THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

CASE NUMBER 205/96

In the matter between:

STANDARD BANK OF

SOUTH AFRICA LIMITED Appellant

and

ONEANATE INVESTMENTS (PTY)

LTD (in liquidation) Respondent

CORAM: MAHOMED CJ, VAN HEERDEN DCJ, HARMS, ZULMAN et PLEWMAN JJA

Date of Hearing: 25 and 26 August 1997

Date of Judgment: 14 November 1997

JUDGMENT

A simple claim based upon an unpaid overdraft gave rise to litigation that began some seven years ago and, because of a number of spurious defences raised, grew out of hand. It resulted in a reported judgment of nearly seventy pages, raising some surprising points a number of which turned out to be irrelevant. The judgment is reported: 1995 (4) SA 510 (C).

The appellant initially sued the respondent in the court a quo for payment of the sum then computed at R1 011 010,65 together with interest and costs. For the sake of convenience I will hereinafter refer to the appellant as either 'the plaintiff or 'the bank' and to the respondent as either 'the defendant' or 'Oneanate'.

The basis of the claim was that the amount was owing to the bank by Oneanate on overdraft. In the alternative the bank alleged that during March 1989 Oneanate acknowledged its indebtedness to the bank and undertook to liquidate the amount owing ('the March

agreement').

Oneanate raised various defences to the claim. The first was that portion of the money, which it acknowledged having borrowed, had been "repaid". In this latter regard Oneanate relied upon a credit entry passed by the bank on 23 May 1988 to Oneanate's account in an amount of R627 079,69 which the bank subsequently reversed by debiting the account with R643 282,21 (being R627 079,69 plus interest). Oneanate contended that the bank was not entitled to reverse the entry. The second defence raised by Oneanate is that certain amounts which were debited to its account had prescribed. Further defences were raised by Oneanate which related to the quantification of any amount for which Oneanate might be liable to the bank. These defences raise questions as to the bank's practice of capitalising interest monthly on the overdraft on the effect of the in duplum rule in regard to the amounts claimed by the bank, and the appropriation of payments made by Oneanate. Based upon its contention that the bank was not entitled to reverse the credit, Oneanate made a claim in reconvention for certain interest payments.

The court a quo (Selikowitz J) found in favour of the bank" on the question of the reversal of the credit. It, however, found in favour of Oneanate in regard to the March 1990 agreement, certain portions of the plea of prescription, the capitalisation issue and the appropriation of payments.

Thereupon Selikowitz J made a provisional order requiring the parties to calculate the amount which the defendant was to pay to the plaintiff, with regard to the findings made. The parties were given an opportunity of agreeing on the amount in question and failing such agreement to again approach the court a quo for further directions. The parties were unable to agree upon the amount and after further argument the court a quo made a final order in terms of which the defendant was ordered to pay to the plaintiff the sum of R388 569,46 together with interest thereon at the rate of 15,5% per annum from the date of the judgment to date of payment. The defendant was also ordered to pay 70% of the plaintiffs costs subject to certain qualifications which are not relevant to this appeal.

The bank appeals, with the leave of the court a quo, against its

disallowance of part of its claim because of the findings in relation to the March agreement, prescription, the practice in regard to "capitalisation" of interest, appropriation of payments, the application of the in duplum rule and the costs order. Oneanate cross-appeals against the court a quo's findings concerning the reversal of the credit entry with the consequent dismissal of its claim in reconvention, aspects of the prescription issue and also the costs order.

It was common cause in the court a quo that if the bank was not entitled to reverse the credit entry, the defendant's liability on its overdraft would have been fully discharged by 25 January 1989. It would follow from this that a finding favourable to the defendant on the issue would have resulted in the dismissal of the plaintiff's claims and the granting of judgment on the defendant's claim in reconvention.

THE REVERSAL, OF THE CREDIT ENTRY

At the beginning of 1988 Oneanate was one of a number of companies effectively controlled by one Gerald Lubner. Oneanate

maintained a current account with the bank at its Long Street branch. Early in February 1988 the bank agreed to lend Oneanate an amount of Rl,2 million on overdraft. It is common cause that the overdraft was to bear interest on the outstanding balance at an annual rate of 2% above the bank's ruling prime rate of interest and that such interest would be calculated daily and debited monthly until repayment of the amount owed. The bank was also entitled to charge its customary bank fees and charges in respect of the account.

Pursuant to the agreement and on 9 February 1988 the bank advanced the sum of R1 100 127 to Oneanate. On 10 February 1988 a further amount of R100 000 was advanced. The amounts advanced were paid out on Oneanate's directions and debited to its account with the bank.

On 15 February 1988 a written agreement was concluded between Oneanate and the Karen Lubner Trust as sellers, on the one hand, and Union Discounting Corporation (Pty) Ltd as duly authorised agents for Jeffrey Hirsch Lurie and Kalman Isaac Lurie as buyers. In terms of this agreement ('the Agserv agreement') the sellers sold

"not less than four million shares and not more than 4,75 "million ordinary shares" in a company known as Agserv to the Luries at a price of 14 cents per share. The purchase price was, therefore, somewhere between R560 000 and R665 000. No evidence was led as to precisely how many shares were in fact sold to the Luries and consequently the final purchase price cannot be determined. The purchase price was to be paid by way of a credit note for R250 000, with the balance together with interest to be paid on or before 28 February 1989. The agreement also provided that if the sellers did not wish to receive a credit note, they could, on 14 days' notice, call upon the purchasers to make payment in cash. It was recorded in the agreement that in this event the Luries would be obliged to borrow the purchase price from a financial institution and Oneanate undertook to sign as surety and co-principal debtor in respect of such borrowings.

Shortly thereafter, and after an introduction by Lubner, the Lurie brothers arranged with the bank's Long Street branch for a loan on overdraft of R600 000 for which Oneanate would sign as surety. At the same time they applied to open a current account in the name of Mooi River Valley Farm (Pty) Ltd ('Mooi River'). Formal

resolutions by Mooi River to open the current account at the bank

were duly lodged. These resolutions provided that the signatories on the Mooi River account would be any one of its three directors, namely the two Lurie brothers and their sister, a Mrs Burman. The bank was fully apprised of the Agserv agreement and the purpose for which the Lurie brothers were seeking the loan of R600 000. Jeffrey Lurie, who testified at the trial, stated that the purchasers were never called upon to pay for the shares. It is probable from the evidence that the shares were, in fact, never delivered to the Luries. Lurie also testified that at no time was anyone authorised to debit the bank account of Mooi River and that Lubner was not advised that the account could be so debited.

One Erlank, who was at the time in question the manager of plaintiffs Long Street branch, testified that on 22 May 1988 Lubner telephoned him and instructed him to debit the Mooi River account and to credit the Oneanate account with R600 000 together with certain interest thereon. Erlank proceeded to cause the Mooi River account to be debited and the Oneanate account to be credited. He says that he did so because he trusted Lubner and because " 'n klient wat goed is kan ek nie sy woord in twyfel trek nie". He

assumed that Lubner and the Luries had a good relationship and he had no reason to doubt Lubner's authority. The credit to the Oneanate account was effected on the following day, 23 May 1988, by means of a general purpose credit. The interest of R27 079,69 which was credited was calculated by Erlank as being half of the interest that had been charged by the bank on the account for the period 9 February 1988 to 25 April 1988. Erlank's understanding was that he was to transfer half of the Oneanate overdraft of Rl,2 million together with half of the accumulated interest to the Mooi River account.

Erlank made no effort to contact the Luries before giving effect to Lubner's instruction that the Mooi River account be debited and the Oneanate account credited. In a letter dated 27 May 1988, Erlank wrote to Lubner personally, advising him of the amount owing on the Oneanate account, as well as the amount owing on the Mooi River account. In the letter he also "confirmed", "that should it be necessary for us to have to take legal action for the recovery of their overdraft or any amount owing to us we would first of all proceed against Mooi River Valley Farm (Pty) Ltd failing which we would proceed against K I Lurie and Mr J H Lurie and only finally

against Messrs Oneanate Investments (Pty) Ltd should this be necessary". The first time that Erlank communicated with the Luries about the debit to the Mooi River account was in a letter dated 2 June 1988 addressed to their agent, one Strydom. In the letter Erlank asked how the overdraft would be repaid. Upon receipt of Erlank's letter from their agent the Luries immediately telexed the bank asking how the figure of the overdraft was arrived at and upon what authority the amount had been debited. The bank then telexed Mooi River as follows:

> "In reply to your telex we advise as follows:
>
> 1. R600 000 plus interest on this amount since inception of R1,2 million overdraft on one of Gerald Lubner's accounts.
>
> 2. Gerald Lubner."

Mooi River's telexed response reads as follows:

> "In view of the fact that no debits were authorised by the signatories of Mooi River Valley Farms (Pty) Ltd, we hereby request you to immediately reverse these

debits."

At about this time the Luries had themselves become disillusioned about the Agserv transaction. According to Jeffrey Lurie, they had discovered that certain misrepresentations regarding the financial affairs of Agserv had been made. Without knowledge that the amount of R600 000 had been debited to the Mooi River account, the Luries had consulted their attorney, who on 24 June wrote a letter cancelling the sale.

On receipt of the telex from Mooi River calling for the reversal of the debit, Erlank wrote to Lubner advising him of what had passed between himself and the Luries. He asked Lubner to give further instructions to the bank. Lubner responded to Erlank's request as follows:

> "I will certainly not permit the reversal of the debits as suggested by Mr Lurie. The debits were effected to Messrs JH and KJ Luries' account by agreement with them and they cannot now change their minds. How they can suggest that no authority was given when they went so far as to provide you with unlimited suretyship as well as their financial statement, etc, escapes me."

By telex dated 30 June 1988 the Luries again demanded that the debit be reversed and instructed the bank to close their account. On the same day Lubner telexed Erlank requesting that the bank maintain the status quo, including Oneanate's suretyship, and asserting that there had been no variation of the Agserv agreement. Erlank's superiors nevertheless instructed him to transfer the amount by which Mooi River's account was then in debit back to the account of Oneanate, noting that this was being done because no authority had been received from Mooi River to accept the original debit. Erlank was also instructed to inform Oneanate of what had been done and to state that he had acted on the oral instructions of Lubner in anticipation of written confirmation from the directors of Mooi River, that this confirmation had not been received and that he had then been instructed to reverse the transaction by the directors of Mooi River. Erlank did not immediately carry out the instructions but again sent a telex to Lubner informing him that he would reverse the overdraft unless Lubner could provide documentary evidence of his authority to operate the Mooi River account. No such evidence was provided by Lubner. Lubner's response was again to assert that Erlank was in possession of the relevant agreement and the evidence of its implementation and that

he was acquainted with the fact that the agreement had been completed. He also threatened to hold the bank responsible should they act in defiance of his communication.

On 1 July 1988 the bank credited the Mooi River account and debited Oneanate's account with the sum of R643 282,21. This debit represented the original amount debited to the Mooi River account as increased by interest.

The court a quo found that the debit to the Mooi River account was irregular. This finding was not attacked before us. In summary, Oneanate's case on appeal in regard to this aspect of the matter was to the following effect. Whilst in general a bank may correct certain types of erroneous credits by merely passing reversing debits, the error, if any, in the present case was not such as entitled the bank to correct it. Its remedy, if any, was to sue Oneanate by way of a condictio. It was also contended that in any event the bank did not prove the mistake which it pleaded in reply, namely, an erroneous belief on Erlank's part that Lubner was duly authorised by Mooi River to give the alleged instruction to debit the Mooi River account.

In order to properly evaluate Oneanate's contentions it is necessary to have regard not simply to the entries in the bank's books when the credits were passed to Oneanate's account on 23 May 1988 and to the reversal of that credit by way of a debit on 1 July 1988 but also to the entire matrix of facts against which such entries came to be made. In addition, regard needs to be had to Oneanate's plea of payment and to certain admissions made by Oneanate at a pre-trial conference concerning the plea.

I have set out the matrix of facts above. As regards the pleadings and the admissions made at a the pre-trial conference the following is to be observed. In answer to the plaintiffs averments in its declaration (as amended from time to time), the defendant's plea averred "that by 25 January 1989 there was no further amount outstanding in respect of the account". In reply to a request for further particulars by the plaintiff to this averment the defendant stated that:-

> "Defendant's case is that if one excises from the said statements the debit entry of R643 282,21 passed on 1 July 1988 (which debit the defendant avers the plaintiff was not entitled to pass) together with the interest thereafter debited to the account and attributable to the said

amount of R643 282,21, and if one assumes the correctness of the remaining debits and credits passed to the account, the amount owing would (balancing such remaining debits and credits) have been reduced to nil by 25 January 1989".

At a pre-trial conference held on 28 May 1993 the plaintiff enquired from the defendant what justification there was for the debit entry made in the account of Mooi River and the credit entry made in the account of Oneanate. The plaintiff also enquired as to what facts and circumstances the defendant relied upon for the averment that the plaintiff was not entitled to debit the amount of R643 282,21 on 1 July 1988 (the "reversal" of the credit). The defendant replied as follows to these requests:-

1.2.1. "…….the amounts debited on 23 May 1988 to the Mooi River account and credited to the defendant's account represented an amount owing by Mooi River (as nominee of the Lurie brothers) to the defendant pursuant to the agreement constituting item 2 of the defendant's discovery and item 9 of the plaintiffs discovery; [presumably the Agserv agreement].

1.2.2. that even if the amount was credited to the defendant's account by the plaintiff in the mistaken belief that it (the plaintiff) would be entitled to debit the Mooi River account with the corresponding amount, such credit nevertheless constituted a payment to the credit of the account which could not be recovered by the

> plaintiff unilaterally by reversing the entry, the defendant referring further in this regard" to paragraph 2 below."

In paragraph 2.2 of the reply the following is recorded:-

> "Nevertheless and without derogating from the aforegoing, the defendant contends that there was no term of the overdraft agreement entitling the plaintiff to pass the said debit without the defendant's authority. Even if the payment which had previously been credited to the account on 23 May 1988 had been made in error (which is denied), it was not the type of error which could be corrected by a reversing entry. The proper remedy of the party thereby impoverished (whether the plaintiff or Mooi River) was to seek to recover the payment by a condictio (assuming that the requirements was such a cause of action could have been established, which is not admitted)."

As correctly pointed out by Mr Rogers who appeared for the defendant both in the court a quo and in this Court, Selikowitz J did not decide the issue on the basis of the case pleaded in its replication by the plaintiff but rather upon the basis of a tripartite agreement said to exist between Oneanate, Mooi River and the bank. Although raised by the plaintiff in its heads of argument on appeal, Mr Hodes who appeared with Mr Rose-Innes for the bank, conceded that reliance could not be placed upon any tripartite

agreement especially in the light of the fact that Mr Hodes at the trial had specifically put it to Lubner in cross-examination that there was no tripartite agreement.

I have some reservation as to whether upon a proper consideration of Erlank's evidence in its totality, it can be said, (despite the statement in his evidence to which 1 have previously referred), that he did not in fact labour under a bona fide but mistaken belief that the debit to Mooi River's account and the consequent credit to the account of Oneanate was authorised by Mooi River. I nevertheless believe, that even in the absence of any error on his part there is a sound basis for concluding that the bank was indeed entitled to reverse the entry made on 1 July 1988.

It was obvious from the conduct of the parties that the credit to the account of Oneanate on 23 May 1988 was conditional upon a recognition of the corresponding debit by Mooi River to its account. The purpose of the debit to the Mooi River account, on the evidence, and the simultaneous credit to the Oneanate account was to effect a payment by Mooi River to Oneanate which Oneanate could then utilise to make payment of part of its overdraft

indebtedness to the bank. Once such payment was not made by

Mooi River because it did not recognise the debit to its account it could not be said that Mooi River had paid anything to Oneanate and accordingly that Oneanate had paid the bank. In these circumstances no question of a condictio arises.

Reliance was placed in argument by Mr Rogers upon the case of B & H Engineering v First National Bank of SA Ltd 1995 (2) SA 279 (A). In that case there had been an actual payment by a bank to a third party. The court held upon those facts and because the bank in question had no right to recover the money that it paid out from the recipient of the money (B & H) it would in principle have been entitled to institute an enrichment action against its customer. In the present case there was no such payment and it cannot be suggested that the bank paid itself by passing the credit entry on 23 May 1988 or that it attempted to recover a payment made by itself to itself.

Entries on bank accounts may reflect valid juristic acts, but that is not necessarily so. Whilst in general it may be said that entries in a bank's books constitute prima facie evidence of the transactions so recorded, this does not mean that in a particular case one is

precluded, unless say by estoppel, from looking behind such entries

to discover what the true state of affairs is. So, for example, if a customer deposits a cheque into its bank account, the bank would upon receiving the deposit pass a credit entry to that customer's account. If it is established that the drawer's signature has been forged it cannot be suggested that the bank would be precluded from reversing the credit entry previously made. So too, if a customer deposits bank notes into its account the bank would similarly pass a credit entry in respect thereof. If it subsequently transpires that the bank notes were forgeries it can again not be successfully contended that the bank would be precluded from reversing the credit entry.

The onus rested upon the defendant to prove the payment that it pleaded (Pillay v Krishna and Another 1946 AD 946 at 958). If it

had succeeded in proving that the debit to Mooi River's account had been authorised by Mooi River then the simultaneous credit to its own account would have established a payment to the bank. The effect of its failure to establish the authorization means, as I have already pointed out, that Oneanate did not establish its defence of payment since there was nothing which could have passed lawfully

from Mooi River to Oneanate enabling the latter to discharge its indebtedness to the bank.

The additional defence, namely that certain letters from the Bank to Lubner "constituted an account settled between the parties" was not pursued. The question whether Erlank committed an excusable error in crediting Oneanate was not part of the bank's claim, but arose in reply to the defences already alluded to. Since Oneanate has failed to establish its defence, the reply was superfluous. If one assumes for a moment that Lubner believed, when he gave the instruction, that Mooi River was indebted to Oneanate and that he was entitled to give the instruction, there can be little doubt that Erlank, acting as he did, did so in the same belief. It is then a clear case of a common assumption which turned out to be false, in which event the status quo has to be restored (Fourie v CDMO Homes (Pty) Ltd 1982 (1) SA 21 (A)).

I accordingly conclude that there was no sound reason why the plaintiff, having credited Oneanate's account with R627 079,69 on 23 May 1988 upon the basis that Mooi River would in effect pay that amount to Oneanate so that Oneanate could in turn pay it over

to the bank, was precluded from reversing the credit when Mooi

River made no such payment.

PRESCRIPTION

The court below upheld a special plea relating to prescription in respect of three 'debts' but dismissed it in relation to a fourth (at p 558 B - C). The finding in relation to the fourth 'debt' is also the subject of the defendant's cross-appeal. I have referred to 'debts' in inverted commas because I believe that basic to Selikowitz J's reasoning is that he held that (at p 546 E - F):-

> "... on each occasion when the bank makes a payment on the express or implied instructions of a customer whose current account is not at the time of such payment sufficiently in credit to cover the payment, the bank lends the shortfall to the customer. Each such loan constitutes a separate debt." [Underlining added,]

Whether a separate advance constitutes a separate debt must be a question of fact and not one of law. The evidence does not address the issue and I would be loathe to base any decision on the correctness of the quoted dictum.

In order to understand the plea of prescription, it is necessary to summarise the salient facts as set out by the court below (especially at p 543 C - 544 I):

[1] The initial loan of Rl,2m was agreed upon on 5 February 1988. It was paid by way of two advances, namely on 9 and 10 February 1986. [2] The three debits concerned were passed during January 1989 to April 1990. [3] A simple summons was served on 26 November 1990. An amount of R1 011 010,65 was claimed, "being the amount due and payable to the plaintiff by the defendant at its special instance and request (plus charges and interest thereon to October 24, 1990)...". [4] The original declaration claimed the same amount but said that it was the balance due in consequence of the Rl,2m advanced during February 1988. [5] Because of the way the plea had been drafted, the bank amended its declaration more than once. [6] Finally, in consequence of a notice of intention to amend dated 1 June 1993, the bank, still only relying on the agreement of 5 February 1988, alleged that "(p)ursuant to and

in terms of the said agreement" it had "lent and advanced" on the different dates the different amounts. This notice of amendment was served more than three years after the debits referred to in [2] were passed. [7] The amount due to the bank as at the date of the summons, R987 762,03, was indeed less than that originally claimed,

Selikowitz J, Ending that the summons has to be read subject to the declaration, held that the declaration indicated it was the intention of the bank to sue in the summons for balance of the Rl,2m, that the claim in respect of the advances referred to in [2] above was only preferred when the amendment was sought, and that that was more than three years after those advances had been made. I therefore find it strange that he should have held, correctly so, that the debt must not be identified by reference to the plaintiffs subjective intention (at p 555 B). It is not necessary to pursue the issue because in my view, one may not, contrary to Selikowitz J's finding (at p 553 E), for the purpose of determining the plea of prescription, read the summons together with the original declaration

in order to identify the 'debt'.

The plaintiffs response to the special plea was that the simple

summons which commenced the action and which was served on the defendant on 26 November 1990, well within the relevant prescriptive period, effectively interrupted prescription in terms of s 15 (1) of the Prescription Act 68 of 1969 (the Act).

A simple summons is for a "a debt or liquidated demand". In terms of Uniform Rule 17 (2) (b) such a summons is required to be "as near as may be in accordance with form 9 of the First Schedule" to the rules. The words "as nearly as possible" can "hardly be taken at their full face value" (per Schreiner JA in Trans-African Insurance Co Ltd v Maluleka 1956 (2) SA 273 (A) at 277 A, dealing with the previous Transvaal Rule 19 which contained a similar phrase). Form 9 requires that the plaintiffs cause of action be set out in concise terms. All that is required is that " the claim be set out with sufficient clarity for the Court to decide whether judgment should be granted and for the defendant to be made aware of what is being claimed from him" (per Berman et Selikowitz JJ in Volkskas Bank Ltd v Wilkinson and Three Similar Cases 1992 (2) SA 388 (C) at 395 A). As stated by Tebbutt J in BW Kuttle & Association Inc v O'Connell Manthe and Partners Inc 1984 (2) SA

665 (C) at 668 C-D:-

> "The object of a summons is not merely to bring the defendant before Court; it must also inform the defendant of the nature of the claim or demand he is required to meet. But it need do no more than that. It need not go into minute particulars. It is for this reason that a Supreme Court summons has been described as 'merely a label' ....or 'a general indication of claim'."

A simple summons stands on its own feet. So, for example, a plaintiffs right to obtain summary judgment will be adjudicated upon in the light of averments made in the summons. There can be no doubt that the simple summons in the instant matter sets out a "cause of action". This "cause of action" is based upon a claim for an amount due and payable by the defendant to the plaintiff in respect of monies lent and advanced to the defendant by way of overdraft at the former's special instance and request. This is sufficient particularity to enable the defendant to be aware of what was being claimed from it and is sufficiently clear to have enabled a court to have decided whether to have granted judgment on it.

In any event and as pointed out by Eksteen JA in Sentrachem Ltd

v Prinsloo 1997 (2) SA 1 (A) at 15 H - 16 B, it is not even, necessary for the purposes of interrupting prescription that a summons, in terms of which a creditor seeks to obtain payment of a debt, sets out a "cause of action". Even a summons which does not set out a "cause of action" can nevertheless serve to interrupt prescription of the debt claimed. The only qualification is that the summons must not be so defective that it amounts to a nullity.

At the heart of the finding of the court a quo in regard to the question of prescription was the view that it took that the amendment envisaged to the plaintiffs declaration in June 1993 introduced a "cause of action" or "causes of action" not set out or at least foreshadowed or embraced, in the simple summons served in November 1990 read with the original declaration.

Colman J pointed out in Mazibuko v Singer 1979 (3) SA 258 (W) at 265 D - G that the expression "cause of action" can be misleading. It is a technical term relating to pleading, and in that sense it carries a connotation which is inapposite when one is looking to see whether or not the running of prescription has been interrupted. His following remarks are also particularly apposite

when considering the question of the interruption of prescription:-

> "That the test in relation to an interruption of prescription cannot be based on an identity between the cause of action (in the narrow sense) which was previously relied on by the plaintiff and the cause of action which he now seeks to rely upon, is
>
> ,
> perhaps best illustrated by the cases in which it was held that a summons may interrupt the running of prescription even if it discloses no cause of action……
>
> The effect of those cases, as I understand them, was that in deciding whether prescription was interrupted, in relation to a particular claim, by prior process served during the prescriptive period, one looks to see whether in the earlier process the same claim was preferred, not whether the same cause of action (or any cause of action) was made out in the earlier process. As pointed out in one of the cases, it is inaction, not legal ineptitude, which the Prescription Act is designed to penalise."

(at 265 G - 266 A)

(See also the minority judgment of Trollip JA in Evins v Shield Insurance Co Ltd 1980 (2) SA 814 (A) at 825 F - H).

In terms of s 15 (1) of the Act the running of prescription is interrupted by the service on the debtor of "any process" whereby

the creditor claims payment of the debt. S 15 (6) defines "process", for the purposes of the section, as including, inter alia, "any document whereby legal proceedings are commenced". The simple summons in this matter is clearly a document which commenced legal proceedings quite independently of any declaration or amended declaration which was subsequently filed (cf Mias De Klerk Boerdery (Edms) Bpk v Cole 1986 (2) SA 284 (N) at 286 A to 287 E and Group Five Building Ltd v Government of the Republic of South Africa (Minister of Public Works and Land Affairs) 1991 (3) SA 787 (T) at 791 A - D).

The real question which arises is whether the subsequent pleading is inconsistent with the claim proffered in the initiating summons. In the instant case I can see no inconsistency between what is averred in the plaintiffs amended declaration of June 1993 and what is averred in its simple summons. The plaintiffs declaration as finally amended indicates that the plaintiff was seeking to enforce the same debt referred to in its simple summons or a debt which is cognisable in the simple summons. The amendment merely clarified or added details which do not appear in the simple summons. Colman J articulated the matter in the form of a single

question in Mazibuko's case (supra) at 266 B - C:-

> "The question to be asked, therefore, is this one: 'Did the plaintiff, in the earlier process, claim payment of the same debt as now forms the subject-matter of the claim which is said to be prescribed?' If the answer is in the affirmative, prescription has been interrupted, even if one of the grounds upon which the claim is now based differs from the ground or grounds relied on at the earlier stage."

If one has due regard to the fact that the concept of "a debt" for the purposes of the Act, is wider than the technical term "cause of action" then one is driven to conclude that in this case the simple summons claimed payment of the same "debt" which forms the subject matter of the claims which are said to be prescribed. (Sentrachem Ltd v Prinsloo(supra) at p 15 E - H).

I am also of the view that the facts averred in the plaintiffs declaration in relation to the three debits which the court a quo held had prescribed were "part and parcel of the original cause of action" and merely represented a fresh quantification of the original claim "or the addition of further items" to make up the claim based on monies lent and advanced referred to in the simple summons (cf the remarks of Corbett JA in the majority judgment in Evins v Shield

Insurance Company Ltd (supra) at 836 D - E).

The plaintiffs simple summons being merely "a label", the cause of action in the sense that I have described above was, in the words of Schreiner JA in Trans-African Insurance Co Ltd v Maluleka (supra) at 279 C, "insufficiently or imperfectly set out" but nevertheless "relied upon" throughout.

I thus conclude that the three advances made in 1990 which the court a quo held to have prescribed could be fairly said to have been included in the amount of R1 011 010,65 which was described in broad terms as money lent and advanced by way of overdraft and interest.

In the light of the foregoing the fourth debit (held to have been discharged by the court below) need not be considered. In any event, because of the circumstances of that debit, I agree with Selikowitz J (at p 558 D - 559 H) that the debit did not represent an advance on the overdraft account. It was a separate transaction covered by a separate credit.

In all the circumstances the special plea of prescription is bad.

THE MARCH AGREEMENT

The conclusion in regard to prescription makes it unnecessary for me to deal with appellant's cause of action based on the March agreement because it was an alternative formulated on the basis that the special plea of prescription was to be upheld .

Before I turn to deal with capitalisation as an issue in this case, it is convenient to refer first to the in duplum rule which is undoubtedly part of our law. It provides that interest stops running when the unpaid interest equals the outstanding capital. When due to payment interest drops below the outstanding capital, interest again begins to run until it once again equals that amount. (LTA Construction Bpk v Administrateur, Transvaal 1992 (1) SA 473 (A)).

It is common cause that, subject to what is later said concerning

appropriation, when summons was served the interest element of the

claim did not exceed the amount of the outstanding capital and, for that simple reason, the application of the rule did not arise at that stage. Because of the delays in the litigation the in duplum rule only became of concern well into the life of the litigation. Because of this, a number of subsidiary questions arise. The first concerns capitalisation. (The other will be dealt with subsequently.) It reared its head in response to the plea of in duplum. What the bank then alleged was that due to the practice of banks to capitalise interest, interest once capitalised, looses its character and becomes capital. Therefore the in duplum rule cannot apply to overdraft accounts. This practice, it was alleged, is long established, notorious, reasonable, certain and does not conflict with the positive law. The capitalisation response gave rise to an extensive excursus in the judgment of the court a quo (at p 560 G - 572 E).

A moment's reflection brings one back to the basic question of whether the pleaded legal effect of the commercial practice to capitalise is in conflict with a rule of positive law (the in duplum rule) which the parties cannot by agreement or conduct alter - in Afrikaans, "dwingende positiewe reg" (Golden Cape Fruits (Pty)Ltd

v Fotoplate(Pty) Ltd 1973 (2) SA 642 (C) 645 H). The Commercial Bank of Zimbabwe Ltd v MM Builders and Suppliers (PVT) Ltd and Others and Three Similar Cases 1997 (2) SA 285 (ZHC) case correctly I believe, held that the in duplum rulee could not be waived (at p 321 D - 322 D). So, too, Leech and Others v Absa Bank Ltd 1997 (3) All SA 308 at p 314 G - H (W). The rule is one based on a public policy designed to protect borrowers from exploitation by lenders (LTA Construction Bpk v Administrateur, Transvaal (supra) at p 482 F - G). As such it cannot be waived by borrowers and cannot be altered by banking practice (cf Morrison v Angelo Deep Gold Mines Ltd 1905 TS 775 at 781 and Ritch and Bhyat v Union Government (Minister of Justice) 1912 AD 719 at 734 - 735).

When this was put to Mr Hodes during the course of argument in this Court he fairly conceded that he had no answer to the proposition dealt with in the preceding paragraph and he further conceded the correctness of the finding of the court a quo in relation to the issue. As pointed out by Selikowitz J:-

> "Words like 'capitalisation' are used to describe the method of accounting used in banking practice. However, neither the description nor the practice itself affects

> the nature of the debit. Interest remains interest and no methods of accounting can change that", (p 572 C - D).

An examination of the bank statements in this matter reveal simply that compound interest was charged and added to the previous balance. Plainly if the bank was entitled to capitalise interest in the sense suggested by the plaintiff, namely to regard each charge of interest as going to increase the capital amount of the debt, this would make serious inroads upon the in duplum rule. If interest were to become capital the capital amount of the debt would always be increasing and the bank would run no risk of a lesser capital amount being the subject matter of the rule.

As correctly pointed out by Mr Rogers the practice of "capitalisation" of interest by bankers does not result in the interest loosing its character as such for the purposes of the in duplum rule. Furthermore, if lenders were entitled to employ the expedient of a book entry to convert what is interest into capital, this would afford an easy way to avoid not only the in duplum rule but also the provisions of the Prescription Act and the Usury Act 73 of 1968 (where such provisions would otherwise be applicable). When interest is compounded it remains interest. (Cf Rooth & Wessels v

Benjamin's Trustee and The National Bank Ltd 1905 TS 624 at

633-634 and Trust Bank of Africa Ltd v Senekal 1977 (2) SA 587

(W) at 600 B-F).

With reference to both English and South African authorities, Selikowitz J correctly summarised the law on the matter in the following terms:-

> " After considering the evidence and weighing the views of the many eminent Judges referred to above, I conclude that there is no basis for saying that the interest debited by a bank to an overdrawn current account and added to the total amount outstanding loses its character as interest and becomes capital or anything else. The debit balance shown in a customer's bank statement is made up of separate debits, each one of which has its own identity and origin. Some arise from moneys lent and advanced, others from the bank's service charges or commissions, still others from taxes or even from the sale to the customer of stationery such as cheque or deposit books. The lumping together of all the amounts which are owed to the bank and which remain unpaid does not change their origin or their nature."

(p 572 A - C).

In a carefully reasoned judgment in the High Court of Zimbabwe in Commercial Bank of Zimbabwe Ltd v MM Builders and Suppliers (PVT) Ltd and Others and Three Similar Casese supra at p 304 D -

311 H, Gillespie J (Smith and Blackie JJ concurring) - again after considering the effect of both English and South African cases and after receiving evidence on affidavit of banking practice much to the same effect as the evidence led in this matter - reached the same conclusion on this issue as did Selikowitz J.

Counsel for the bank in their heads of argument submitted that the a passage in the judgment of Botha JA in Du Toit en 'n Ander v Barclays Nasionale Bank Bpk 1985 (1) SA 563 (A) at 568 D - H supported, at least by implication, the proposition that once interest is capitalised it looses its quality as interest. The way I read the remarks, they were not intended to be of general application but only to be of application to the particular facts of the case being considered by the court. In any event it seems to me that the remarks are obiter and insofar as they may be inconsistent with the authorities to which I have referred, I have to disagree respectfully.

APPROPRIATION OF PAYMENTS

The significance of how to properly appropriate payments

admittedly made by Oneanate to the bank assumes importance in deciding the capital amount of the debt owing to which the in duplum rule was to be applied. As was pointed out, it is common cause that, subject to the argument concerning appropriation, when summons was served, the interest element of the claim did not exceed the amount of the outstanding capital. By allocating payments to the account to capital and not to interest the court a quo was able to apply the in duplum rule to the debt prior to summons. Selikowitz J proceeded to develop special new rules concerning appropriation for banks and like institutions (at p 573 F - 576 E).

He held applying the so called rule in Clayton's case (Devaynes v Noble; Clayton's case (1816) 1 Mer 572: 35 ER 767; [1814 - 23] All ER Rep 1) that, "in the absence of effective appropriation by the customer or the bank, the rule in Clayton's case applies in our law to current accounts with banks for so long as the account is not affected by the in duplum rule. As soon as - and for so long as - the in duplum rule suspends the running of further interest, all credits to the account should be appropriated to pay the interest

before they are applied to pay the capital." (p 576 C - D).

Clayton's case concerned the appropriation of payments made into a bank account. Sir William Grant MR, after setting out the general principles relating to appropriation of payments, recognised the debtor's right to make an allocation, and in absence thereof the right of the creditor to appropriate. He found a conflict of principle as to whether the creditor was entitled to exercise any such right ex post facto. He considered it unnecessary to resolve such conflict in the circumstances holding that:-

> "But this is the case of a banking account, where all the sums paid in form one blended fund, the parts of which have no longer any distinct existence. Neither banker nor customer ever thinks of saying, this draft is to be placed to the account of the £500 paid in on Monday, and this other to the account of the £500 paid in on Tuesday. There is a fund of £1000 to draw upon, and that is enough. In such a case, there is no room for any other appropriation than that which arises from the order in which the receipts and payments take place, and are carried into the account. Presumably, it is the sum first paid in, that is first drawn out. It is the first item on the debit side of the account, that is discharged, or reduced, by the first item on the credit side. The appropriation is made by the very act of setting the two items against each other.

> Upon that principle, all accounts current are settled, and particularly cash accounts.....
>
> If appropriation be required, here is appropriation in the only way that the nature of the thing admits. Here are payments, so placed in opposition to debts, that, on the ordinary principles on which accounts are settled, this debt is extinguished." (At 793 of the English Reports).

As pointed out by Gillespie J in his discussion of Clayton's case in the Commercial Bank of Zimbabwe case (supra) at p 316 H - 317 A, it is important to note two distinguishing features:- First, the facts in the matter showed a system of accounting involving a passbook issued to the customer showing the bank as debtor, the customer as creditor and ruled in two columns for debtor and creditor with chronological entries on each side as the transactions were effected. Second, the competing debits in issue in Clayton's case were all capital debits. Additionally, as pointed out by Gillespie J, due regard must be had to the words presumably it is the sum Erst paid in that is first drawn out' in the dictum quoted above. The significance of these latter words is demonstrated in Deeley v Lloyds Bank Ltd [1912] AC 756 (HL) at 771 where Lord Atkinson commented as follows:-

> "It is no doubt quite true that the rule laid down in Clayton's case is not a rule of law to be applied in every case, but rather a presumption of fact, and that this presumption may be rebutted in any case, by evidence going to shew that it was not the intention of the parties that it should be applied."

On the facts of Deeley's case it was held that the presumption had not been displaced and that payments made to the debtor's account after notification of a second mortgage bond ought to have been taken as having been appropriated to an earlier indebtedness, namely that under a first mortgage bond. (In this case there was a competition between two capital debts and not between capital and interest components of the same debt as is the situation in casu.)

The following remarks of Gillespie J in the Bank of Zimbabwe case (supra) at p 318 B are particularly apposite:

> "The important principle once again is that the so-called rule in Clayton's case is no more than a factual presumption arising from the general circumstances pertaining to the keeping of a current account by a banker in the absence of any express appropriation by either party."

There is thus clearly no room for the operation of the Clayton

presumption where the facts of the case do not support such a presumption. The facts in casu certainly do not support any such presumption. Oneanate's account was certainly not "ruled" in the manner described in Clayton's case nor does any question of two competing capital debts arise.

Once one accepts that the Clayton rule amounts to no more than a presumption of fact, there is no warrant for its adoption in the present case. In any event nothing is to be derived from the way in which banks keep their books to support a factual presumption of the type contended for. The evidence led at the trial reveals no more than that banking practice is to calculate interest accrued on a daily balance and then to simply to add it monthly to the previous balance owing so as to reflect a single balance figure from which deposits made to the account are deducted.

The following remarks of Gillespie J in the Commercial Bank of Zimbabwe case (supra) at 318 B - D apply with equal force to our law:-

> "Properly examined, it seems to me that the rule in Clayton's case cannot possibly

> apply to our law and practice of banking so as to justify the appropriation of credits in an overdrawn current account first to capital and then to interest accrued. As regards law, this is because a distinction must be drawn between the situation of competing principal debts and debits relating to capital and interest accrued on the same debt."

Whilst it is true that Wessels, The Law of Contract in South Africa (2 ed vol 2 par 2310 at 641) refers to the rule in Clayton's case with apparent approval, the author does not do so in the context of the appropriation of interest debits but where there are capital debts of differing ages. The passage in Wessels was approved by De Wet JP in Volkskas Bpk v Meyer 1966 (2) SA 379 (T) at 382 C - D but applied out of context without any motivation.

I agree with the view expressed by Gillespie J in the Bank of Zimbabwe case (supra) at 318 H to the effect that it would be better to state the rule of appropriation to interest first and then to capital not as an application of the rule that the appropriation is to the most onerous or burdensome debt first, but rather as a rule in its own right (cf the judgment p 572 I - 573 B where Selikowitz J sets out the rule correctly with reference to authority in our law going back

to 1888). The rule is set out by Wessels (supra) in para 2308 (xi)

as follows:-

> " Where a debt produces interest, the money paid must be applied in the first instance to the payment of the interest and then to the capital (C. 8.42(43), 1; Bank of Africa v Craven, N.O., 1888, 5 H.C.G. 112). Even if the payment is made on account of principal and interest, it will by law be appropriated first to the interest and then to the capital (D. 46.3.5.3). If no mention is made of the principal, but only of the interest, the surplus after paying the interest will nevertheless be appropriated to the capital (D. 46.3.102), provided the capital is then due."

A further difficulty posed by the application of the Clayton rule in a case such as this, which was recognised by Selikowitz J, is the incompatibility of the Clayton rule with the in duplum rule. This incompatibility is evident in the application of the Clayton rule when the in duplum rule is in operation. It results in the debtor being granted a double benefit. Selikowitz J sought to overcome this difficulty by tempering the application of the Clayton rule at the conclusion of his judgment by applying it only to "current accounts with banks for so long as the account is not affected by the in

duplum rule", and stating that "as soon as - and for so long as - the in duplum rule suspends the further running of interest, all credits to the account should be appropriated to pay the interest before they are applied to pay the capital" (p 576 C to D). Such a qualification would obviously not be necessary if one applied the clear rule of our common law and appropriated payments, where neither the debtor nor the creditor did so, first to interest and then only to capital.

I am accordingly of the view that Selikowitz J erred in applying the rule in Clayton's in regard to the appropriation of the payments made by Oneanate to the bank. All these payments fall to be first appropriated to reduce the interest charged by the bank on the sums advanced to Oneanate.

THE DATE FROM WHICH INTEREST IS TO RUN

A further question which arises in regard to the application of the in duplum rule is whether, if during the course of litigation the double is reached, interest stops running and only begins to run again once judgment is pronounced. There is no dispute that in this

case the bank is entitled to interest as from the date of judgment at

the agreed rate and in spite of the double having been reached. The finding of the court a quo (at p 578 F - H) that the bank was entitled to statutory mora interest only was based on Stroebel v Stroebel 1973 (2) SA 137 (T) at 139 C - E, but Stroebel's case did not say that.

Stroebel's case is, however, authority for the proposition that, in spite of the contrary view of van der Keessel Praelectiones ad Gr 3.10. 9 - 10, if the duplum has been reached, interest does not again commence to run pendente lite. The Commercial Bank case (supra at 299 B - 300 F) followed suit. Van der Keessel relied upon a decision of the Hooge Raad which could not be traced and Mr Rogers' researches point to the probability that van der Keessel either had access to Scheltinga's lecture notes on de Groot loc cit (Scheltinga had been his teacher) or that they both used the same source. Scheltinga, incidentally, was first published in 1986 due to the efforts of Professors de Vos and Visagie. Van der Keessel was unaware of other Hooge Raad judgments since made public by the publication of van Bynkershoek's notes. There are two, Obs Tum 267 and 738, brought to our attention by Mr Rogers that can be

interpreted to state otherwise. Due to the paucity of the facts

recited by van Bynkershoek, it is not easy to assess the impact of these cases.

Because of the low rates of legal interest in olden times, this question could not have been one that would have arisen readily before the era of hyperinflation and excessively high rates of interest. The very limited references to the question in the authorities and the absence of a decision in our case law before Stroebel's case in 1973 make this clear.

Huber, Heedensdaegse Rechtsgeleertheyt 3.37.38 - 43 especially at 40 expressed a view to the effect that interest in the excess of the double does not run pendente lite, but only as from the date of judgment. This view was preferred in Stroebel's case (supra). Stroebel's case was followed without elaboration in Administrasie van Transvaal v Oosthuizen en 'n Ander 1990 (3) SA 387 (W) at 397 E - H. Gillespie J in the Bank of Zimbabwe case (supra) at 299 B - 300 F also followed Stroebel's case.

Although a Frisian, the views of Huber on the in duplum rule are

usually a true reflection of Roman Dutch law (LTA Construction (supra) at p 481 G - H). The same applies to those of Sande, another Frisian. As neither van der Keessel nor Huber justify their views other than to rely on authority, it is necessary to consider the authority relied upon. I have already mentioned that of van der Keessel. Huber relied upon Carpzovius, a Saxon. The references in Gane's translation of Huber to Carpzovius are incorrect. In any event, Carpzovius Def For 2.30.28 deals with exceptions to the in duplum rule. The first and the one relied upon by Huber is that (and I quote from a translation supplied by counsel which accords with one kindly supplied to us by Ms Scott and Mrs Hewitt of the University of Cape Town) " in the case of interest on a judgment, when the debtor, who already previously paid interest all the way up to the amount of the capital, and having been condemned by judgment to pay, delays payment of the capital." I agree with Mr Rogers that the in duplum rule with which Carpzovius was concerned, differed from that applicable in Holland, or for that matter in Friesland, because it is premised on the view that ordinarily no further interest could run once a debtor had paid an amount of interest equal to the capital. In the light of this I am not prepared to consider his views on the subject as being of any

persuasive authority.

But Huber also dealt with the same principle in his Praelectiones Iuris Civilis ad 22.1.29. His reasoning there is that since judgment novates the original debt, interest can again begin to run on the novated capital amount as from the date of judgment. Sande Dec Cur Fris 3.14.11 express a slightly divergent view. He allows interest to run on the debt as novated by judgment, but adds logically, if novation is the test, that the interest element of the judgment also attracts interest. In effect, what he holds is that if the judgment is for Ra capital plus Rb interest (b may equal but not exceed a), after a short legal respite, judgment interest can run up to 2 (Ra + Rb). Neither Huber nor Sande's reasoning is in consonance with our law, simply because a judgment does not in a real sense novate the debt (Swadif (Pfy) Ltd v Dyke NO 1978 (1) SA 928 (A)).

It might at this stage be helpful to repeat the justification for the in duplum rule. There is a useful collection of authorities in the judgment of Boruchowitz J in Leech's case (supra) (at p 313 C -314 D). It appears as previously pointed out that the rule is

concerned with public interest and protects borrowers from

exploitation by lenders who permit interest to accumulate. If that is so, I fail to see how a creditor, who has instituted action can be said to exploit a debtor who, with the assistance of delays inherent in legal proceedings, keeps the creditor out of his money. No principle of public policy is involved in providing the debtor with protection pendente lite against interest in excess of the double. Since the rule as formulated by Huber does not serve the public interest, I do not believe that we should consider ourselves bound by it. A creditor can control the institution of litigation and can, by timeously instituting action, prevent the prejudice to the debtor and the application of the rule. The creditor, however, has no control over delays caused by the litigation process.

The present case is a good illustration of such delays. Summons was served in November 1990, the trial commenced in June 1993, the final judgment of the court a quo was given in May 1995. This appeal was heard in August 1997. If one accepts that interest and indeed compound interest is "the life-blood of finance" in modern times I am of the opinion that one should not apply all of "the old Roman-Dutch Law to modern conditions where finance plays an

entirely different role" (per Centlivres, CJ in Linton v Corser 1952 (3) SA 685 (A) at 695 H.) (See also the remarks of Kotze JA in West Rand Estates Ltd v New Zealand Insurance Company Ltd 1926 AD 173 at 196 to 197 dealing with the question of mora.)

Once judgment has been delivered the question again arises as to what the public interest demands. It is arguable that the creditor is in duty bound to execute and bring to a close the further accumulation of interest. That can be achieved by accepting the approach adopted in the Commercial Bank case (supra) (at p 300 G - I) that interest on the amount ordered to be paid may accumulate to the extent of that amount, irrespective of whether it contains an interest element. This would then mean that (i) the in duplum rule is suspended pendente lite, where the lis is said to begin upon service of the initiating process, and (ii) once judgment has been granted, interest may run until it reaches the double of the capital amount outstanding in terms of the judgment.

COSTS

Two sets of costs fall for consideration. The first are the costs in

the court a quo. Time was taken up in the court a quo in dealing with the March agreement which became irrelevant in the light of the finding in favour of the bank concerning the prescription issue. Time was also taken up in the court a quo in leading evidence in regard to banking practice to deal with the question of the capitalisation of interest. This evidence served no useful purpose.

All this notwithstanding I do not believe that if a broad view is taken of the matter one should interfere with the award of costs made by the court a quo, which deducted 30% from the successful plaintiffs costs. It may well be that the court a quo made this deduction because of the findings that it made in favour of the defendant in regard to the issues of the March agreement and prescription. In my view little purpose would be served, from a practical point of view, in embarking upon a detailed analysis of the evidence led in regard to the March agreement and the arguments relating thereto simply for the purpose of deciding whether allowance should be made for costs relating to the issue. A broad approach similar to that taken in the well known case of Jenkins v SA. Boiler Makers, Iron & Steel Workers & Ship Builders Society 1946 WLD 15 of 77 commends itself to me.

As regards the costs on appeal, I was initially inclined to make some allowance for the fact that the probabilities indicate that the plaintiff bank was primarily concerned in this case with establishing a principle in regard to the capitalisation issue. Inasmuch as the bank failed on this issue it would not, prima facie, be unreasonable to make some allowance for such failure in the costs order made. However upon further reflection I cannot loose sight of the fact that the appellant has been overwhelmingly successful in this appeal if for no other reason than the fact that in the court a quo judgment was granted in its favour in an amount of some three hundred and eighty eight thousand odd rand whereas in this Court the judgment granted in its favour will, if interest is taken into account, exceed one million rand. On this basis I believe it would be correct to allow the bank all of its costs on appeal.

The parties were agreed that the plaintiff should be entitled to costs attendant upon the employment of two counsel.

On 26 November 1990 when the plaintiffs summons was served

upon the defendant the sum of R987 612,03 and not the sum of R1 011 010,65 as reflected in the summons was due (on the assumption that no part of the claim was prescribed and that appropriation was to be made first to interest and thereafter to capital). After that date there was a capital debit of R150 on 12 December 1990 and no further credits to the account.

The parties were agreed as to the judgment that was to be granted if the cross-appeal were to fail and the plaintiff were to succeed (save for the issue of capitalisation) on the prescription issue, if all credits were to be appropriated first towards interest and then towards capital and if interest were to run pendente lite. The parties were also agreed as to what the plaintiffs prime rate of interest was from time to time.

Based upon the aforesaid agreement and the conclusions arrived at on the various matters in issue the following order is made:-

1. The appeal succeeds with costs such costs to include costs consequent upon the employment of two counsel.

2. The cross-appeal is dismissed with costs such costs to include

costs consequent upon the employment of two counsel.

3. The order of the court a quo is set aside and substituted with the following order:-

"1. The defendant is ordered to pay to the plaintiff the sum of R987 762,03 together with:-

3. Interest on the sum of R987 612,03 from 26 November 1990 to 11 December 1990 at the rate of 23 per cent per annum;

4. and thereafter interest on the sum of R987 762,03 plus interest from 12 December 1990, at the agreed rate of 2 per cent per annum above the plaintiffs ruling prime rate of interest from time to time.

2. The defendant is ordered to pay 70% of plaintiffs costs, which costs shall include the costs incurred in pleading to the defendant's conditional claim in reconvention. Notwithstanding the aforegoing the plaintiff shall

pay the costs of the hearing on 3 May 1995.

Costs shall include costs of two counsel where two counsel were employed."

RH ZULMAN JA

Mahomed CJ }
Van Heerden DCJ } (Concur
Harms JA }

Plewman JA }