beukes had contended earlier that certain clauses thereof were contrary to public policy, and that it was therefore invalid and unenforceable. This is indicative of how important the deed of cession, in its entirety, was to Sasfin. I accordingly conclude that the offending provisions of the deed of cession are not severable."

[the underlining is mine]

It is clear, therefore, that clauses 3.24 (1) and (2) 2 were assessed separately from the other suspect clauses and was found to be per se contrary to public policy. The reason for that finding is to my mind also clear, to wit, that the author of the certificate of balance was a creditor of the surety, and that the creditors were therefore judges in their own cause by virtue of the conclusive proof stipulation whereby the jurisdiction of the courts was excluded in a vitally important respect, namely determining, in the absence of fraud, the correctness or otherwise of the amount stated in the certificate.

Where Smalberger J refers in the above-quoted passage from his judgment in Ocean Diners to the contextual scene of sec 3.24, he probably had in mind the cumulative effect of the invalid clauses, as mentioned by him in the last-quoted passage from his judgment in Sasfin.

I conclude, therefore, that in Sasfin this Court in essence decided that any conclusive proof clause in terms of which the creditor

was the author of the certificate of balance was in any agreement per se against public policy and, therefore, invalid.

In Nedbank Le Roux J came essentially to the same conclusion as the one set out above. His interpretation of the Sasfin decision consequently reflects the law correctly.

The question of law submitted to this Court for determination as set out in par 5 on p 5 of the submission, is, however, not correctly framed in that in Sasfin this Court did not deal merely with a "conclusive proof clause in favour of a creditor in an agreement", nor did it find "that such a clause is contra bonos mores and therefore void regardless of the context of the agreement in which it finds itself".

There are many such clauses which are not contra bonos mores. An example of such a clause is to be found in the Ocean Diners case, supra.

Conclusive proof clauses invariably provide that a

document, usually a certificate, will be conclusive proof of the amount claimed, and usually indicate who the author thereof is to be. In many cases the author is to be an independent third person, such as eg an engineer, architect or auditor. Such clauses have repeatedly been held not to be contra bonos mores, as was the case in Ocean Diners.

What this Court dealt with in Sasfin was not, however, any such clause. It there dealt with a very particular type of conclusive proof clause, namely, where it is provided that the author of the certificate of balance was to be the creditor.

As it stands the question of law submitted cannot, therefore, be answered effectively by this Court because it does not correctly set out the cardinal facts. It was undoubtedly the intention of the Minister of Justice in submitting the question of law to this Court for determination to have the relevant facts correctly stated therein, because what he wanted to have answered by this Court was which of the two conflicting interpretations correctly reflected the law

as enunciated in Sasfin.

A failure to answer the question in its present faulty guise would render the whole submission futile. That should be avoided if at all possible. To my mind that can be avoided by correcting the question submitted so as to truly reflect the Minister's intention. This Court has the competence to do so. The question will accordingly be corrected by inserting the following words between the words "agreement" and "correctly" in the second last line of par 5 on page 5 of the submission, namely, "in terms whereof the creditor is to be the author of the certificate of balance issued under such clause".

The question of law submitted to this Court for determination, is, as corrected, therefore, answered as follows:

The interpretation of the Court in Nedbank Ltd v Abstein Distributors (Pty) Ltd and Others 1989 (3) SA 750 (T) of the decision of the Appellate Division of the Supreme Court of South Africa in the matter of Sasfin (Pty) Ltd v Beukes 1989

(1) SA 1 (A) relating to the validity of a so-called "conclusive proof clause" in favour of a creditor in an agreement in terms whereof the creditor is to be the author of the certificate of balance issued under such a clause, correctly reflects the law, namely, that such a clause is in itself contra bonos mores and therefore void regardless of the context of the agreement in which it finds itself.

M T STEYN JA

CORBETT, CJ)
NESTADT, JA) VIVIER,JA)
concur
NICHOLAS, AJA)