THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

Reportable

Case No 86/02

In the matter between

SHIRLEY JOYCE JANS
Appellant

and

NEDCOR BANK LIMITED
Respondent

CORAM	*:*	*VIVIER ADP, SCOTT, FARLAM, MTHIYANE, et LEWIS JJA*
HEARD	*:*	*4 MARCH 2003*
DELIVERED	*:*	*24 MARCH 2003*

Interruption or delay in the running of prescription in favour of the principal debtor interrupts or delays the running of prescription in favour of a surety. *Rand Bank Ltd v De Jager* 1982(3) SA 418 (C) overruled.

J U D G M E N T

SCOTT JA/…

SCOTT JA:

[1] The question in issue in this appeal is one which has been the subject of debate for centuries. Does an interruption or delay in the running of prescription in favour of the principal debtor interrupt or delay the running of prescription in favour of a surety?

[2] The facts are largely common cause. On 30 May 1995 the appellant executed a contract of suretyship in terms of which she bound herself jointly and severally as surety and co-principal debtor *in solidum* to the respondent bank for repayment of all sums of money which Ryday Construction (Pty) Ltd ('Ryday') 'may now or from time to time hereafter owe or be indebted to the bank'. Ryday was a construction company of which both the appellant and her husband were directors. Previously, and in terms of a written agreement dated 29 August 1994, Ryday had opened a current account with the bank. In pursuance of that agreement the bank advanced Ryday moneys on overdraft from time to time. On 4 March 1997 Ryday was provisionally liquidated. On 15 April 1997 the liquidation was made final. On 11 August 1997 the bank submitted its claim for moneys advanced on overdraft to Ryday's liquidator. On 10 October 2000 the liquidator's final liquidation and distribution account was confirmed by the Master.

[3] It is convenient at this stage to refer to the Prescription Act 68 of 1969.

Section 13(1) reads:

'If –

(a) the creditor is a minor or is insane or is a person under curatorship or is prevented by superior force including any law or any order of court from interrupting the running of prescription as contemplated in section 15(1); or

(b) the debtor is outside the Republic; or

(c) the creditor and debtor are married to each other; or

(d) the creditor and debtor are partners and the debt is a debt which arose out of the partnership relationship; or

(e) the creditor is a juristic person and the debtor is a member of the governing body of such juristic person; or

(f) the debt is the object of a dispute subjected to arbitration; or

(g) the debt is the object of a claim filed against the estate of a debtor who is deceased or against the insolvent estate of the debtor or against a company in liquidation or against an applicant under the Agricultural Credit Act, 1966 (Act No 28 of 1966); or

(h) the creditor or the debtor is deceased and an executor of the estate in question has not yet been appointed; and

(i) the relevant period of prescription would, but for the provisions of this subsection, be completed before or on, or within one year after, the day on which the relevant impediment referred to in paragraph (a),(b),(c),(d),(e),(f),(g) or (h) has ceased to exist,

the period of prescription shall not be completed before a year has elapsed after the day referred to in paragraph (i).'

It was accepted by this Court in *Kilroe-Daley v Barclays National Bank Ltd* 1984 (4) SA 609 (A) at 621I that the impediment contemplated in s 13(1)(g) commences when the creditor's claim is filed. It ceases to exist once the Master confirms the final liquidation and distribution account: *Leipsig v Bankorp Ltd* 1994 (2) SA 128 (A) at 135I. In terms of s 11 of the Prescription Act the relevant period of prescription was three years. But for the impediment, the bank's claim against Ryday would therefore have

prescribed sometime before 10 October 2000, being the date on which the impediment ceased to exist. By virtue of the provisions of s 13(1) the bank's claim against Ryday would accordingly not have become prescribed until a year had elapsed after 10 October 2000.

[4] In early October 2000 the bank instituted action against the appellant for payment of the sum of R746 891,58 together with interest and costs in terms of the contract of suretyship she had executed on 30 May 1995. Three other sureties and co-principal debtors were joined as defendants but they played no role in the subsequent proceedings. The summons was served on the appellant on 13 October 2000 at her chosen *domicilium citandi et executandi* in terms of the deed of suretyship. There was no appearance to defend and on 12 December 2000 the bank obtained judgment by default against the appellant.

[5] In August 2001 the appellant launched an application for an order rescinding the default judgment granted against her on 12 December 2000. In her supporting affidavit she explained that she and her husband had parted company sometime in January or February 1996 when she left the dwelling which had been her chosen *domicilium citandi*. She said that since then she had played no part in the affairs of Ryday and had only become aware of the summons and the default judgment against her on 29 April 2001 when she received notice from the sheriff that property she owned had been judicially attached. She denied that she was liable to the bank. She contended that prescription began to run in her favour no later than on 15 April 1997 when a final order of liquidation was granted against Ryday and that the running of prescription in her favour was unaffected by any delay in the running of prescription in favour of Ryday. Accordingly, so the contention went, the bank's claim against her became prescribed in April 2000, some six months before summons was served on her. The respondent opposed the application. It contended that the delay in the running of prescription in favour of the principal debtor served to delay the running of prescription in favour of the surety and that the appellant had therefore failed to disclose a defence to the claim.

[6] It should be mentioned that the appellant subsequently amplified her application by seeking condonation for the delay of some three months between the time of her becoming aware of the judgment and her application for its rescission. The respondent initially opposed the granting of such condonation, but no longer does so.

[7] The matter was heard by Goldstein J in the Witwatersrand Local

Division on 4 February 2002. The learned judge considered himself to be bound by the full bench decisions of *Cronin v Meerholz* 1920 TPD 403 and *Union Government v Van der Merwe* 1921 TPD 318 and dismissed the application with costs. At the same time, however, he granted the appellant leave to appeal to this Court.

[8] The question in issue has arisen in the past mainly in the context of the service of a summons on, or a judgment against, the principal debtor or, less frequently, an acknowledgment of debt by the latter. In the present case the running of prescription was delayed in terms of s 13(1)(g) of the Prescription Act 1969 and not interrupted in terms of s 14 or s 15. Nonetheless, it is clear that the same principles must apply to both situations. Indeed, under the repealed Prescription Act of 1943 the filing of a claim against a company in liquidation was treated as an interruption.

[9] As previously indicated, whether or not prescription in favour of a surety should run independently of prescription in favour of the principal debtor is a question which has occupied the minds of jurists for a long time. Before attempting to trace the history of the debate it is convenient to set out briefly the various characteristics of the contract of suretyship on which the proponents of the two points of view largely rely in order to advance their respective contentions. Those who argue that the claim against the surety should prescribe independently of that against the principal debtor point in the first place to the fact that the claim against the former arises from a contract which is quite separate and distinct from the contract giving rise to the claim against the latter, and that both contracts give rise to distinct obligations. This is undoubtedly so. In the case of the one, the contract is between the creditor and the principal debtor. In the other it is between the creditor and surety. See eg *Bulsara v Jordan and Co Ltd (Conshu Ltd)* 1996 (1) SA 805(A) at 810D-G. (The liability of the principal debtor may even arise from some cause other than contract, eg delict.) A contract of suretyship may be concluded at a time and place which is different from that at which the contract with the principal debtor was concluded; it may even be concluded without the latter's knowledge. The obligation of the surety may also differ in extent; it may be for a limited period or a lesser amount. If the benefit of excussion has not been excluded the surety's liability will arise later than that of the principal debtor. However, in most contracts of suretyship, certainly in more modern times, it is usual for the surety to bind him- or herself as surety and co-principal debtor. But this does not mean that the surety becomes a party to the contract between the creditor and principal debtor. As pointed out by Trollip JA in *Neon and Cold Cathode Illuminations (Pty) Ltd v Ephron* 1978 (1) SA 463 (A) at 471C-G the effect of a surety binding himself as a co-principal debtor is not to render him liable to the creditor in any capacity other than that of a surety who has renounced the benefits ordinarily available

to a surety against the creditor. But where the surety is bound as a co-principal debtor he or she will be jointly and severally liable with the principal debtor and prescription will begin to run in favour of both at the same time.

[10] On the other hand, those who take the opposing view acknowledge that the surety's liability is founded upon a different contract giving rise to a distinct obligation, but stress that the surety's liability is accessory to that of the principal debtor with the result that if the claim against the principal debtor becomes prescribed or for some other reason ceases to exist, the claim against the surety likewise becomes prescribed or otherwise ceases to exist. The point is well illustrated in *Kilroe-Daley v Barclays National Bank Ltd*, *supra.* In that case the surety executed a mortgage bond securing his obligation in terms of a contract of suretyship. It was held that when the claim against the principal debtor became prescribed the claim against the surety likewise became prescribed and the creditor was accordingly precluded from invoking s 11(a)(i) of the Prescription Act which provided for a period of prescription of 30 years in respect of a mortgage bond. Those of the opposing viewpoint point out further that although the obligations of the surety and principal debtor arise from different contracts, the obligation of the former merely guarantees performance by the latter; in other words, both obligations relate to the same performance or debt. They contend that, in these circumstances, the very nature of suretyship is such that the fortunes of the surety's obligation should follow those of the debtor's obligation as far as prescription is concerned.

[11] Against this background I shall attempt to sketch, as briefly as the circumstances permit, the history of the debate which goes back to the time of Justinian. The starting point is a decree, or 'constitution', of that emperor in 531 AD addressed to John of Cappadocia, but of general application. The modern citation of the constitution is C8.39(40).4(5). It contains no express reference to sureties. It provides in effect that if prescription in favour of one co-debtor, presumably a debtor *in solidum*, is interrupted, whether by acknowledgment made to one out of several joint creditors or otherwise, so that the period of prescription in respect of that debtor is extended, the period of prescription will be extended in respect of all the debtors to the advantage of all the creditors. The material portion of the constitution, for present purposes, reads:

'. . . it seems to us to be consistent with the dictates of humanity that, where prescription has been interrupted, or acknowledgment of the debt has been made with reference to one and the same contract, all the parties should be compelled to pay the debt at the same time, whether there are several debtors, or only one of them, or whether there are several

creditors, or not more than one.

Hence we decree that in every case above mentioned, where part of the debt has been paid or acknowledged, or the other debtors have been notified in writing that they are liable, the other creditors shall enjoy the benefit. Therefore they shall be jointly responsible and none of them will be permitted to profit by the unfairness of another, as a single contract is derived from one source or liability, and a debt is incurred by the same act.'

(Scott's translation. The full text of the constitution is reproduced in *Rand Bank Ltd v De Jager* 1982 (3) SA 418 (C) at 421F-422B. I shall refer in greater detail to this decision later in this judgment.)

[12] It was probably the Glossators who first sought to equate the relationship between principal debtor and surety with that between co-debtors *in solidum* for the purpose of applying C8.39(40).4(5) to sureties so that interruption of prescription against the principal debtor would interrupt prescription against the surety. (See the Gloss ad D.17.1.29.6.) Carpzovius (1595-1666) in his *Decisiones Illustres Saxonicae Rerum et Quaestionum Forensium* (Leipzig 1646) reports a decision of the Supreme Court of Appeal of Saxony – Dec Illust 34 – in which it was held that an interruption of prescription in respect of the principal debtor did not avail the creditor in so far as prescription in respect of a surety was concerned. In doing so it rejected the contention that C8.39(40).4(5) was applicable to sureties. Of significance in this regard is that it not only rejected the opinion of Heringius (*Tractatus de Fidejussoribus* (1614)) but also the view expressed in the Gloss.

[13] Brunnemann (1608-72), on the other hand, took the view that C8.39(40).4(5) was to be construed as including the case of sureties; in other words, although the liability of the surety and the principal debtor arose from different contracts (and to this extent was different from the liability of co-debtors *in solidum*), an interruption in the running of prescription in favour of the principal debtor served to interrupt prescription in favour of the surety. In his *Commentarius in Codicem Justinianeum* (1663) ad C8.39(40).4(5) he argued that those who held the contrary view gave too narrow a meaning to the words of Justinian's constitution; he pointed out that while the action of the creditor against the principal debtor was different from the action against the surety —

'. . . in reality (*reipsa*) both actions flow from the same origin and source and in effect (*in effectu*) they [the principal debtor and the surety] are bound by the same thing and there is

no culpable delay on the part of the creditor'.

In support of his view he relied not only on the opinion of other jurists but also on a decision of the Court of Brandenburg, from which it would appear that the latter Court took a different view from the decision of the Saxon Court.

[14] Voet in his *Commentarius ad Pandectas* 46.1.36, like Brunnemann, adopted the view that interruption of prescription in respect of the principal debtor served to interrupt prescription in respect of the surety. He justifies his view as follows:

'If in sooth the making of a demand on one of two joint debtors interrupts prescription in respect of the other also, when each of them was bound as a principal debtor, far more must we say that an obligation against a surety is prolonged by a demand which was made on the principal debtor. It is more in accord with nature for an accessory to go with its principal, than for one principal thing to be assessed on another.' (Gane's translation)

[15] In addition to C8.39(40).4(5), Voet refers to two passages in the Digest (D45.1.91.4 and D22.1.24.1) as well as to Vinnius – *Selectae Juris Quaestiones* 2.10 and Struvius – *Ad Pandectas* 46.1 n 47. Surprisingly he makes no mention of Brunnemann. The passages in the Digest are somewhat cryptic and not particularly helpful. Neither Vinnius nor Struvius adds anything of consequence.

[16] Pothier, writing some 50 years after the death of Voet, was similarly of the view that an interruption of prescription against the principal debtor interrupted prescription against the surety. In his *Obligations* at para 664 (Evans's translation) he acknowledges that the question is a controversial one; he sets out the two viewpoints and briefly the contentions of the proponents of each and thereafter gives his answer to those who oppose his view. The contention which he attributes to 'Brunnemann *ad L Fin Cod de duob reis* (C8.39(40).4(5)) and the doctors cited by him, and Catelan, amongst the moderns', shortly stated, is the following. The principle underlying C8.39(40).4(5) is that if a creditor makes judicial demand against one co-debtor *in solidum* the other co-debtors cannot say that the creditor has not exercised the claim which he has against them because the claim against co-debtors *in solidum* is one and the same; similarly the claim which the creditor

has against the surety is the same as that against the principal debtor and therefore by enforcing the claim against the principal debtor he is enforcing his claim against the surety. In summarising the opposing view, Pothier says

'They say, that there is a great difference between sureties and co-debtors *in solido*. When I have sold a thing to several purchasers, who have obliged themselves *in solido* for the payment of the price, the claim against them is one and the same claim having the same cause, and for which there is only one and the same kind of action, *viz* the action *ex vendito* against each of them; whence it follows, that in exercising my claim by the judicial interpellation of any one of them, I exercise it against all the rest. It is otherwise, say they, with respect to the principal debtor and his sureties; the claim against the principal and that against his sureties are indeed claims of one and the same things, and, therefore, a real or fictitious payment by the one discharges the other; but still they are distinct claims, arising from different contracts, and producing different actions.'

Pothier answers as follows:

'It may be replied that the engagement of the sureties is a contract purely accessory; sureties do nothing more thereby than accede to the debt of the principal debtor; the contract does not, properly speaking, form a new claim, but only gives the creditor new debtors, who accede to the debt of the principal; the claim which the creditor has against them is the same as that against the principal. As to the argument that by the Roman law the action *ex stipulatu* against the surety is a different action from that against the principal debtor; I answer that it does not therefore follow that it is founded upon a different claim; the stipulation, upon which the action *ex stipulatu* is founded, is not itself the title of the claim, but rather the corroboration of it, with the accession of the sureties.'

(The paragraph is quoted in full in *Rand Bank Ltd v De Jager, supra*, at 435B-436B.)

[17] More than a century later the cudgel was taken up for the view opposed to that of Pothier and his predecessors by Francois Laurent (1810-87), a Belgian jurist and one time professor at Ghent. Writing after the enactment of the French Civil Code and in the context of its provisions he argued in his *Principes de Droit Civil Francais* 2 ed vol 32 paras 151-153 that Pothier's opinion was founded on the premise that the obligation of the surety was the

same as that of the principal debtor, that this was not correct and that interruption of prescription extended from one person to another only in the case of solidarity and indivisibility. He observed, too, that art 2250 of the Code recognised that interruption of prescription as against the principal debtor interrupted prescription as against the surety, but not the converse. This, he argued, indicated the exceptional nature of the article and that it was contrary to principle. (A translation of all three paragraphs appears in *Rand Bank Ltd v De Jager, supra,* at 437E-439B.)

[18] In the event Laurent, of course, was too late. Not only the French Civil Code, but also the Belgian Code and the Netherlands Code (in art 2021) provided that interruption against the principal debtor interrupted prescription against the surety. (The provisions of art 2021 of the old Netherlands Code are not repeated in the new code, but see Book 7 art 851.1 and art 853.) In South Africa C8.39(40).4(5) was similarly recognised as applying to sureties in the Transvaal Act 26 of 1908. Section 12(3) provides:

'Interruption as against the principal debtor shall be deemed an interruption as against the surety.'

Section 14(1) dealt with co-debtors. It reads:

'Prescription shall not be interrupted or affected in respect of one joint debtor by reason of any fact which would interrupt or affect prescription in respect of any other joint debtor except in the case of debtors *in solidum*.'

Section 12(3) of the Transvaal Act was repeated in identical terms in s 6(2) of the first post-union statute on the subject, the Prescription Act 18 of 1943. Section 14(1) of the Transvaal Act was repeated in s 8 of the 1943 Act with certain minor changes.

[19] The first case in South Africa in which the issue arose was *Cronin v Meerholz* 1920 TPD 403. The plaintiff took judgment against the principal debtor and thereafter sued the surety. At the time there was no prescription in

respect of a judgment and what had to be decided was whether the claim against the surety had similarly become 'imprescribable'. Both Wessels JP and Mason J held that it had. To obtain the answer Wessels JP found it necessary (at 406) to:

'. . . consider whether, according to the fundamental principles of our law, a contract of suretyship must be considered as independent of the principal obligation or whether it is to be regarded as so bound up with the principal obligation that the suretyship contract is to be regarded as an accessory obligation'.

In concluding that the latter was correct the learned judge relied on Voet 46.1.36 (quoted in para 14 above) and said the following (at 406-407):

'By our common law the surety undertakes to pay the debt of the principal debtor so long as that debt exists in law and has not in fact been paid by the debtor. If, therefore, the debt is extinguished by prescription or the remedy is barred by a limitation of actions the surety is either discharged or the remedy against him is also barred. But if the debt is kept alive by judgment, so that neither prescription nor limitation will run, the surety's obligation by the common law continues to exist, because his obligation and that of the principal debtor is one and the same.'

The learned judge did not, of course, intend to convey in the final sentence of this passage that the obligations of the surety and principal debtor were not distinct. From the context it is clear that what was intended was that both obligations relate to the same debt or performance.

[20] The following year Wessels JP adopted the same approach in *Union Government v Van der Merwe* 1921 TPD 318. In the course of his judgment, with which De Waal J concurred, the judge president said (at 321):

'The legal scope of the surety's contract is identical with that of the principal debtor – *accessorium sui principalis naturam sequitur*. The surety undertakes the same obligation

as the debtor, and undertakes to perform this same obligation so soon as the debtor, when called upon, fails to perform it. Troplong, *Cautionnement,* 46. It is true there are two contracts, the one between the creditor and the debtor and the other between the creditor and the surety. But the contract between the creditor and the surety is not an independent contract with an obligation of its own but an accessory contract with the very same obligation that exists between the principal debtor and the creditor.'

[21] In view of s 6(2) of the 1943 Prescription Act it is not surprising that the issue did not arise again until after the enactment of the Prescription Act of 1969. The provisions of s 6(2) of the repealed Act were not re-enacted in the 1969 Act. Interestingly enough, Professor J C De Wet, who was largely responsible for the 1969 Act, described the section as 'onsekerheidstigtend en oortollig'. (See 'Verjaring' (1967) in: J J Gauntlett (ed) *Opuscula Miscellanea* (1979.)) In the event, the non re-enactment of its provisions opened the way for the revival of the debate which had continued for centuries. The decision in *Cronin v Meerholz, supra,* was accepted as correctly reflecting the common law by Caney in *The Law of Suretyship* 2ed (1970) at 214, but not by De Wet. The thrust of the latter's criticism, however, is directed not so much at the distinction between the liability of a surety and that of a co-debtor *in solidum* but at C8.39(40).4(5) itself which he categorises as ill-considered and unpersuasive (De Wet and Van Wyk *Kontraktereg en Handelsreg* 5ed at 138 and 399). He points out that it failed to recognise that prescription does not necessarily begin to run in favour of all co-debtors at the same time since the liability of one may be *pure*, another *sub die* and a third, *sub condicione*. In this respect, therefore, the position of co-debtors is little different from that of sureties; if a surety has not renounced the benefits of excussion etc, prescription will begin to run in favour of the principal debtor before prescription commences running in favour of the surety. De Wet argues that as prescription is a personal, not a general defence, there is no reason why interruption of prescription in respect of one co-debtor should interrupt

prescription in respect of another co-debtor. (De Wet and Van Wyk *op cit* at 137-138; 'Verjaring' *op cit* paras 102-103.) The solution which he in effect advances is that C8.39(40).4(5) should be rejected so that interruption of prescription against one co-debtor *in solidum* should not interrupt prescription against other co-debtors. The same would apply *a fortiori* to principal debtors and sureties. (See also C F Forsyth 'Suretyship and Prescription : A New Direction' (1984) 101 *SALJ* 237 at 246-247.) With regard, in particular, to the reasoning in *Cronin v Meerholz, supra,* De Wet points out that while the accessory nature of the surety's obligation has the effect that prescription of the claim against the principal debtor results in prescription of the claim against the surety, it does not necessarily follow that *interruption* of prescription against the principal debtor *interrupts* prescription against the surety. He says that to accept that it does, is to put the cart before the horse. (De Wet and Van Wyk *op cit* at 398-399 n 53.) The metaphor is, of course, not entirely accurate. If completion of the principal debtor's period of prescription results in completion of the surety's period of prescription, even if prescription in favour of the latter began to run at a later date than in the case of the former, it is neither a big nor an illogical step to accept that an interruption of prescription against the principal debtor has the effect of interrupting prescription against the surety. But in any event, in arriving at the conclusion it did, the Court relied not only on the accessory nature of the surety's obligation but also on its commonality with the principal debtor's obligation.

[22] Some 60 years after the decision in *Cronin v Meerholz* it was held in *Rand Bank Ltd v De Jager, supra,* to have been incorrect. The facts in *Rand Bank* were relatively straight forward. The Bank sued for payment of money presumably lent and advanced on overdraft and took judgment against the principal debtor and a surety. Neither was able to pay the debt. Subsequently

and more than three years after judgment when prescription was presumed, at the latest, to have commenced to run, the bank sued the other surety who had bound himself as surety and co-principal debtor *in solidum*. The latter raised the defence of prescription. The magistrate upheld the defence solely on the strength of the opinion of De Wet, as expressed in De Wet and Yeats *Kontraktereg en Handelsreg* 4 ed. The appeal to the Cape Provincial Division was dismissed. In the course of a long and extremely industrious judgment Baker J, with whom Lategan J concurred, referred to a vast array of authorities, including many which were silent on the issue, and ultimately came to the conclusion that the plea of prescription should be upheld. The learned judge placed considerable store on the views of De Wet and clearly agreed with the latter's criticism of C8.39(40).4(5). (See eg at 434 F-H.) Nonetheless, the *ratio* of the judgment was that C8.39(40).4(5) applied to co-debtors only and that Voet incorrectly extended its application to sureties.

[23] The judgment had a mixed reception. K M Kritzinger, 'Prescription of Suretyship for a Judgment Debt' (1983) 100 *SALJ* 35, pointed out that the contract of suretyship in the *Rand Bank* case was couched in terms wide enough to include a judgment which would have given rise to a new cause of action and that the cause of action actually relied upon was indeed the judgment. He argued that the period of prescription both in respect of the principal debtor and the surety was 30 years and that the claim against the surety had accordingly not prescribed. (See generally *E A Gani (Pty) Ltd v Francis* 1984 (1) SA 462 (T); *Bulsara v Jordan and Co Ltd (Conshu Ltd), supra*). C F Forsyth, 'Suretyship and Prescription : A New Direction' (1984) 101 *SALJ* 237, doubted whether on the facts of the *Rand Bank* case the period of prescription for the claim against the surety would have been 30 years. However, elsewhere in the article, which was generally favourable to the judgment, the learned author seemed to accept that 'it is implicit in the

surety's agreeing to undertake his obligation that he will be bound for the laid-down prescription period of the principal debt' (at 249). The *Rand Bank* case was considered to have been correctly decided in subsequent editions of Caney's *The Law of Suretyship*, by Forsyth and Pretorius (see also C F Forsyth 'Suretyship' in Zimmermann and Visser (eds) *Southern Cross* at 428-430; C F Forsyth 'Prescription, Suretyship and the Unwelcome Revival of Correality' (1999) 11 *SA Merc LJ* 384) but sharply criticised by Styrian, 'Verjaring van Borgverpligtinge Redux' 2001 (64) *THRHR* 316 and its correctness doubted in LAWSA First Reissue vol 26 para 217. It was followed in *Bank of the Orange Free State v Cloete* 1985 (2) SA 859 (E), *Absa Bank Bpk v De Villiers* 1998 (3) SA 920 (O) and *Nedcor Bank Ltd v Shapiro and Others* 2002 JDR 766 (W). It was also followed, but subject to qualification, in *Commissioner for Customs and Excise v Standard General Insurance Company Ltd* [1998] 4 All SA 46 (W). To the extent, however, that Flemming DJP in the latter case sought to rely on the distinction between 'solidarity' and 'correality' it is worthy of note that Zimmermann, *The Law of Obligations : Roman Foundations of the Civilian Tradition* (1992), at 129 suggests that such theorizing in respect of these notions should be avoided as being an 'ahistorical enterprise'. On the other hand, the *Rand Bank* case was disapproved and not followed in *Jordan and Co Ltd v Bulsara* 1992 (4) SA 457 (E) and *Nedcor Bank Ltd v Sutherland* 1998 (4) SA 32 (N). In *Leipsig v Bankorp Ltd*, *supra*, this Court assumed without reference to the *Rand Bank* case that the filing of a claim by the creditor against the principal debtor's insolvent estate would serve to delay the completion of prescription in respect of the claim against the surety but in the event the claim against the principal debtor was found to have prescribed. The same assumption was made in *Kilroe-Daley v Barclays National Bank Ltd*, *supra*, but in that case the Court expressly cautioned (at 628D-E) that the judgment was to be construed as

neither agreeing nor disagreeing with the decision in *Rand Bank*.

[24] Baker J summarised his conclusions (at 454G to 455H). He said in effect that Voet, relying on dubious authority, was incorrect to have applied C8.39(40).4(5) to sureties as the text clearly referred to co-debtors *in solidum* and not to sureties. He said that right from the beginning there was a dispute about this, that to his mind the argument of Pothier was 'unconvincing' while that of Laurent was 'logical and sound', and added that C8.39(40).4(5) was an 'ill-considered piece of legislation' which demonstrated a failure on the part of Justinian to appreciate that joint debtors *in solidum* are liable not by virtue of a single obligation but by virtue of a series of obligations directed to a single performance.'

[25] It is convenient to begin with the reference to Pothier and Laurent. As previously indicated, the gravamen of Laurent's complaint was that Pothier's opinion was founded on the premise that the obligation of the surety was the same as that of the principal debtor. But it is clear from the passages from Pothier's *Obligations* quoted above that Pothier was fully aware that the respective obligations of the surety and the principal debtor arose from different contracts and in that respect were distinct. His reference to the creditor having the same claim against the surety as against the principal debtor is clearly a reference to the content of the claim, not to the *vinculum juris* itself. Brunnemann, who was referred to by Pothier, similarly appreciated that the actions which the creditor had against the principal debtor and against the surety were based on different contracts, each of which would give rise to correspondingly different obligations. His point was that having regard to what in essence is a commonality between the creditor's respective actions (and corresponding obligations) both as to origin and content, they should be treated as one for the purpose of prescription. He argued that to make a distinction between the two actions would involve reasoning which

was overly subtle (*subtilis ratio*). Wessels JP, too, in *Cronin v Meerholz, supra,* refers to the obligations of the surety being 'the same' as that of the principal debtor. It is clear from the context that the learned judge was referring to the content of the respective obligations, ie to the debt or performance to which both relate. Baker J, in criticising Wessels JP, points out that the liability of the surety arises from a contract which is totally separate from that between the principal debtor and creditor (at 447H-448B). But Wessels JP, like Brunnemann and Pothier, obviously appreciated this. He expressly said as much in *Union Government v Van der Merwe, supra*, at 321 (quoted in para 20 above). The emphasis on the distinction between the obligations of the surety and principal debtor as an argument against the extension of C8.39(40).4(5) to sureties is in any event to some extent misplaced. The obligation of one co-debtor *in solidum* may differ from the obligation of another. As De Wet (De Wet and Van Wyk, *supra*, at 138) points out, the obligation of one may be *pure*, that of another *sub die* and that of a third *sub condicione*. Indeed, Baker J in his summary (at 455B-C) makes the point that co-debtors *in solidum* are liable to the creditor by virtue of 'a series of obligations directed to a single performance'. In these circumstances, the distinction between the relationship between the principal debtor and the surety on the one hand, and between co-debtors *in solidum* on the other, is less compelling than the antagonists of Pothier's view would contend it to be. This is particularly so when the surety has renounced the benefits ordinarily available to a surety, which today is an almost invariable practice.

[26] It is true, as Baker J observes (at 444D-H), there is a clear distinction between the obligation of a co-debtor *in solidum* and the accessorial obligation of a surety. But once again, this is hardly something which would have escaped the attention of those who favoured the extension of C8.39(40).4(5) to sureties. It is also true that the authorities to which Voet

refers are not particularly compelling. But his understanding of the law reflects a viewpoint that went back as far as the Gloss and enjoyed the support of many before him, including the likes of Heringius and Brunnemann.

[27] It is not clear why Baker J in summarising his conclusions (under the heading of 'Conclusions') found it necessary to criticise C8.39(40).4(5), as ultimately his decision appears to have been based on the conclusion that its extension to include sureties was incorrect. In criticising 'this ill-considered piece of legislation' he was of course echoing the view of De Wet. But whether one likes it or not the legislation was part of the Roman Law which in turn became part of the Roman Dutch Law accepted in South Africa. It cannot be dismissed simply because it does not fit into a particular perception of the law as a logical edifice.

[28] Before turning to the further point raised by Baker J which relates to what he says is the unfairness resulting from the approach adopted by Voet, it is appropriate at this stage to comment on certain aspects of what has already been said. Voet is high authority in South Africa. The same may be said of Pothier and Brunnemann. Although opinion on the issue is divided, and has been for centuries, the weight of authority appears to be on the side of Voet. No Roman Dutch lawyer contends for the opposing view. Moreover, Voet's view has generally prevailed. It was incorporated into the codes of the Netherlands, France, Belgium and other European countries and was accepted in South Africa until the *Rand Bank* case in 1982. There are undoubtedly significant differences between the relationship that exists between principal debtor and surety on the one hand and that between co-debtors *in solidum* on the other. It is also true that there is some inconsistency in applying Justinian's constitution to sureties to the limited extent that interruption of prescription against the principal debtor interrupts prescription against the

surety but not applying it to the converse situation. It was probably this that Baker J had in mind when he categorised Pothier's view as 'unconvincing' and that of Laurent as 'logical and sound'. But ultimately the differences, in my view, are not so profound as to have precluded those jurists seeking in the past to develop the law from extending the principle embodied in C8.39(40).4(5) to sureties to the extent referred to. Once Justinian's enactment is accepted to be the law, as it must, I do not think that the extension involves a step in terms of legal theory which is so far-reaching as to justify rejecting the view of Voet, particularly in the absence of other Roman Dutch authority, and in effect putting the clock back after so many years. The position, of course, may well be otherwise if interruption or delay in the running of prescription in favour of a surety in accordance with the principle embodied in C8.39(40).4(5) were to cause undue hardship or operate in a manner contrary to social utility. This is the question to which I now turn.

[29] The unfairness which Baker J refers to may arise, he says, in the following circumstances if Voet's approach is adopted. A surety who renounces the benefit of excussion and who guarantees a debt which would ordinarily prescribe after three years, could, without his or her knowledge, be saddled with 30 years of jeopardy if the creditor were to take judgment against the principal debtor within the three-year period without notice to the surety. This was said to be 'manifestly unfair' (at 455E) and to 'go against the grain' (at 421E). In passing, it should be observed that in similar circumstances a surety who has not renounced the benefit of excussion may notionally end up in virtually the same situation because prescription would ordinarily begin to run against the surety only upon excussion of the principal debtor. However, the point remains that if prescription running in favour of the surety is interrupted or delayed without the latter's knowledge, he or she

may well be unfairly prejudiced, particularly if the validity of the suretyship or the creditor's claim against the principal debtor is contested. A surety who believes a claim has prescribed may lose touch with potential witnesses, allow relevant documents to be lost or destroyed, or generally act in a manner prejudicial to his or her best interests.

[30] By its very nature a contract of suretyship is burdensome. The surety undertakes responsibility for the fulfilment of another's obligation. No doubt for this reason the law affords protection to a surety in a number of different ways. At common law, for example, a surety will be released if the creditor does something in his dealings with the principal debtor which has the effect of prejudicing the surety (Caney's *The Law of Suretyship* 5 ed at 205). In order to be valid, contracts of suretyship must now also be embodied in a written document signed by or on behalf of the surety (s 6 of Act 50 of 1956). But a balance must be struck. Sureties do not assume the obligations of others against their wills, but with their free consent. Once having done so they cannot expect to be entitled simply to disabuse their minds of the fortunes of the principal debtor's liability and then require the law to protect them against their ignorance. If prescription in favour of the principal debtor is delayed or interrupted without their knowledge, they generally have themselves to blame. The example given by Baker J postulates a surety whose interest in the debt is no greater than that of a friend of the principal debtor. But today that is an infrequent occurrence. The typical surety in modern society is one who binds him- or herself as co-principal debtor and guarantees the debts of a company or close corporation which has little in the way of share capital or assets but is dependent on credit in order to conduct its business. More often than not the business is that of the surety or a spouse who for various reasons chooses to conduct it through the medium of a company or close corporation with limited liability. A creditor will ordinarily refuse to afford credit to such a

legal *persona* in the absence of a personal suretyship and few businesses can operate successfully without credit. The very existence of the debt is therefore dependent upon the existence of the suretyship while the object and function of the latter is, of course, to ensure proper payment of the former. To permit the claim against the surety in these circumstances to prescribe before the claim against the principal debtor, in the words of Wessels JP in *Union Government v Van der Merwe, supra,* at 320, would be 'almost subversive of the whole contract of suretyship'. Indeed, in the type of situation sketched above it is frequently the surety himself who brings about, or at least participates in, the interruption or delay of prescription against the principal debtor, eg by acknowledging liability or accepting service of judicial process on behalf of the principal debtor, or by submitting a dispute to arbitration, or by initiating proceedings to have the principal debtor placed in liquidation. The acceptance of Voet's view would certainly not result in unfairness to a surety having a commercial interest in the principal debtor's liability. But even if the surety is a disinterested party, I have difficulty in appreciating the unfairness complained of. Admittedly the period of prescription may be extended by reason of circumstances which relate solely to the claim against the principal debtor, but that is not an unreasonable or illogical consequence of assuming responsibility for the fulfilment of another's obligation. Provided only that the surety exercises some vigilance in relation to the fortunes of the claim against the principal debtor, there will be no prejudice.

[31] Those opposed to Voet's view contend that where the surety is also bound as co-principal debtor there is nothing to prevent the creditor from instituting action against the surety within the ordinary period of prescription; in other words, there is no reason why a delay or interruption of prescription in respect of the principal debtor should be visited on the surety. I do not

agree. The linking of the surety's period of prescription to that of the principal debtor, quite apart from considerations of uniformity and convenience as far as the creditor is concerned, will in many instances serve the interests of the surety as well. One would imagine that even when the surety has waived the benefit of excussion he or she would welcome the creditor's first excussing the principal debtor before looking to the surety for the balance of the claim. But if prescription in favour of the surety is not to be interrupted by the institution of proceedings against the principal debtor, the creditor is likely to be compelled to sue the surety jointly with the principal debtor or at some stage before excussion of the latter. As an alternative, the creditor may be compelled to commence proceedings against the surety merely in order to prevent the claim prescribing while he or she litigates against, or attempts to recover payment from, the principal debtor. Such a step serves little purpose other than to increase the costs of recovering the debt. Similar situations may arise if the surety is unaffected by a delay in the running of prescription in favour of the principal debtor. If the principal debtor is liquidated, instead of filing a claim against the liquidator and recovering first what may possibly prove to be a substantial dividend and then looking to the surety for the balance, the creditor may be compelled to sue the surety first, leaving it to the latter to proceed against the liquidator. The alternative would be to institute proceedings against the surety and allow the matter to remain dormant, if

possible, pending confirmation of the liquidator's account which, as I have said, merely serves to increase the costs. The same would be the case where the principal debtor dies, or is sequestrated (see s 13(1)(g) quoted in para 3 above). If a disputed claim against the principal debtor is subjected to arbitration (see s 13(1)(f)) the creditor may be compelled to institute action against the surety to interrupt prescription. If the matter were resolved by arbitration the action against the surety would once again have been a needless exercise resulting in wasted costs. Yet another example of an anomalous situation that may arise is the case of debts between spouses. The effect of s 13(1)(c) is that prescription in such a case is delayed during the subsistence of the marriage. But the creditor spouse would have to sue the surety within the ordinary period of prescription. The surety, in turn, would have to sue the debtor spouse timeously, regardless of whether the marriage still subsisted and, if it did, the very object of s 13(1)(c) would be undermined. (See Styrian, *supra*, at 319.)

[32] To sum up, I am unpersuaded that the acceptance of Voet's view is unfair to sureties. On the contrary, it leads to a result which is both convenient and equitable, particularly when considered against the backdrop of the commercial realities of our modern society. In the circumstances, I can see no justification for departing from it. In my view therefore the position in the South African law is that an interruption or delay in the running of prescription in favour of the principal debtor interrupts or delays the running of prescription in favour of the surety. If, of course, prescription in respect of the claim against the surety has not yet commenced to run, any interruption or delay relating to the claim against the principal debtor will not affect the position of the surety, but in the present case, of course, prescription began to run in respect of both the principal debtor and the surety at the same time.

[33] It follows that in my view *Rand Bank Ltd v De Jager* was wrongly decided.
[34] The appeal is dismissed with costs.

D G SCOTT
JUDGE OF APPEAL

Concur:

VIVIER ADP
FARLAM JA
MTHIYANE JA
LEWIS JA