THE SUPREME COURT OF APPEAL

OF SOUTH AFRICA

Reportable

Case no: 614/2005

In the matter between:

FAROCEAN MARINE (PTY) LTD

APPELLANT

and

THE MINISTER OF TRADE AND INDUSTRY

OF THE REPUBLIC OF SOUTH AFRICA

RESPONDENT

Coram: FARLAM, MLAMBO, MAYA JJA, COMBRINCK *et* MALAN AJJA

Date of hearing: 9 November 2006

Date of delivery: 30 November 2006

Summary: General Export Incentive Scheme – Recovery of benefits unduly paid – Power of Minister to institute action – Prescription – When claim is due – 'advance … by

the State' (s 11(b) Prescription Act 68 of 1969) - Knowledge of debt and exercise of reasonable care – Section 12(3) Prescription Act 68 of 1969

Neutral Citation: This judgment may be referred to as Farocean Marine v Minister of Trade and Industry 2006 SCA 165 (RSA)

JUDGMENT

MALAN AJA:

[1] This is an appeal with the leave of the court a quo against a judgment and an order of Wagley J[1] dismissing two special pleas against the respondent's particulars of claim with costs.

[2] On 12 April 1996 the appellant lodged a claim with the Director-General of the Department of Trade and Industry for benefits payable to exporters under the *General Export Incentive Scheme* (*GEIS)* in respect of a yacht it had constructed and exported to a foreign purchaser on 28 February 1996. Benefits amounting to R 1 723 861 were paid to the appellant on 5 July 1996. In this action the respondent seeks to recover the amount so paid from the appellant and other relief.

[3] The *GEIS* was originally introduced as a State prerogative on 1 April 1990 for an initial period that ended on 31 March 1995 and was intended to encourage higher levels of beneficiation of products before their export by providing for the payment to exporters of certain defined financial benefits so as to generate foreign currency income for the country. The *Guidelines* introducing and

[1] *Minister of Trade and Industry v Farocean Marine (Pty) Ltd* 2006 (6) SA 115 (C).

governing the operation of the scheme have the force of legislation.[2] Revision No 4 of the *Guidelines* has been in force since 1 April 1995[3] and governs the claim lodged by the appellant.

[4] During November 1996 to 31 January 1998 the Director-General, acting in terms of paragraph 3.11 of the *Guidelines*, caused an investigation to be conducted to verify the information furnished by the appellant in respect of its claim. As a result of the investigation the Director-General was satisfied that the export of the yacht was not eligible for financial benefits under *GEIS* and/or that the appellant's claim was based on false information and/or that misleading information was furnished in respect of it. It is alleged that the investigation revealed that the purchase of the yacht by the overseas purchaser had been financed through a local bank by means of a loan repayable over 10 years in South Africa; that the export of the yacht did not constitute 'export sales' as defined in the *Guidelines* since it did not 'produce the inflow of the total sales value in foreign exchange into the Republic of South Africa within 12 months after the date of actual export'; and that the appellant had represented that the export of the yacht constituted 'export sales' when it did not.[4] As a consequence the Director-General acting under paragraph 3.11 disallowed the appellant's claim and seeks to recover the amount paid to the appellant. This decision, it is common cause, was taken after 2 September 1996 being more than three years after the date the summons was served, viz 2 September 1999.

[5] The respondent's claim for recovery of the benefits paid to the appellant is

[2] *Director-General, Department of Trade and Industry and another v Shurlock International (Pty) Ltd* 2005 (2) SA 1 (SCA) para 2 at 3G-H. See *South African Co-Operative Citrus Exchange Ltd v Director-General: Trade and Industry and another* 1997 (3) SA 236 (SCA) 239B-F; *Dilokong Chrome Mines (Edms) Bpk v Direkteur-Generaal, Departement van Handel en Nywerheid* 1992 (4) SA 1 (SCA) 21G ff.

[3] The scheme terminated on 31 December 1997; see the introduction to the *Guidelines*.

[4] See para 17 hereunder for the definition of 'export sales'.

based on paragraph 3.11 of the *Guidelines*:

'The Director-General's decision on the eligibility of any product for benefits under the General Export Incentive Scheme, as well as the determination of the amounts of the incentives will be final and conclusive. Nothing in this document shall be construed as an offer open to acceptance constituting a contractual or other obligation or enforceable right against the Department. The Director-General may at any time conduct a full-scale investigation to verify any information furnished by a claimant. If the Director-General is satisfied the claim was based on false information, or the claimant furnished misleading information, or the claimant is unable to back his claim by documentary proof, he may disallow the claim and recover the full amount paid to the claimant. Interest on payments not due to a claimant shall be levied at the rate prescribed in terms of section 1(2) of Act No 55 of 1975 as from the issue dates of warrant vouchers or promissory notes.

If the Director-General regards more drastic action necessary, he may decide on the deregistration of a claimant under this Scheme and/or the institution of criminal proceedings against the claimant. The Director-General will not consider the registration of the claimant unless good cause is shown by the claimant and at least one year has passed from the date on which the claimant was deregistered.'

Paragraph 3.9 is also relevant and provides that

'[t]he Department will check all claims and determine the amount of the claim, but all payments are subject to final verification'.

[6] In its first special plea the appellant alleges that the respondent, the Minister, has no right or *locus standi* under paragraph 3.11 of the *Guidelines* to sue for or recover payments made and that only the Director-General may do so. The appellant pleaded that '[i]n terms of clause 3.11 of the GEIS Guidelines . . . it is the Director-General, and not the [respondent], who must exercise the powers set out therein, including the recovery of amounts paid to claimants'. The respondent has alleged in its particulars of claim and in its replication that it was

the Director-General, and not the Minister, who took the three steps referred to in paragraph 3.11, viz causing an investigation to be conducted; satisfying himself in respect of certain aspects of the appellant's claim; and deciding to disallow the claim and recover the amount paid.

[7] The appellant's argument is based entirely on the wording of paragraph 3.11 that describes the powers of the Director-General. Paragraph 3.11, however, must be read in the context of the *Guidelines*. The scheme was introduced by the State through the Department. Benefits under the Scheme were intended to be paid by the Department to claimants who qualified. The Scheme was administered by the Department and the Director-General was empowered 'within his absolute discretion' to 'devise and implement rules and guidelines pertaining to the practical implementation and operation' of the scheme.[5] The 'terminology' of the *Guidelines* emphasises the role of the Department in the administration of the scheme: 'claimants' and 'exporters' had to be registered by and claims lodged with the Department. Certain forms had to be used.[6] The Department could call for additional information from claimants,[7] and, should the information not be forthcoming, 'the Department shall treat these exports as not qualifying for GEIS purposes and shall reclaim all payments relating to such exports plus interest from the claimant.' All payments were 'subject to final verification' and the Department was to 'check all claims and determine the amount of the claim'.[8] Exporters who traded under a trade name or in the name of a division were allowed to register and claim under that name or the name of a division provided 'the exporter shall at all times remain liable for all monies, damages and liabilities due to the Department by such division or under such trade names'. Certain documents had to accompany claims and copies of them 'kept available, sorted and be easily accessible for Departmental inspection' for

[5] Para 3.10.

[6] Paras 3.2; and 4.

[7] Para 3.8.

[8] Para 3.9.

at least five years.[9] The Department had the right to verify information furnished by a 'manufacturer'.[10] The declaration by the chief executive of a claimant requires him or her to accept liability 'jointly and severally … with the claimant for all monies which may become due by the claimant to the Department.'[11] The audit reports were furnished 'solely for the information of the Department' and required the auditor to state that the claim was the responsibility of the claimant.[12] The *Guidelines* give certain powers to the Director-General,[13] but these powers are exercised on behalf of the Department the claim of which is the subject matter of this action.

[8] The first special plea has a narrow ambit: may the Minister commence these proceedings where the power to recover the amount paid to a claimant on the wording of paragraph 3.11 resides in the Director-General. Proceedings on behalf of the State may be commenced both in the name of the State or the Government and in the name of a nominal plaintiff or applicant, usually the Minister as the embodiment of the Department.[14] Proceedings may also be commenced by the administrative head of a department.[15] Where proceedings are initiated, as in this case, by the Minister 'in his official capacity as the member of the Cabinet … who has overall control, authority and responsibility for the Department of Trade and Industry', the question is not whether the plaintiff is authorised to do so,[16] but whether the Minister has set out the necessary

[9] Para 3.8.

[10] Para 5.2.9.

[11] Para (r).

[12] Annexures 6A and 6B to the *Guidelines*.

[13] Eg paras 2.8; 3.10; 3.11.

[14] *Distcor Export Partners; Distcor Yacht Exporters v The Director-General of the Department of Trade and Industry* Case 521/03 (SCA) 23 March 2005 paras 4 and 6. In litigation against the State the Minister of the department concerned may be cited as the nominal defendant or respondent (s 2 State Liability Act 20 of 1957) but the State or Government may also be cited.

[15] *Distcor Export* paras 6,10.

[16] *Distcor Export* para 6.

requirements for liability. It is not a question whether the Minister has *locus standi*: as Conradie JA said in *Distcor Export Partners; Distcor Yacht Exporters v The Director-General of the Department of Trade and Industry*:[17]

'A nominal plaintiff does not sue for his or her own account and the question of whether such a plaintiff has a sufficient interest in the proceedings (the essential *locus standi* enquiry) obviously does not arise. Such a plaintiff is there (only) to put someone else's case before the court: the question is whether or not he has authority to do so.'

The respondent has expressly alleged that the Director-General, and not the Minister, decided to disallow the respondent's claim and to recover the full amount of the benefits paid. While it is correct that '[p]ower is not conferred upon "the administration" generally, and any power which is conferred may be exercised by the office holder or body upon which it is conferred alone',[18] the facts founding the cause of action based on paragraph 3.11 have been expressly alleged. It is thus not a question of the Minister exercising the powers of the Director-General but of the Minister instituting action to put the case of the Department on whose behalf it was decided to recover the benefits paid before court.[19] This is permissible and it follows that the first special plea was correctly dismissed.

[9] In its second special plea the appellant alleges that the respondent's claim has in terms s 11(d) of the Prescription Act 68 of 1969 become prescribed in that the respondent's claim is for the recovery of a payment made on [5] July 1996; that the respondent had knowledge of the identity of the appellant and the facts from which the debt arises (or could have had such knowledge by exercising reasonable care) before 1 September 1996. Summons was served on 2 September 1999, a date more than three years after the date on which the alleged debt became due.

[10] To the plea of prescription it was argued on behalf of the respondent that

[17] Case 521/03 (SCA) 23 March 2005 para 7.

[18] Lawrence Baxter *Administrative Law* (1984) 426.

[19] Cf *Distcor Export* para 7.

the applicable period of prescription is not three years but, in terms of s 11(b), fifteen years the debt in question being 'a debt owed to the State and arising out of an advance or loan of money or a sale or lease of land by the State to the debtor'. The argument was that the debt is an 'advance . . . of money' falling under the provisions of s 11(b). I do not agree. The verb 'advance' means to 'pay (money) before it is due' or to 'lend (money)'.[20] When the word is considered in the context of s 11(b) it must be noted that it is used together with the word 'loan' and followed by the words 'sale' or 'lease' which, like loans, are commercial contracts. Payment of a benefit in terms of *GEIS* is not made pursuant to a contract,[21] nor can it be described as a 'loan' of any kind.

[11] Nor can the payment of *GEIS* benefits be a payment before it is due. The respondent has argued that a claimant for *GEIS* benefits becomes entitled to them once he *prima facie* satisfies the criteria of Revision 4. Payment is made on this basis but always 'subject to final verification.' The appellant relies on the words 'but all payments are subject to final verification' inserted in paragraph 3.9 of Revision 4 of the *Guidelines* which did not appear in the corresponding paragraph 3.10 of Revision 2. To my mind, these words mean no more than that the claims submitted were subject to final verification by the Director-General acting in terms of paragraph 3.9. They do not make payment of benefits before such verification conditional or 'in advance'.[22] The fact that the respondent may have certain rights against the exporter's auditors or chief executive officer does not detract from this conclusion.[23]

[20] *The Concise Oxford Dictionary* 8ed *sv* 'advance'.

[21] See para 14 hereunder.

[22] See *Shurlok* para 11: 'It is true that claims were provisional in the sense that they were subject to disallowance by the appellant, but, on the plain wording of para 3.11, the power of disallowance was made expressly subject, as I have said, to the presence of one or other of the jurisdictional facts stated, neither of which is present in this case.' The amended wording of paragraph 3.9 in Revision 4 does not affect this conclusion.

[23] See Annexures 3A and 3B to the *Guidelines*.

[12] Prescription commences to run 'as soon as the debt is due' (s 12(1)). Although the 'date on which a debt arises usually coincides with the date on which it becomes due' this need not always be the case.[24] The question is thus when the debt the respondent seeks to recover arose and when it became due. A money debt is 'due' when there is a 'liquidated monetary obligation presently claimable by the creditor for which an action could presently be brought against the debtor. Stated differently, the debt must be one in respect of which the debtor is under an obligation to pay 'immediately'.[25]

[13] On behalf of the appellant it has been argued that the debt in this matter, ie the obligation to refund the benefits paid, arose when they were paid to the appellant, ie on 5 July 1996, and that once the respondent had knowledge of the financing arrangement for the purchase of the yacht it knew that the appellant did not qualify for *GEIS* benefits and was not entitled to them. It has further been submitted that the fact that the Director-General conducted an investigation later and decided to reclaim the money subsequently were irrelevant since a creditor cannot by its own conduct or inaction postpone the commencement of prescription. At best, it was submitted, the investigation and decision by the Director-General in terms of paragraph 3.11 were 'procedural conditions' which could not affect the fact that the benefits could be reclaimed as soon as they were paid.[26] I do not agree that the requirements set out in paragraph 3.9 can be

[24] *List v Jungers* 1979 (3) SA 106 (A) 121C and see *MV Forum Victory: Den Norske Bank ASA v Hans K Madsen CV and others (Fund Constituting the Proceeds of the Sale of the MV Forum Victory)* 2001 (3) SA 529 (SCA) 535G-H.

[25] *The Master v I L Back and Co Ltd and others* 1983 (1) SA 986 (A) 1004F-G and see *Singh v Commissioner, South African Revenue Service* 2003 (4) 520 (SCA) 533D-E; *Deloitte Haskins & Sells Consultants (Pty) Ltd v Bowthorpe Hellerman Deutsch (Pty) Ltd* 1991 (1) SA 525 (A) 532H-I and MM Loubser *Extinctive Prescription* (1996) p 51.

[26] See eg *Uitenhage Municipality v Molloy* 1998 (2) SA 735 (SCA) 742A-H; *The Master v IL Back & Co Ltd and others* 1983 (1) SA 986 (AD) 1005G-H; *Stockdale and another v Stockdale* 2004 (1) SA 68 (C) 73I-74G.

termed ‘simple procedural steps’.[27] This is not a case of a person who is entitled to enforce his claim but through inaction delays to do so.[28] Accepting for the purposes of the second special plea that the debt existed at the time of payment because payment of the benefits to the appellant was not due, the respondent may have several causes of action available for its recovery including paragraph 3.11. The power of disallowance is made subject to the presence of certain jurisdictional facts and even if those facts were present the Director-General still had a discretion whether or not to disallow a claim.[29] The debt became due only after an investigation had been conducted to verify the information furnished by the claimant; the Director-General being satisfied that the claim was based on false information or that the claimant had furnished misleading information or that the claimant was unable to support his claim with documentary proof; and the Director-General, in addition, upon being so satisfied deciding to exercise his discretion to disallow the claim and cause recovery of the benefits paid.

[14] The relationship between a claimant under *GEIS* and the Director-General or Department is not contractual but arises from administrative law. In *Dilokong* Botha JA explained the relationship:[30]

‘Wat hier gebeur het, is dat die Minister, verteenwoordigend van die uitvoerende gesag van die Staat, bekend gemaak het dat sekere geldelike voordele beskikbaar gemaak is vir sekere uitvoerders wat aan bepaalde vereistes voldoen en wat eise indien volgens die “riglyne” wat daarvoor voorgeskryf is. Hierdie oorwegings dui op wat na my oordeel van fundamentele belang is in die huidige ondersoek: die aard van die onderliggende verhouding tussen die partye. Daardie verhouding is dié van owerheid teenoor onderdaan. Dit lê op die gebied van die administratiefreg. Dit kan natuurlik gebeur dat ‘n kontraktuele verhouding geskep word tussen die uitvoerende gesag en ‘n onderdaan, soos wanneer ‘n kommersiële ooreenkoms beklink word, maar in die huidige geval is die beskikbaarstelling aan onderdane van geldelike bystand uit die Staatskas deur middel van ‘n suiwer begunstigende beskikking, iets wat so eie is aan ‘n administratiefregtelike verhouding dat ek geen ruimte daarin kan sien vir ‘n bevinding van

[27] *Santam Ltd v Ethwar* 1999 (2) SA 244 (SCA) 253C-D.

[28] Cf *Van Vuuren v Boshoff* 1964 (1) SA 395 (T) 401D-E.

[29] *Shurlock* above 6E-I.

[30] *Dilokong* above note 2 at 18B-F.

kontraktuele aanspreeklikheid van Staatskant nie. Ek wil dit so stel: objektief beoordeel, toe die Minister die skema uitgevaardig het, en toe die appellant hom ingevolge die skema geregistreer het en 'n eis ingedien het, was daar nóg by die een nóg by die ander die bedoeling om 'n kontraktuele verhouding tot stand te bring: die *animus contrahendi* het wedersyds ontbreek.'

In acting as aforesaid the Director-General was acting in an administrative capacity and conducting an investigation in which the claimant was entitled to be heard and actively participate in.[31] The debt was 'due' only when the Director-General decided to disallow the benefits.[32]

[15] On behalf of the appellant, however, reliance was placed on s 12(3) of the Prescription Act 68 of 1969:

'A debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises: Provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care.'

Counsel's argument was directed at paragraph 9 of the particulars of claim where it is alleged that the investigation undertaken by the Director-General established:

'9.1 That the purchase of the motor yacht by the overseas purchaser thereof had been financed locally through the Standard Merchant Bank, such finance constituting a loan repayable over 10 years in monthly instalments in arrears in South Africa;

9.2 That the export of the motor yacht by Defendant did not constitute "export sales" (as defined in paragraph 5.1.3 above) as it did not "produce the inflow of the total export sales value (as defined in paragraph 5.1.4 above) in foreign exchange into the Republic

[31] *Dilokong* above 22C-E where it was said that the Director-General in administering the scheme acts 'as 'n funksionaris wat sy bevoegdheid ontleen aan die bepalings van die skema. As sodanig, en as 'n amptenaar van die Staat, is hy gebonde om op te tree binne die raamwerk van die skema. Hy tree dan op op 'n administratiefregtelike vlak wat sy beslissings beregbaar maak deur 'n Hof.' See *South African Co-Operative Citrus Exchange Ltd v Director-General: Trade and Industry and another* 1997 (3) SA 236 (SCA) 239D-E.

[32] Cf *Stockdale and another v Stockdale* 2004 (1) SA 68 (C) 73D-74E.

of South Africa within 12 months after the date of actual export".

9.3 That Defendant had represented to the Department that the export of the motor yacht constituted "export sales" as defined in paragraph 5.1.3 above, when it did not.'

Paragraph 9.2, counsel has submitted, contains a conclusion of law, not a statement of the facts relied upon. In this regard reference is also made to the respondent's letter of 6 March 1998 in which a refund of the benefits was claimed:

'A verification carried out by officials of this department . . . revealed that the steel motor vessel exported . . . was financed locally through the Standard Merchant Bank and the loan is repayable over 10 years in 6 monthly instalments in arrears. Therefore, this export does not qualify for GEIS benefits as total export sales value in Foreign Exchange did not flow into the Republic of South Africa within twelve months after the date of actual export as is stipulated in Paragraph 2.9 of the GEIS guidelines.'

[16] On behalf of the appellant it was contended that the respondent acquired knowledge of the claim and facts on which it was based as early as 29 March 1995, ie more than a year before the appellant submitted its *GEIS* claim on 12 April 1996, when it received the appellant's letter of 23 March 1995 together with a schedule attached to one of the annexures. The schedule was prepared by the Credit Guarantee Insurance Corporation (CGIC) dated 3 April 1990 and contains details of the loan by Standard Merchant Bank (SMB) to the foreign purchaser repayable in 20 consecutive six monthly instalments in Rand in South Africa over 10 years the first instalment to fall due six months after completion of the project, ie the construction of the yacht. Counsel for the appellant argued, with reference to the allegations in paragraphs 1.1 to 9.3 of the particulars of claim, that the respondent knew or should have been aware on 29 March 1995, when it received the letter, that the purchase of the yacht was financed locally through SMB; and that the export of the yacht did not constitute 'export sales' as defined since it did not produce the inflow of the total export sales value in foreign exchange into the Republic within twelve months after the date of actual export.

[17] To my mind paragraph 9.2 does not contain a conclusion of law: it refers to the entire definition of 'export sales' and the particulars of claim cite this definition in its entirety in paragraph 5.1.3. It is clear that the whole of the definition is relied upon as a factual averment including that part of it underlined below. 'Export sales' is defined in paragraph 2.8 of the *Guidelines* as:

'sales of qualifying products produced in the Republic of South Africa, to *bona fide* importers in eligible countries. It is essential that these sales produce the inflow of the total sales value in foreign exchange into the Republic of South Africa within twelve months after the date of actual export, notwithstanding any authorization of payment for such export sales over a longer period than twelve months by the Exchange Control Authorities. Only goods which physically left South Africa qualify under the GEIS. *If the price for any such export sale is paid in South African currency, such sale may qualify for assistance under the GEIS if proof to the satisfaction of the Director-General, is furnished that the payment of such price in South African currency emanated from a direct inflow of foreign exchange to the same value*' (my emphasis).[33]

[18] It follows from this definition that the fact that the relevant officials in the Department may have had knowledge that the purchase price of the yacht was payable in Rand and was financed through a loan by SMB is not sufficient to lead to the conclusion that the respondent had knowledge of the facts from which the debt arose (s 12(3) of the Prescription Act). The question is not whether the respondent knew that the purchase was financed through a local bank but

[33] In the *General Notes on the Guidelines in respect of the GEIS* paragraph 2.8 is commented upon: 'In the instance where payments for exports are made in rand, the onus is on the claimant to prove that the rand payments received were converted from foreign exchange and in fact resulted in the inflow of foreign currency into South Africa. It is vitally important that the exporter should approach his bank to establish and confirm by way of Form E (or a certificate signed by the claimant's bank manager personally that the requirements of Form E have been met) before or after the GEIS claim has been processed and approved for payment.'

whether, because the price was payable in Rand, the Department knew that payment nevertheless ‘emanated from a direct inflow of foreign exchange to the same value’. This was the purpose of the investigation undertaken by Mr Strydom, one of the officials employed by the Department. The officials of the Department could obviously not have known of any ‘direct inflow of foreign exchange’ at the time of payment of the benefits or at the time of receiving the appellant’s letter of 23 March 1995. The further question is thus whether, by exercising reasonable care (s 12(3)), they could have known that payment would nevertheless not have emanated from a direct inflow of foreign exchange to the same value. A review of the evidence shows that this is unlikely.

[19] The letter of 23 March 1995 and the SMB letter should be seen in perspective. Mr Ocenasek, a founder of the appellant, testified that the original contract to build the yacht was signed on 27 June 1990 but amended subsequently. The foreign purchaser agreed to borrow the purchase price from SMB and the appellant, according to the evidence of Mr Burt, approached SMB to arrange for a loan under the Export Credit Scheme to the foreign purchaser. The application was submitted to SMB who sent it to CGIC who forwarded it to the re-insurance committee of the Export Credit Authority, an agency administered by the Department. The re-insurance committee granted SMB approval for the loan subject to inter alia approval by the SA Reserve Bank. The SMB document, ie the schedule of payments, was generated by the CGIC in relation to this approval and sets out the repayment terms to which the CGIC was

prepared to agree in order to provide the appellant with credit insurance cover in respect of the sale of the yacht.

[20] The appellant applied to the Director: Financial Assistance Schemes 'for GEIS benefits in respect of a project of a capital nature' on 9 November 1994. The application makes provision for the Director-General to fix the 'E factor' and to stipulate the 'GEIS category (M factor)'. The application was declined. The appellant thereafter on 23 March 1995 made representations to the Department to reconsider the application. Attached to this letter was the schedule of repayments referred to. The respondent then requested the appellant to complete a claim form according to the *Guidelines* which the appellant submitted on 12 April 1996. The claim form embraced three claims including one for the yacht. With regard to the yacht the 'export sales value' was reflected as R 12 313 296 and the *GEIS* benefit claimed as R 1 723 861. By letter dated 1 July 1996 the appellant was advised that the claim had been approved. The amount of the benefit was paid by cheque dated 5 July 1996. The appellant's application to fix the E factor, the Department's refusal of the application and the appellant's letter of 23 March 1995 (enclosing the schedule of repayments) were not included in the appellant's claim for *GEIS* benefits. Mr Ocenasek testified that he thought that the Department would have had all the correspondence relating to the claim in its possession.

[21] The investigation into the appellant's claim was instigated by a note dated 13 August 1996 received from the SA Reserve Bank requesting SMB to confirm that the export proceeds were received in South Africa as well as its extent and other information. The appellant in a letter of 25 September 1996 explained to its banker, SMB, that the amount of the original contract price had increased from R 8 million to an amount in excess of R 9 722 712 as a result of extra costs incurred at the request of the purchaser. Its letter added:

'*The amounts received in Foreign Currency, converted to Rands at the time when received in*

South Africa over the duration of the contract, amount to R 9 722 712.00.
When the export value is claimed for Geis purposes, the total foreign value received is converted at the rate that is applicable on the date of the Geis Claim hence the discrepancy between the export value and the value of R 9 722 712.00 in our application' (my emphasis).

[22] SMB's explanation of 8 October 1996 to the Reserve Bank confirmed the appellant's figures. However, it stated that

'a total payment of R 9 723 012-50 has been received being *R 2 973 012-50 by direct transfer from abroad* and the balance of R 6 750 000-00 being financed by our Standard Corporate and Merchant Bank secured by CGIC per H/O Ref 224/91 submitted by Standard Merchant Bank Limited' (my emphasis).

[23] A departmental investigation was thereupon requested on 29 October 1996 and the appellant was formally notified of it by letter on 31 October 1996. An initial investigation by Mr Strydom took place at the appellant's premises on 11 and 12 November 1996 resulting in the Department's letter of 15 November 1996 advising that the full amount of the *GEIS* benefits had to be refunded. The appellant was invited to make further representations. The appellant's letter of 6 January 1997 explained that the yacht building contract was entered into on 27 June 1990 for R 8 million but that due to modifications the price was eventually increased to more than R 16 million but that no claim was submitted for the amount of the increase 'as this amount was paid in local currency', the implication being that the original part of the price was received in foreign currency. With regard to the loan obtained by the foreign purchaser from SMB the appellant said:

'The Guidelines in respect of the General Export Incentive Scheme (Revision No 4) states in paragraph 2.8 that should the price for the export sale be received in South African currency, such claim may qualify for assistance *if it can be shown that the payment of such price emanated from a direct inflow of foreign exchange to the same value*' (my emphasis).

The letter also stated that on 1 March 1996 an invoice in foreign exchange had been raised for the full outstanding value of both the original and modified contract and that in determining the export sales value

'the free carrier value of the original contract was used and the foreign currency value reflected on the . . . invoice was converted into local currency at the spot buying rate on the date of the original DA550.'

[24] This led to the respondent's response that the appellant had not replied to the 'most critical aspect' of the enquiry, viz that only R 2,9 million was received in foreign currency. Further information regarding the amounts of R 9 722 712 allegedly received from overseas and R 6 571 340 received locally was requested. The appellant responded by letter of 29 January 1997 enclosing a reconciliation between invoices and monies received for the yacht. This was the first full accounting received by the respondent. This led to a provisional finding that the claim in respect of the yacht had to be disallowed partially. The appellant was asked to comment but no agreement could be reached and the error committee decided that Strydom should again verify the information which he did on 29 and 30 September 1997.

[25] In giving evidence on the appellant's reconciliation Mr Strydom pointed out that the invoices were dated from 19 February 1991 to 12 February 1996 and that they did not reflect foreign exchange but only Rand payments. In the 'received from column' five payments were reflected as Rand payments amounting to R 2 972 152-50 which were paid by the foreign purchaser in foreign currency. Seven payments were received from SMB totalling R 6,75 million. From the reconciliation and vouchers it is apparent that the appellant had arrived at the foreign exchange values by converting the Rand payments to dollars at the spot rate on the dates of the invoices. The total of these dollar values were then again converted to Rand at the spot rate on the date of the claim form. In this way the appellant had calculated the alleged 'export sales value' of approximately R 12,3 million reflected in column 8 of the claim form. In fact, only R 9,7 million was received mostly in Rand and payments received from SMB was received in Rand. Mr Strydom then recommended to the error committee that the full amount of the benefit for the yacht be disallowed. After he received legal opinion the final error report dated 31 January 1998 was produced. At its monthly meeting of

February 1998 the error committee disallowed the appellant's claim in respect of the yacht and informed the appellant accordingly.

[26] From the history of the investigation detailed above it is clear that the officials of the Department could not reasonably have known of the facts from which the debt arose before completion of this investigation in which the appellant was entitled to and did participate. At the earliest they could reasonably have known of the facts from which the debt arose (accepting that it arose at the time of payment of the benefits) was after receipt of the appellant's letter of 29 January 1997 enclosing a reconciliation between invoices and monies received for the yacht On all accounts the officials acted with reasonable care. It follows that the second special plea was misconceived and was correctly dismissed.

The appeal is dismissed with costs.

F R MALAN

Acting Judge of Appeal

CONCUR:

FARLAM JA

MLAMBO JA

MAYA JA

COMBRINCK AJA