SOCIETY OF LLOYD'S v PRICE
SOCIETY OF LLOYD'S v LEE 2005 (3) SA 549 (T)

Citation	2005 (3) SA 549 (T)
Case No	17040/2003 (Price), 20764/2003 (Lee)
Court	Transvaal Provincial Division
Judge	Mynhardt J
Heard	July 22, 2003; March 16, 2004
Judgment	January 14, 2005
Counsel	A C Thompson SC (with him J E Joyner) for the plaintiff. C E Puckrin SC (with him A N Oelofse) for the defendants.
Annotations	Link to Case Annotations

Flynote : Sleutelwoorde

Prescription - Extinctive prescription - Conflict of laws - Period of prescription - Provisional sentence sought on judgments obtained in English High Court - Prescriptive period six years under English law but three years in South Africa in terms of s 11*(d)* of Prescription Act 68 of 1969 - Debts prescribed under South African law but not under English law - Prescription a matter of substance according to South African law (*lex fori*) and matter of procedure according to English law (*lex causae*) - South African law of prescription not applying because it was, in terms of *lex fori*, a matter of substance, and English law, *lex causae*, not applying because *lex causae* regulated only matters of substance and South African court would not apply foreign rules of procedure - In such situation own South African law should be applied and not foreign law relating to prescription - Prescription Act 68 of 1969 applicable - Debts accordingly prescribed.

Prescription - Extinctive prescription - Period of prescription - Foreign judgment - Action for provisional sentence on foreign judgment - Phrase 'any judgment debt' in s 11*(a)*(ii) of Prescription Act 68 of 1969 not including foreign judgment - Period of prescription not 30 years but three years in terms of s 11*(d)* of Act.

Headnote : Kopnota

In two applications for provisional sentence on judgments obtained in the High Court of England and Wales, the defendants raised the defence of prescription, averring that in terms of the Prescription Act 68 of 1969 the debts had prescribed. The judgments had been granted more than three years and less than six years (the applicable prescriptive period in England) prior to the institution of the actions for provisional sentence on the judgments. The question arose whether the English law of prescription or

the South African law thereanent applied. The parties were agreed, and the Court accepted, that prescription, or the concept of limitation of actions, was, according to South African law

(ie the Prescription Act 1969), a matter of substance, and, according to English law, pursuant to the relevant legislation, a matter of procedure. (Paragraphs [31] and [37] at 559G - H and 563E.)

Held, that, strictly speaking, and logically, the South African law relating to prescription could not apply in the present matters because prescription in terms of the *lex fori*, the South African law, was a matter of substance and not procedure. The English law, the *lex causae*, could also not apply because the *lex causae* regulated only matters of substance and a South African court will not apply foreign rules of procedure in a matter to be adjudicated upon by it. There is, therefore, a gap and possibly no one system of law would apply. (Paragraph [38] at 563G - H.)

Held, further, that in such a situation our own South African law should be applied and the Court should not apply the foreign law relating to prescription. The provisions of the Prescription Act 1969 should therefore be applied. (Paragraph [38] at 564B/C - D, paraphrased.)

Held, further, as to the plaintiffs' contention that the plaintiffs' claims were based on a 'judgment debt' within the meaning of s 11*(a)*(ii) of the Prescription Act and that the period of prescription was 30 years, that the word 'any' in the phrase 'any judgment debt' in s 11*(a)*(ii) did not serve to include foreign judgments. Although that word was a word of wide import its meaning in any particular case depended on the context in which it was used. In regard to foreign judgments it has been laid down that such a judgment merely constituted a cause of action and that it was not directly enforceable. Such a judgment could not, therefore, on a linguistic approach to the words used in s 11*(a)*(ii) be regarded as a 'judgment debt'. A foreign judgment was therefore not included under s 11*(a)*(ii) of the Prescription Act 1969. (Paragraph [40] at 565F/G - H and 566E/F.)

Held, accordingly, that the plaintiff's claims had become prescribed in terms of ss 10, 11*(d)* and 12(1) of the Prescription Act 1969 after the lapse of three years from the date upon which each of the judgments were given. The plaintiff was therefore not entitled to enforce those judgments. (Paragraph [41] at 566F - G.) Actions dismissed.

Cases Considered

Annotations

Reported cases

De Jager en Andere v ABSA Bank Bpk 2001 (3) SA 537 (SCA): referred to

E A Gani (Pty) Ltd v Francis 1984 (1) SA 462 (T): considered

Jaffray and Others v Society of Lloyd's [2002] EWCA Civ 1101: referred to

Jones v Krok 1995 (1) SA 677 (A): applied

Joosab v Tayob 1910 TS 486: referred to

Kilroe-Daley v Barclays National Bank Ltd 1984 (4) SA 609 (A): considered

Kuhne & Nagel AG Zurich v APA Distributors (Pty) Ltd 1981 (3) SA 536 (W): dictum at 537

in fin - 538A applied

Laconian Maritime Enterprises Ltd v Agromar Lineas Ltd 1986 (3) SA 509 (D): applied

Laurens NO v Von Höhne 1993 (2) SA 104 (W): distinguished

MV Ivory Tirupati*: MV* Ivory Tirupati *and Another v Badan Urusan Logistik (aka Bulog)* 2003 (3) SA 104 (SCA): considered

Minister of Transport, Transkei v Abdul 1995 (1) SA 366 (N): applied

Primavera Construction SA v Government, North-West Province, and Another 2003 (3) SA 579 (B): compared

Protea International (Pty) Ltd v Peat Marwick Mitchell & Co 1990 (2) SA 566 (A): dictum at 568I - 569A applied.

Statutes Considered

Statutes

The Prescription Act 68 of 1969, ss 10, 11, 12(1): see *Juta's Statutes of South Africa 2003* vol 1 at 1-778, 1-779.

Case Information

Actions for provisional sentence on foreign judgments. The facts appear from the reasons for judgment.

A C Thompson SC (with him *J E Joyner*) for the plaintiff.

C E Puckrin SC (with him *A N Oelofse*) for the defendants.

Cur adv vult.

Postea (January 14).

Judgment

Mynhardt J:

Introduction

[1] These are two applications for provisional sentence in terms of Rule 8 of the Uniform Rules of Court (the Rules) on judgments obtained in the High Court of Justice of England and Wales, which judgments arise from the defendants' membership of the Society of Lloyd's (Lloyd's). Both of the judgments against the defendants were obtained in London in the Commercial Court, Queen's Bench Division, in 1997. The matters were heard together because it was convenient to do so. Identical issues were raised in each of the matters and there is no difference in principle between the two.

[2] On 13 October 1997 the English Court granted judgment by default in favour of Lloyd's against Mr Price, the defendant in matter No 17040/03 (Price) for payment of the amount of

£71 511,11 inclusive of interest in an amount of £5 630,11, and £389,25 as and for costs, plus interest at the rate of 8% per annum as from 13 October 1997 to date of payment thereof.

[3] Lloyd's is based in London and is a Society and Corporation which is incorporated under the Lloyd's Acts of the United Kingdom of 1871 to 1982.

[4] Price is resident in Pretoria and is an attorney of this Court who practices as such.

[5] The defendant in the second matter, Mr Lee (Lee) is a retired person who lives in Cape Town. Pursuant to an order of the Cape Provincial Division his matter was transferred to Pretoria for hearing by the Transvaal Provincial Division.

[6] Price became a member of Lloyd's on 1 January 1987 and he resigned during 1992. Lee became a member of Lloyd's on 1 January 1988 and he resigned during 1993.

[7] On 27 June 1997 the same English Court that granted judgment against Price granted judgment by default in favour of Lloyd's against

MYNHARDT J

Lee for payment of the amount of £162 823,84 inclusive of interest in an amount of £9 104,20 and £589,25 as and for costs together with interest thereon at the rate of 8% per annum as from 27 June 1997 to date of payment thereof.

[8] Neither Price nor Lee gave notice of intention to defend the matters in London. They also allege that they have not received copies of the pleadings which initiated the suits against them in London. I shall later deal with this particular aspect and then it will become clear what procedural steps were taken by Lloyd's to institute the two actions.

[9] It is alleged by Lloyd's in the provisional sentence summonses that the judgments are final and conclusive. It is further alleged that the English Court was a Court of competent jurisdiction. The ground relied on for this allegation is that each defendant has entered into an agreement, a so-called 'General Undertaking', of which clauses 2.1 and 2.2 provide as follows:

> '2.1 The rights and obligations of the parties arising out of or relating to the member's membership of, and/or underwriting of insurance business at, Lloyd's and any other matter referred to in this Undertaking shall be governed by and construed in accordance with the laws of England.
>
> 2.2 Each party hereto irrevocably agrees that the courts of England shall have exclusive jurisdiction to settle any dispute and/or controversy of whatsoever nature arising out of or relating to the member's membership of, and/or underwriting of insurance business at, Lloyd's and that accordingly any suit, action or proceeding (together in this clause 2 referred to as "proceedings") arising out of or relating to such matters shall be brought in such courts and, to this end, each party hereto irrevocably agrees to submit to the jurisdiction of the courts of England and irrevocably waives any objection which it may have now or hereafter to *(a)* any proceedings being brought in any such court as is referred to in this clause 2 and *(b)* any claim that any such proceedings have been brought in an inconvenient forum and further irrevocably agrees that a judgment in any proceedings brought in the English courts shall be conclusive and binding upon each party and may be enforced in the courts of any other jurisdiction.'

[10] Because of certain allegations that were made in the papers about the conduct of

Lloyd's, notice was given by Lloyd's that it would seek punitive cost orders against Price and Lee, including the costs of two counsel, in respect of the costs of the proceedings for provisional sentence. At the hearing of the matters on 24 November 2004 Mr *Thompson SC*, who together with Mr *Joyner* appeared for Lloyd's, informed the Court that Lloyd's is not persisting with those requests and would merely seek costs on the ordinary party and party scale, including the costs of two counsel, in the event of provisional sentence being granted in favour of Lloyd's against the defendants.

[11] In regard to the facts that are relevant for present purposes, the parties have agreed 'that the facts as referred to in the English judgments' collated in the bundle that was prepared, and put before the Court by the plaintiff's attorneys, are accepted 'as the facts'. I shall later herein refer to these facts, which I shall summarise, insofar as they are relevant for purposes hereof.

MYNHARDT J

In the plaintiff's replying affidavits which were filed of record in each case, the deponent thereto, Mr Demery, has, in any event, dealt with the facts fairly extensively. Mr Demery is a solicitor of England and Wales and he is an employee of the Legal Services Department of Lloyd's. He has 23 years' experience as a practising solicitor and is experienced in English law and in the process and procedure of the High Court of England and Wales.

[12] Various defences were raised by Price and Lee in their opposing affidavits. At the hearing of the matters Mr *Puckrin SC*, who appeared for the defendants together with Mr *Oelofse*, relied on only three defences. These were, first, that the plaintiff's claims have become prescribed by virtue of the provisions of the Prescription Act 68 of 1969 of the Republic of South Africa, secondly, that the English Court did not have international jurisdiction in terms of South African law to grant the two judgments, and, thirdly, that it would be against public policy, as determined by the Courts of South Africa, to give recognition to the two judgments and to enforce them in South Africa.

In the opposing affidavits of Price and Lee much play was made of the fact that they each have a claim against Lloyd's for damages because of fraudulent misrepresentations, in the form of non-disclosures and express representations, that were made to them. However, it appeared from the papers filed of record by Lloyd's that the attorneys who acted on behalf of Price and Lee in June 1997, Messrs Hofmeyr, Herbsteins Inc (Hofmeyr) had rescinded, or cancelled, the agreement*(s)* in terms of which Price and Lee became members of Lloyd's. The grounds for cancellation, or rescission, as set out in the letter of 25 June 1997 of Hofmeyr were that misrepresentations had been made to them to induce them to become members of Lloyd's.

Mr *Puckrin* disavowed any reliance on a claim against Lloyd's by either Price or Lee. Counsel contended that it was permissible for him to rely on any defence in law which may be available to his clients and which is based on the facts as disclosed in the papers. Counsel for Lloyd's, Mr *Thompson SC*, did not contest this, and rightly so.

The background facts

[13] In what follows I shall rely heavily on the replying affidavit filed of record by Lloyd's and

which was deposed to by Mr Demery.

[14] Lloyd's has traced its origins to the 17th century. It was established by Deed of Association in 1811. Before the enactment of the Lloyd's Act of 1982 Lloyd's was regulated by the Lloyd's Act of 1871 as supplemented and amended by three later Acts.

[15] A person who wants to become a member of Lloyd's must apply for membership through a member's agent with the sponsorship of an existing member of Lloyd's. Such a person must not only pass the means test but must also travel to London to be interviewed by a member of the Committee of Lloyd's who forms the 'Rota Committee'. If an applicant

is approved by the Rota Committee he must still be elected by the full Committee of Lloyd's. Members of Lloyd's are often referred to as 'names'.

[16] Potential members make use of the services of members' agents who provide an applicant with, *inter alia*, information of the syndicates which he will recommend to the applicant and the policy for the investment of the premium income which is adopted by the syndicate's managing agent. An applicant for membership will also be advised on which syndicates to join for his first year and the maximum premium income to accept on each syndicate.

[17] Prior to the 1990 year of account each member, or name, appointed a member's agent to carry out the entirety of the underwriting business including the actual underwriting of insurance. The member's agent could also delegate its functions to a managing agent. From 1990 onwards members appointed both a member's agent and a managing agent to carry out the actual underwriting. Such an agent is in complete control of the underwriting affairs of its members and will also be responsible for the investment of premium income received for the member's account.

[18] The accounting system of Lloyd's is on a three year basis. The profit or loss in respect of a given syndicate's year of account is determined only as at the end of the third year when a reasonable estimate can be made of the ultimate income, claims and expenses which will be received or incurred with respect to policies signed during the year of account. Insurance policies are written on behalf of a syndicate during the entire year of account.

The estimated outstanding liability for a year is calculated in accordance with the provisions of audit instructions which were issued annually by the Committee of Lloyd's with approval of the British Department of Trade. The outstanding liabilities, estimated as at the end of the third calendar year, must be reinsured by a policy of reinsurance before an account for a specific year can be closed. This is known as reinsurance to close or as 'RITC'. Once closing reinsurance is effected, the profit or loss for the year of account is determined and, if there is a profit, it is credited to the members of the syndicate, but if there is a loss, members are debited with their share of the loss.

[19] The relationship between Lloyd's and a member or name is not that of insurer and reinsurer. Lloyd's issues insurance policies but has no liability on those policies. The syndicates to which members belong and which they have joined underwrite the policies

and members are directly liable on those policies underwritten by the syndicates which they have joined. Each member accepts a certain amount of the premium paid for a policy and is also liable for a *pro rata* share of the insurance risk.

A member's liability for policies underwritten by his syndicate is several and is unlimited for his share of his syndicate's losses. Underwriting is therefore a high risk business which can bring losses instead of profits.

MYNHARDT J

[20] In the 1980s and 1990s the Lloyd's insurance market was rocked by financial problems which arose, to a large extent, from claims arising out of asbestosis litigation in the United States of America (the USA). The result of this was that the RITC premiums were proved to have been inadequate.

Health problems caused by asbestos gave rise to thousands of claims being instituted in the USA and asbestos-related litigation was very lucrative for American lawyers.

The result of this was that many underwriting members of Lloyd's, like Price and Lee, suffered serious losses. Members formed action groups and instituted proceedings which were largely successful and resulted in judgments in their favour against members' agents or managing agents or auditors. By 1993 it appeared that Lloyd's itself may be at risk of being sued.

[21] A plan, called the Reconstruction and Renewal Plan or 'R&R' was adopted to combat 'the avalanche of litigation'. The purpose thereof was to resolve the financial difficulties which had troubled Lloyd's from 1990 onwards. Each member, as already mentioned, had unlimited liability for his share of the losses suffered on policies underwritten by his syndicate. The R&R plan was put forward by Lloyd's as a settlement to members for certain claims in respect of the 1992 and prior underwriting years. It involved a mutual waiver of claims by Lloyd's and the members.

The members who accepted the settlement waived all claims in respect of the 1992 and prior years of underwriting against Lloyd's, agents, auditors and the Equitas Group (Equitas).

Equitas reinsured the non-life liabilities of all members in respect of the 1992 and prior years of accounts. On acceptance of the settlement a member 'undertook to take all necessary steps to facilitate payment of the premium to Equitas'. Equitas was to be funded by means of moneys paid by Lloyd's from its central fund and by premiums paid by all members whose outstanding liabilities were reinsured by it. Equitas therefore reinsured the non-life liabilities of even those members, like Price and Lee, who did not accept the R&R settlement. Those members, of course, had to pay a premium for that benefit and protection. The R&R plan therefore introduced a compulsory reinsurance and a run-off scheme.

The fact that Price and Lee did not accept the R&R plan or settlement did not affect their liability to pay the Equitas premium. That was, in fact, what they were sued for in the English Court mentioned hereinbefore and for which judgment was obtained.

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[22] In order to introduce and implement the settlement offer Lloyd's had to make use of its statutory powers to make by-laws. Members had, in any event, to enter into a standard form agreement known as the 1986 General Undertaking, which included an undertaking by the member to comply with the Lloyd's Act and any subordinate legislation made by Lloyd's thereunder and also with any direction made by the Council of

Lloyd's and also to become a party to any agreement as may be prescribed or notified to the member or his underwriting agent by the council.

The provisions of the General Undertaking form the basis of the contention of Lloyd's that it has succeeded in procuring all members to become parties to the Equitas contract. It achieved that, so it contends, by using its statutory powers to make by-laws.

In terms of by-law 20 of 1983 the Council of Lloyd's was empowered to appoint a substitute agent to take over the whole or any part of a member's underwriting business.

On 3 September 1996 the Council appointed a substitute agent, Additional Underwriting Agencies (No 9) Ltd, 'AUA9', a company controlled by Lloyd's, and also based in London, to take over all non-life business written in or before 1992 for all members. AUA9 was directed to give effect to the R&R plan for which provision had been made in 1995 by by-law 22 of 1995.

[23] In regard to members who have not accepted the R&R plan Lloyd's rely on clauses 2.1 and 2.2 of the 1986 General Undertaking which I have quoted in para [9] hereof.

In terms of the Equitas reinsurance contract AUA9 was authorised to accept service of all process on behalf of members who have not accepted the R&R settlement plan. It is on this basis that Lloyd's contend that the process which was issued out of the English Court in London was properly served on Price and Lee. The writ of summons in each case was duly served on AUA9 and that constituted proper service under English law.

[24] The steps that were taken by Lloyd's to enable it to sue members, like Price and Lee, who have not accepted the settlement, for payment of the 'Equitas premium', were attacked by various members. All these attacks failed and were dismissed by the English Courts. The judgments that were obtained are now final and conclusive and no further appeals are possible.

[25] A number of members instituted counterclaims against Lloyd's which were based on fraudulent misrepresentation or on the English tort of deceit. The principal action in this regard became known as the *Jaffray* proceedings. These proceedings were concerned with what is known as 'the threshold fraud issue'.

The claims based on fraudulent misrepresentation (the tort of deceit) were dismissed by the Commercial Court, the Court of first instance. An appeal to the Court of Appeal was also dismissed. See *Jaffray and Others v Society of Lloyd's* [2002] EWCA Civ 1101 (26 July 2002). It was held that the members had failed to prove that Lloyd's did not believe that the representations that were made in a brochure that there was in place a rigorous system of auditing which involved the making of a reasonable estimate of outstanding liabilities were

true or that it knew that they were untrue or that it was reckless as to whether they were true or untrue. The

judgment in the *Jaffray* proceedings did not, however, deal with fraudulent non-disclosures which were relied on in their opposing affidavits by Price and Lee.

[26] For purposes hereof, and especially in the light of the stance adopted by the defendants' counsel, Mr *Puckrin*, I am prepared to accept, without deciding that, that Price and Lee will not succeed in an English Court with a claim for damages against Lloyd's based on fraudulent misrepresentation or negligent misrepresentation as a cause of action.

The defence of prescription

[27] It is trite law that a foreign judgment will under certain circumstances be enforced by the South African courts. In *Jones v Krok* 1995 (1) SA 677 (A) at 685B - E Corbett CJ said the following:

> 'As is explained in Joubert (ed) *The Law of South Africa* vol 2 (1st reissue) para 476, the present position in South Africa is that a foreign judgment is not directly enforceable, but constitutes a cause of action and will be enforced by our Courts provided (i) that the court which pronounced the judgment had jurisdiction to entertain the case according to the principles recognised by our law with reference to the jurisdiction of foreign courts (sometimes referred to as "international jurisdiction or competence"); (ii) that the judgment is final and conclusive in its effect and has not become superannuated; (iii) that the recognition and enforcement of the judgment by our Courts would not be contrary to public policy; (iv) that the judgment was not obtained by fraudulent means; (v) that the judgment does not involve the enforcement of a penal or revenue law of the foreign State; and (vi) that enforcement of the judgment is not precluded by the provisions of the Protection of Businesses Act 99 of 1978, as amended. . . . Apart from this, our Courts will not go into the merits of the case adjudicated upon by the foreign court and will not attempt to review or set aside its findings of fact or law. . . .'

[28] The question now to be considered is whether or not the judgments upon which Lloyd's relies have not become superannuated.

[29] It is also trite that there are two kinds of prescription. In the one instance rights of action are wiped out after the lapse of time and in the other instance rights of action remain *in esse* but one is barred from bringing an action to enforce them or to take steps in execution pursuant to a judgment.

Section 10 of the Prescription Act 68 of 1969 provides as follows:

> '(1) Subject to the provisions of this chapter and of ch IV, a debt shall be extinguished by prescription after the lapse of the period which in terms of the relevant law applies in respect of the prescription of such debt.
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> (2) By the prescription of a principal debt a subsidiary debt which arose from such principal debt shall also be extinguished by prescription.
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> (3) Notwithstanding the provisions of ss (1) and (2), payment by the debtor of a debt after it has been extinguished by prescription in terms of either of the said subsections, shall be regarded as payment of a debt.'

In *Protea International (Pty) Ltd v Peat Marwick Mitchell & Co* 1990 (2) SA 566 (A) at 568I - 569A (the *Protea* case) Joubert JA, who delivered the unanimous judgment of the Court,

described the effect of the section as follows:

MYNHARDT J

> 'Subject to certain exceptions, a prescribed debt is in terms of s 10(1) of the main Act extinguished after the lapse of the relevant prescriptive period. Since a prescribed debt is the correlative of the creditor's contractual right of action, the prescription of the debt necessarily extinguishes the right of action. The extinction of a contractual right of action by prescription is accordingly a matter of substantive law and not a procedural matter. . . . This constitutes a radical departure from the position under the old Prescription Act 18 of 1943. The effect of s 3(1) of the latter Act was procedural in character, since the lapse of the prescriptive period rendered a contractual right of action unenforceable, whereas the prescribed debt became a natural obligation until the effluxion of 30 years after the contractual right of action had first come into existence [s 3(5)].'

Sections 5 and 24 of the English Limitation Act of 1980 provide as follows:

> '5. An action founded on simple contract shall not be brought after the expiration of six years from the date on which the cause of action accrued.
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> . . .
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> 24(1) An action shall not be brought upon any judgment after the expiration of six years from the date on which the judgment became enforceable.
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> (2) No arrears of interest in respect of any judgment debt shall be recovered after the expiration of six years from the date on which the interest became due.'

According to the affidavit of Mr Freeman, a member of a firm of solicitors in London, the enforcement of an English judgment in England is governed by the Civil Procedure Rules. He stated the following in this regard:

> 'There is a time limit on the enforcement by execution of a judgment or order of an English Court. In this regard Order 46 Rule 2 of the Rules of the Supreme Court states that:
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> > "A writ of execution to enforce a judgment or order may not be issued without the permission of the Court in the following cases, that is to say - *(a)* where six years or more have elapsed since the date of the judgment or order. . . ."
>
> In the case of *Duer v Frazer* [2001] 1 All ER 249 it was held that permission will not be granted by the Court unless it is demonstrably just to do so and that the burden of satisfying the Court is on the applicant.'

Chapter 7 of vol 1 of Dicey and Morris on *The Conflict of Laws* 13th ed deals with matters of 'Substance and procedure'. According to the relevant rule of the English law of conflict of laws discussed in that chapter of the book, '*(a)*ll matters of procedure are governed by the domestic law of the country to which the court wherein any legal proceedings are taken belong (*lex fori*)'. Under the heading 'Comment' it is stated that '*(t)*he principle that procedure is governed by the *lex fori* is of general application and universally admitted'. It is further stated in para 7-003 of the book: 'While procedure is governed by the *lex fori*, matters of substance are governed by the law to which the Court is directed by its choice of law rule (*lex causae*).' In para 7-008 it is said that '*(t)*he method of enforcing a judgment is a matter of procedure'. The relevant part, for present purposes, of para 7-040, at 172 of the book, reads as follows:

> '(7) **Statutes of limitations**. English law distinguishes two kinds of statutes of limitation: those which merely bar a remedy and those which extinguish a right; this common-law rule was well-established,

> to searching judicial criticism, doubting whether the distinction between "right" and "remedy" provided an acceptable basis on which to proceed. Statutes of the former kind are procedural, while statutes of the latter kind are substantive. In general, the English law as to limitation of actions has been regarded as procedural, but ss 3(2), 17 and 25(3) of the Limitation Act 1980 are probably substantive since they expressly extinguish the title of the former owner.'

In para 28-126 at 1618 of vol 1 of *Chitty on Contracts* 29th ed the following is stated:

> '**General.** Except for the provisions governing extinction of title in relation to land, and goods, and the 10-year long-stop period for actions under Part I of the Consumer Protection Act 1987, the effect of limitation under the Limitation Act 1980 is merely to bar the claimant's remedy and not to extinguish his right. Limitation is a procedural matter, and not one of substance: the right continues to exist even though it cannot be enforced by action.'

The aforesaid principles of English law also hold good for South African law except that prescription is, in terms of South African law, by virtue of the provisions of s 10 of the Prescription Act 1969, a matter of substance or substantive, as was stated by Joubert JA in the *Protea* case.

In *Kuhne & Nagel AG Zurich v APA Distributors (Pty) Ltd* 1981 (3) SA 536 (W) at 537 *in fin* - 538A (the *Kuhne* case) O'Donovan J said the following:

> 'It is settled law that procedural matters are governed by the law of the place where the action is brought (*lex fori*), whereas matters of substance are governed by the proper law of the transaction (*lex causae*). Statutes of limitation merely barring the remedy are part of the law of procedure. . . . If, however, they not only bar the remedy but extinguish altogether the right of the plaintiff they belong to the substantive law and the *lex causae* applies.'

[30] Classification, or characterisation, of the applicable rules in any given case is, of course, also done in accordance with the law of the *lex fori*. See *Laconian Maritime Enterprises Ltd v Agromar Lineas Ltd* 1986 (3) SA 509 (D) at 517G - H, 518D, 519I - 521B (the *Laconian* case).

[31] For purposes of the present case it must therefore be accepted that prescription, or the concept of limitation of actions, is, according to South African law, a matter of substance, and, according to English law, pursuant to the 1980 Act, a matter of procedure. Counsel for both parties were also *ad idem*, and correctly so, that this is indeed the position.

[32] In the present two cases the proper law of the contracts which are relevant to these issues, the 1986 General Undertaking in each case, is, in fact and in law, the English law, the *lex causae*. This is so by virtue of the provisions of clauses 2.1 and 2.2 of those contracts which I have quoted in para [9] hereof. Counsel were also agreed on this particular aspect.

[33] The question now arises as to which system of law should this Court apply in resolving the question whether or not the judgments on which Lloyd's relies have become prescribed. Should the court apply the *lex causae* or the *lex fori*? If the *lex causae* is applied the judgments would have become unenforceable in 2003, six years after they were granted.

present applications were instituted in June 2003 before the period of six years had lapsed. It would follow then that the plaintiff's remedy, enforcement of the judgments, has not become barred before the present proceedings were instituted. If the *lex fori* is to be applied, the prescriptive period would have been three years since the date on which each of the judgments was granted. It would then follow that, generally speaking, the plaintiff's rights in terms of the judgments would have become prescribed in 2000 which is prior to the present proceedings being instituted. I shall later deal with two further arguments that were advanced by the plaintiff's counsel insofar as they may become relevant.

[34] Plaintiff's counsel, Mr *Thompson SC*, submitted that I should adopt the approach that was adopted by Schutz J, as he then was, in *Laurens NO v Von Höhne* 1993 (2) SA 104 (W) (the *Laurens* case). In that case the Court had to consider which law had to be applied in regard to the dispute about payment of a debt and also in regard to the defence of prescription. Two systems of law competed with each other, namely the German law and the South African law. The learned Judge pointed out, at 116E - 117E of the report, that:

> 'In a case involving a multilateral conflict rule, such as the present case, one starts off by characterising the nature of the issue and, having done that, one applies the connecting factor. The problem in this case is characterisation and the question is which law determines the quantity, nature and quality of proof of payment? It is a difficult question and there is no direct authority on it.
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> . . .
>
> The traditional rule has been that *lex fori* characterises according to its own law without looking further. In some cases this can lead to unfortunate results and because of that various writers, *Falconbridge* being an important early one, have much stirred the question. *Falconbridge's* approach is a *via media* according to which the Court has regard to both the *lex fori* and the *lex causae* before determining the characterisation.
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> According to him, although the matter is one for the law of the forum, the conflict rules of the forum should be construed "*sub specie orbis*", that is from a cosmopolitan or world-wide point of view, so as to be susceptible of application to foreign domestic rules. (*Turpin* (*op cit* at 223).)
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> . . .
>
> For myself, I accept the *via media* and propose to follow it through wherever it leads. We may not dare to let our law stand still.'

In regard to prescription the learned Judge said the following at 121D - F of the report:

> 'There remains the ninth issue, prescription. I have already said something about it in connection with the *via media* and the *Curtis* and *Kuhne* cases. For the rest I shall be brief. Our Prescription Act, as interpreted in *Kuhne's* case, is classified as substantive so that it is not a matter for the *lex fori*. German law, even although their prescription laws are only remedy-barring, characterises them as substantive. I follow the *via media*. Looking at both the *lex fori* and the *lex causae*, the policy decision is in my view obvious. German law should be applied. In this case there is no conflict between the two systems. The situation differs from that in the *Laconian* case at 530I - J, so that there is not even a temptation to fall back on the residual *lex fori*.'

[35] Mr *Thompson* submitted that I should, for policy reasons, select the English law as the applicable law in the present case. Counsel's submission was, in a nutshell, that not only is English law the proper law

MYNHARDT J

of each contract in the present case, the *lex causae*, which is correct, of course, but that the relevant English law to be applied by this Court also provides that prescription is a matter of substance and not a matter of procedure. For this submission Mr *Thompson* relied on the English Foreign Limitation Periods Act of 1984 (the 1984 Act). It is therefore necessary to refer to some of the provisions of that Act.

Section 1 provides as follows:

'(1) Subject to the following provisions of this Act, where in any action or proceedings in a court in England and Wales the law of any other country falls (in accordance with rules of private international law applicable by any such court) to be taken into account in the determination of any matter -

(a) the law of that other country relating to limitation shall apply in respect of that matter for the purposes of the action or proceedings; and

(b) except where that matter falls within ss (2) below, the law of England and Wales relating to limitation shall not so apply.

(2) A matter falls within this subsection if it is a matter in the determination of which both the law of England and Wales and the law of some other country fall to be taken into account.

(3) The law of England and Wales shall determine for the purposes of any law applicable by virtue of ss (1)*(a)* above whether, and the time at which, proceedings have been commenced in respect of any matter; and, accordingly, s 35 of the Limitation Act 1980 (new claims in pending proceedings) shall apply in relation to time limits applicable by virtue of ss (1)*(a)* above as it applies in relation to time limits under that Act.

(4) A court in England and Wales, in exercising in pursuance of ss (1)*(a)* above any discretion conferred by the law of any other country, shall so far as practicable exercise that discretion in the manner in which it is exercised in comparable cases by the courts of that other country.

(5) In this section "law" in relation to any country, shall not include rules of private international law applicable by the courts of that country or, in the case of England and Wales, this Act.'

Subsections (1) and (2) of s 4 provide as follows:

'(1) Subject to ss (3) below, references in this Act to the law of any country (including England and Wales) relating to limitation shall, in relation to any matter, be construed as references to so much of the relevant law of that country as (in any manner) makes provision with respect to a limitation period applicable to the bringing of proceedings in respect of that matter in the courts of that country and shall include -

(a) references to so much of that law as relates to, and to the effect of, the application, extension, reduction or interruption of that period; and

(b) a reference, where under that law there is no limitation period which is so applicable, to the rule that such proceedings may be brought within an indefinite period.

(2) In ss (1) above "relevant law" in relation to any country, means the procedural and substantive law applicable, apart from any rules of private international law, by the courts of that country.'

Mr *Thompson* submitted that according to the South African conflict of law rules the English law relating to limitation should now, pursuant to the 1984 Act, be classified as substantive. If that is so, submitted counsel, the choice is easy; the Court should apply the six-year period provided for by the 1980 Act and find that the plaintiff's entitlement to

MYNHARDT J

enforce the two judgments did not become barred as at June 2003 when the two applications were launched.

These contentions of counsel are based on what Mr Demery has submitted in what I shall call the plaintiff's second replying affidavit which was filed of record in September 2004. In paras 9.4, 9.5, 9.6 and 9.7 of that affidavit Mr Demery deals with the provisions of the 1980 and 1984 English Acts. In para 9.6 and 9.7 of the affidavit he concludes that an English court would have resolved the present dispute by applying the limitation rules of the *lex causae*, ie the limitation rules of England. The period would then have been six years. He further states that the previous English distinction between matters of substance and matters of procedure has now become defunct by virtue of the 1984 Act and 'the English common-law choice of law rule' has now been replaced 'with a statutory choice of law rule which does not depend upon any such distinction', ie 'between substantive and procedural statutes of limitation'.

[36] Defendants' counsel, Mr *Puckrin*, submitted that Mr Demery is wrong in what he says. Counsel pointed out, first, that what Mr Demery says is in conflict with what Mr Freeman says in his affidavit which was filed of record in support of the defendants' case. In para 9 of his affidavit Mr Freeman said that the English Courts characterise the provisions of the English Limitation Act of 1980 in regard to limitation of action 'as being procedural in nature'.

Mr *Puckrin* further submitted that the 1984 Act 'has had no effect at all on the classification of the English limitation provisions' and that 'the Act does not deal with *English* limitation provisions, but with *foreign* limitation provisions'. (I quote from counsel's written heads of argument.) Defendants' counsel further submitted that the 1984 Act merely enacts a new rule of English private international law

> 'to the effect that if the *lex causae* is a foreign law, the English court must apply that foreign law's limitation provisions to the matter, irrespective of whether those provisions are procedural or substantive in nature'.

(I once again quote from defendants' counsels' written heads of argument.)

If the submissions of defendants' counsel are correct it would follow that the 1984 Act is irrelevant to the present two matters, as was also submitted by defendants' counsel.

[37] The standpoint of defendants' counsel finds support in an article written by C Forsyth 'Enforcement of Arbitral Awards, Choice of Law in Contract, Characterisation and a New Attitude to Private International Law', which was published in (1987) 104 *SALJ* at 4. At 12 of the publication the learned author said the following:

> 'On the other hand, English rules of prescription are procedural (this proposition is not affected by the Foreign Limitation Periods Act 1984 (c 16), which broadly, imposes a classification as substantive upon *foreign* limitation statutes. . . .'

In para 7-043 of *Dicey and Morris* (*op cit*) one also finds support for the contentions of defendants' counsel where it is stated in regard to the 1984 Act that

> 'the limitation rules of the *lex causae* are to be applied in actions in England, even if those rules do not lay down any limitation period for the claim. English limitation rules are not to be applied unless English law is the *lex causae* or one of two *leges causae* governing the matter.'

In my view the standpoint of defendants' counsel is also supported by *Cheshire and North's Private International Law* 13th ed (by Sir Peter North and J J Fawcett). At 73 ch 6, under the heading 'The time within which an action must be brought', the learned authors say the following:

> 'The general principle of the 1984 Act abandons the common-law approach which favoured the application of the domestic law of limitation. Instead, the English court is to apply the law which governs the substantive issue according to English choice of law rules, and this new approach is applied to both actions and arbitrations in England. In the case of those few tort claims, such as defamation, to which the common-law choice of law rules still apply, English law, as the law of the forum will remain relevant because of the choice of law rule which requires actionability both by the law of the forum and by the law of the place of the tort. The corollary of the main rule is that English law is no longer automatically to be applied.'

In the light of the views expressed by the experts referred to above, I conclude that the submission of defendants' counsel that the 1984 Act is irrelevant to the present matters is correct.

The crucial question therefore has to be approached on the basis that prescription is, in terms of the *lex fori*, a matter of substance, and in terms of the *lex causae* it is a matter of procedure.

[38] It is true that Schutz J opted for the *lex causae* in the *Laurens* case. In that case, however, prescription was a matter of substance in terms of both the *lex fori* and the *lex causae*. There was no conflict between the two systems of law. It was therefore easy to make the policy decision which the learned Judge in fact made. The present two matters differ from the *Laurens* case. Here there is a conflict between the *lex fori* and the *lex causae*.

Strictly speaking, and logically, the South African law relating to prescription cannot apply in the present matters because prescription in terms of the *lex fori*, the South African law, is a matter of substance and not procedure. The English law, the *lex causae*, also cannot apply because the *lex causae* regulates only matters of substance and a South African court will not apply foreign rules of procedure in a matter to be adjudicated upon by it. There is, therefore, a gap and possibly no one system of law will apply. See the *Laconian* case at 524A - E.

This problem is not *res nova*. In the *Laconian* case Booysen J was faced with the same problem. The learned Judge chose to apply the *lex fori* and held that the provisions of the Prescription Act 68 of 1969 should be applied. The reason for this was

> 'that in such an event I should apply my own law on the basis that, if I am not enjoined by my own law to apply foreign law, I am enjoined by my oath to apply my country's law. I am, no doubt, influenced to some extent by *Ehrensweig's* scepticism and preference for the residual *lex fori* approach where no formulated or non-formulated rule exists which seems to me to accord with good sense.'

(At 524F - G.)

In *Minister of Transport, Transkei v Abdul* 1995 (1) SA 366 (N) (the

MYNHARDT J

Abdul case) the Court was faced with the same problem that this Court is faced with. In terms of the *lex fori* the Prescription Act 1969 would not apply because it is a matter of substance and not procedure. In terms of the *lex causae* prescription was a procedural matter. Those rules could therefore not be applied by the South African Court hearing the matter. The Court refused to apply the foreign law relating to prescription or, more correctly put, relating to an expiry period which was also held to be procedural in nature.

I am, in the light of the conclusions reached by the learned Judges in the *Laconian* and *Abdul* cases, not persuaded that I should apply the English law relating to limitation periods in the present matters. In my view, the provisions of the Prescription Act 1969 should be applied. It therefore follows, subject to what will be discussed in the next two paragraphs, that the plaintiff's claims in the present matters have become prescribed and that the plaintiff cannot, therefore, succeed in obtaining provisional sentence against the defendants.

[39] In para 9.10 of the plaintiff's second replying affidavit in the case against Price Mr Demery stated that the defendant had 'implicitly waived any right to rely on the local limitation or the prescription rules of the foreign court (that is, any courts other than the English courts)'. This is so, according to Mr Demery, because the defendant has agreed, in clause 2.2 of the 1986 General Undertaking, that a judgment of an English court may be enforced in the courts of any other jurisdiction.

There is no merit in that standpoint of Mr Demery. Neither Mr Demery nor the plaintiff's counsel have advanced any grounds other than the reference to clause 2.2 of the General Undertaking as to why Price had impliedly waived any rights he may have had in terms of the South African law. I think that it is of significance that neither Mr Demery nor plaintiff's counsel have made the point that Price had waived his rights to rely on the provisions of s 24 of the 1980 Act should he be sued in England. The mere fact that Price had consented to the enforcement of an English judgment in the courts of another jurisdiction does not justify the inference that he had waived any right to rely on prescription, or limitation, of the plaintiff's right to enforce the judgments of an English court.

In South Africa the Supreme Court of Appeal has not yet ruled on the question whether or not it is permissible for a party to a contract to waive a defence of prescription in advance. See *De Jager en Andere v ABSA Bank Bpk* 2001 (3) SA 537 (SCA) at 543J - 544C.

The statement of Mr Demery is therefore rejected.

[40] In para 9.8 of the plaintiff's second replying affidavit in the matter of Price, Mr Demery also stated, as an alternative argument, that 'Lloyd's claim is based on a "judgment debt" within the meaning of s 11*(a)*(ii) of the Prescription Act 69 of 1969, and that the period of prescription is 30 years'. In terms of s 11*(a)*(ii) of the Prescription Act, 1969, 'any judgment debt' becomes prescribed after 30 years.

Plaintiff's counsel contended that the English judgments in the present matters should also be regarded as 'judgment debts' and that the use of

the word 'any' shows that the term 'judgment debt' should not be limited to South African judgments. In support of this submission counsel relied on *E A Gani (Pty) Ltd v Francis* 1984 (1) SA 462 (T) (the *Gani* case). In that matter a creditor obtained judgment against a lessee, the debtor, for payment of a sum of money. The creditor thereafter sued the defendant, Francis, the respondent on appeal, on the basis of the judgment which was obtained against the debtor. The respondent had bound himself as a surety and co-principal debtor for all and any indebtedness for which the debtor was, or may become, indebted to his creditor, the appellant on appeal. The respondent pleaded that the appellant's claim had become prescribed because the debt arising from the contract of lease had become prescribed. The magistrate upheld the plea of prescription.

On appeal the Court concluded that the magistrate was wrong. It was held, at 466H of the report, that the judgment against the debtor created 'an independent cause of action enforceable as such in a court of law' and that the respondent was, in terms of the suretyship, liable on the 'new cause of indebtedness created by the judgment'. That cause of action had not become prescribed at the time when the action against the respondent was instituted.

In the course of their judgment, and at 466D - H of the report, Goldstone and Kirk-Cohen JJ approved of the *dictum* of Bristowe J in *Joosab v Tayob* 1910 TS 486 at 489 - 90 'that the judgment of any court constitutes a debt' and that it is not possible to draw any distinction between the judgment of a foreign court and a judgment of a domestic court.

In *MV* Ivory Tirupati*: MV* Ivory Tirupati *and Another v Badan Urusan Logistik (aka Bulog)* 2003 (3) SA 104 (SCA) (the *Tirupati* case) Farlam JA, writing for the Court, came to a similar conclusion at 116D - I of the report. The learned Judge of Appeal held 'that a judgment furnishes the judgment creditor with a new cause of action on which he may sue in another court . . .'.

I do not agree with the submission of plaintiff's counsel that the word 'any' in s 11*(a)*(ii) of the Prescription Act 1969 serves to include foreign judgments. Although that word is a word of wide import its meaning in any particular case depends on the context in which it is used. In regard to foreign judgments it has been laid down in the *Krok* case that such a judgment merely constitutes a cause of action and that it is not directly enforceable. Such a judgment cannot, therefore, on a linguistic approach to the words used in s 11*(a)*(ii) of the Prescription Act 1969, be regarded as a 'judgment debt'. A judgment debt, moreover, 'is the amount or subject-matter of the award in the judgment. Execution can be levied to recover the judgment debt.' The 'judgment' in the case of 'a judgment debt' is also appealable, *per* Galgut AJA in *Kilroe-Daley v Barclays National Bank Ltd* 1984 (4) SA 609 (A) at 626C and F - G (the *Kilroe-Daley* case).

In this regard it is also interesting to note that, according to Halsbury's *Laws of England* 4th ed reissue vol 28 para 863, the six-year period of limitation laid down for actions founded on 'simple contract' by the English Limitation Act of 1980 applies to an action founded on a foreign judgment. Not even the English law regards a foreign judgment as a

judgment of the court which is enforceable as such in England. The term 'judgment' as used in the aforesaid Act 'is limited to an English judgment'. See *Halsbury* (*op cit* para 917).

In *Primavera Construction SA v Government, North-West Province, and Another* 2003 (3) SA 579 (B) at 604E (the *Primavera* case) Friedman JP held that an award of an arbitrator only becomes 'a judgment debt' which prescribes after 30 years once the award has been made an order of Court. Until that happens 'it appears that a party's right to enforce the award would ordinarily prescribe within three years from the date of publication of the award'. In my view, there is no difference in principle between an arbitrator's award and a foreign judgment.

Defendants' counsel also referred me to the provisions of Act 6 of 1861 of the Cape of Good Hope and of Act 14 of 1861 of the Province of Natal and of Act 26 of 1908 of the Transvaal, all of which preceded the Prescription Act of 1969. The Cape Act specifically referred to 'any judgment of any court in this colony or elsewhere'. The Natal Act also referred to 'any judgment or order of any court in this Colony or elsewhere'. Section 9 of the Transvaal Act provided 'that there shall be no prescription in respect of a judgment of a court of law'.

In my view, the old Cape and Natal Acts are examples of statutory provisions which were couched so widely that foreign judgments would have been included under the terms thereof. The same cannot be said of s 11*(a)*(ii) of the present Prescription Act 1969.

It follows from the aforegoing that I cannot accept the submissions of plaintiff's counsel. I therefore hold that a foreign judgment is not included under s 11*(a)*(ii) of the Prescription Act, 1969.

[41] In the result I therefore find that the plaintiff's claims have become prescribed in terms of ss 10, 11*(d)* and 12(1) of the Prescription Act 1969 after the lapse of three years from the date upon which each of the judgments were given. The plaintiff is therefore not entitled to enforce those judgments.

The defences of lack of international jurisdiction and public policy

[42] In the light of the conclusion reached on the defence of prescription, it is not necessary to deal with these two defences and I therefore refrain from expressing any opinion in regard to them.

Order

1. Case No 17040/03

   The plaintiff's claim for provisional sentence is dismissed with costs, including the costs of two counsel.

2. Case No 20764/03

   The plaintiff's claim for provisional sentence is dismissed with costs, including the costs of two counsel.

Plaintiff's Attorneys: *Webber, Wentzel, Bowens*, Johannesburg; *Solomon, Nicolson, Rein &*

Verster Inc, Pretoria. Defendants' Attorneys: *Stegmanns*, Pretoria.