SOCIETY OF LLOYD'S v ROMAHN AND TWO OTHER CASES 2006 (4) SA 23 (C)

Citation	2006 (4) SA 23 (C)
Case No	5105/03, 5107/03, 5108/03 and 8588/04
Court	Cape Provincial Division
Judge	Van Zyl J
Heard	May 16, 2005
Judgment	March 3, 2006
Counsel	A Thompson SC (with J E Joyner) for the plaintiff. M Seligson SC (with E Fagan) for the defendants.
Annotations	Link to Case Annotations

Flynote : Sleutelwoorde

Contract - Legality - Contracts contrary to public policy - Specific instances - 'Conclusive proof' provision - *Semble:* Finding in reported case that provision in terms of which amount owing deemed to be determined and proved by certificate signed by director of any of creditors contrary to public policy, possibly being overdue for reconsideration, or at least qualification.

International law - Conflict of laws - *Via media* approach - Court having regard to both *lex fori* and *lex causae* before determining characterisation - Plaintiff seeking provisional sentence on basis of judgments of English Court - Defendants raising plea of prescription in South African law - Parties having agreed that underlying contract would be governed by English law - Whether issue of prescription to be determined by English or South African law - Under English law, prescription constituting procedural matter and thus governed by *lex fori*, namely South African law - Under South African law, prescription substantive and thus governed by *lex causae* - Claim thus remaining perpetually unenforceable - *Via media* approach adopted in determining whether *lex fori* or *lex causae* applicable - Where prescription procedural in *lex causae* and substantive in *lex fori*, justice, fairness, reasonableness and policy considerations dictating that matter revert to *lex causae* - *Lex causae* law with which contract most closely connected - *In casu, lex causae* English law - In terms of English law plaintiff's claim not having prescribed - Plaintiff entitled to provisional sentence.

International law - Contract - Proper law of contract - Determination of where no express or tacit choice of law made by parties - Court declining to follow 1924 Appellate Division case - Proper law (*lex causae*) of contract being legal system with which contract having closest and most real connection.

Headnote : Kopnota

The plaintiff sought provisional sentence against the defendants on the basis of judgments obtained against them in an English Court. The defendants were investors who had chosen to become underwriting members of the plaintiff, commonly referred to as 'names'. The plaintiff alleged, *inter alia*, that the defendants had submitted to the jurisdiction of the English Court by way of a 'general undertaking' given by each of them to the plaintiff and that the English law therefore governed its claims. The defendants alleged, on the other hand, that

the plaintiff's claims were governed by South African law and raised three defences, in South African law, to the plaintiff's claims: (1) that the plaintiff's claims had prescribed; (2) that the recognition and enforcement of the English judgments would be *contra bonos mores*, in that the defendants had been precluded from raising the plaintiff's fraud as a defence in the English courts; and (3) that the recognition and enforcement

of the English judgments would be *contra bonos mores*, in that the plaintiff had been permitted to rely on a 'conclusive proof' provision regarding calculation of the amounts allegedly owing by the defendants. The defendants did not dispute the *quanta* of the plaintiff's claims, but merely alleged that they would have liked to have known *how* the figures had been calculated.

Held, that, as to (1): If English law applied, as contended for by the plaintiff, the plaintiff's claims on the English judgments would *not* have prescribed. On the other hand, if South African law applied, as contended for by the defendants, the plaintiff's claims *would* have prescribed, unless the judgments could be regarded as 'judgment debts', in which case they would not have prescribed. (Paragraph [25] at 34D.)

Held, further, that in English law prescription *barred* the institution of an action and was therefore a matter of procedural law, whereas, in South African law (s 10(1) of the Prescription Act 68 of 1969), prescription *extinguished* the action and was therefore a matter of substantive law. According to the English authorities, matters of procedure were governed by the *lex fori* and matters of substance by the *lex causae*. (Paragraphs [30] - [31] at 35F - 36A.)

Held, further, that where the statute of the *lex causae* was procedural and that of the *lex fori* substantive, as in the present case, strict logic suggested that neither applied, so that the claim remained perpetually unenforceable. It was therefore for the Court to decide how to fill the 'gap' arising from the absence of any rule or principle governing the particular situation. (Paragraphs [32] and [77] at 36D/E and 51D.)

Held, further, that although the Court was bound by *Standard Bank of South Africa Ltd v Efroiken and Newman* 1924 AD 171 at 185 in identifying the law which governed a contract, if it considered the matter anew, the Supreme Court of Appeal might well be persuaded to follow the approach of the English Court in *John Lavington Bonython and Others v Commonwealth of Australia* 1951 AC 201 at 219, in which the Court identified the law with which the contract had its closest and most real connection as governing the contract. The Court associated itself with the latter approach. (Paragraphs [46], [48] and [82] at 41G, 42B - C, 52E and 52F/G.)

Held, further, that in the present case it was essential that a *via media* approach be adopted. That meant that regard should be had to both the *lex fori* and the *lex causae* in considering whether the South African prescription regime or the English limitation regime should apply to the plaintiff's claims against the defendants. English law was the *lex causae* in that it was the legal system with which the underlying transactions between the parties had their closest connection. It followed that the rule of English law relegating matters of procedure to the *lex fori* had to be critically examined and appraised before simply applying it to the facts of the present case. (Paragraph [84] at 53B - D.)

Held, further, that when the defendants agreed that their rights and obligations would be governed by English law and therefore that matters of procedure would be governed by the *lex fori*, they could not have contemplated that, in South African law, prescription extinguished the plaintiff's claims and did not merely bar enforcement of them. In those circumstances, the rule of English law relegating matters of procedure to the *lex fori* ought to have been qualified to the extent that, if a matter were procedural in the *lex causae* and substantive in the *lex fori*, justice, fairness, reasonableness and policy considerations dictated that it should revert to the *lex causae*. (Paragraphs [85] and [86] at 53E - H.)

Held, further, that the matter accordingly had to be dealt with in terms of relevant statute of the English law and, in terms of that statute, the pleas of prescription had to fail. (Paragraph [89] at 54F - G.)

Held, further, as to (2), that it was not correct that the defendants had been precluded from raising the plaintiff's fraud before the English Court. Although they had not been permitted, in terms of their respective agreements with the plaintiff, to raise it as a defence, they had been permitted to do so by way of a separately-instituted counterclaim, which they had done and in which they had been unsuccessful. There was thus nothing untoward, unjust, unfair or unreasonable in including such a provision in the plaintiff's agreements with names and the recognition and enforcement of the judgments could not be regarded as *contra bonos mores*. (Paragraphs [106], [108] and [110] at 58H - 59B, 59F and 59I.)

Held, further, as to (3), that the defendants' failure to understand how the amounts had been calculated raised no dispute or issue at all. The defendants could therefore not be heard to contend that the clause in question was *contra bonos mores*. (Paragraphs [121] and [122] at 62F - H.)

Held, accordingly, that all of the defences raised had to fail and provisional sentence had to be granted as sought. (Paragraph [128] at 64E.)

Semble: The English judgments were 'judgment debts' for purposes of s 11*(a)*(ii) of the Prescription Act. (Paragraph [94] at 55G - H.)

Semble: The finding in *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A) at 9E that a provision in a contract in terms of which the amount owing would be deemed to be determined and proved by a certificate signed by a director of any of the creditors was contrary to public policy, might be overdue for reconsideration or, at least, qualification. (Paragraphs [112] and [125] at 60E and 63F - H.)

Cases Considered

Annotations

Reported cases

Southern African cases

De Beer NO v North-Central Local Council and South-Central Local Council and Others (Umhlatuzana Civiv Association Intervening) 2002 (1) SA 429 (CC) (2001 (11) BCLR 1109):

referred to

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

Ex parte Minister of Justice: In re Nedbank Ltd v Abstein Distributors (Pty) Ltd and Others and Donelly v Barclays National Bank Ltd 1995 (3) SA 1 (A): referred to

Guggenheim v Rosenbaum (2) 1961 (4) SA 21 (W) : referred to

Improvair (Cape) (Pty) Ltd v Establissements NEU 1983 (2) SA 138 (C): referred to

Joffe v Salmon 1904 TS 317: referred to

Jones v Krok 1995 (1) SA 677 (A): dictum at 685B - E applied

Joosab v Tayob 1910 TPD 486: referred to

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

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

Laconian Maritime Enterprises Ltd v Agromar Lineas Ltd 1986 (3) SA 509 (D): criticised and not followed

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

Metcash Trading Ltd v Commissioner for the South African Revenue Service and Another 2001 (1) SA 1109 (CC) (2001 (1) BCLR 1): referred to

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

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

National Milling Company Ltd v Mohamed 1966 (3) SA 22 (R): referred to

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

Protea International (Pty) Ltd v Peat Marwick Mitchell & Co 1990 (2) SA 566 (A): referred to

Reeves and Another v Marfield Insurance Brokers CC and Another 1996 (3) SA 766 (A): referred to

Sasfin (Pty) Ltd v Beukes 1989 (1) SA 1 (A): criticised

Society of Lloyd's v Price; Society of Lloyd's v Lee 2005 (3) SA 549 (T): criticised and not followed

Sperling v Sperling 1975 (3) SA 707 (A): referred to

Standard Bank of South Africa Ltd v Efroiken and Newman 1924 AD 171: criticised and not followed

Wells v South African Alumenite Co 1927 AD 69: referred to.

Foreign cases

Adams and Others v Cape Industries plc and Another [1991] 1 All ER 929 (ChD and CA): distinguished

Arbuthnott v Fagan and Others (No 2) [1994] 3 Re LR 168 (CA) ([1995] CLC 1396): referred to

Coast Lines Ltd v Hudig & Veder Chartering NV [1972] 1 All ER 451 (CA): referred to

Everard and Others v The Society of Lloyd's [2003] EWHC 1890 (Ch): referred to

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

John Lavington Bonython and Others v Commonwealth of Australia 1951 AC 201: dictum at 219 applied

Laws and Others v The Society of Lloyd's [2003] EWCA Civ 1887: referred to

Marchant & Eliot Underwriting Ltd v Higgins [1996] 2 Lloyd's LR 31 (CA) ([1996] CLC 301): referred to

Society of Lloyd's v Fraser and Others [1998] CLC 127: referred to

Society of Lloyd's v Fraser and Others [1998] CLC 1630 ([1999] 3 Lloyd's LR 156 (CA)): referred to

Society of Lloyd's v Leighs and Others [1997] CLC 759: referred to

Society of Lloyd's v Leighs and Others [1997] CLC 1012: referred to

Society of Lloyd's v Leighs and Others [1997] CLC 1398: referred to

The Society of Lloyd's v Bowman and Others [2003] EWCA Civ 1886: referred to

The Society of Lloyd's v Laws and Others [2003] EWHC 873: referred to

The Society of Lloyd's v Laws and Others [2004] EWHC 71: referred to

Yew Bon Tew v Kenderaan Bas Mara [1982] 3 All ER 833 (PC): referred to.

Unreported cases

Society of Lloyd's v Fraser and Others Commercial Court, 4 March 1998: referred to.

Statutes Considered

Statutes

The Prescription Act 68 of 1969, ss 10(1), 11*(a)*(ii) and 11*(d)*: see *Juta's Statutes of South Africa 2004/5* vol 1 at 1-796.

Case Information

Applications for provisional sentence on English judgments. The facts appear from the reasons for judgment.

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

M Seligson SC (with *E Fagan*) for the defendants.

Cur adv vult.

Postea (March 3).

Judgment

Van Zyl J:

Introduction

[1] In the four matters under consideration, the plaintiff seeks provisional sentence against the defendants (M Romahn, H Ilse, M Ilse and F Ilse, respectively) on the basis of judgments obtained against them in the High Court of Justice (Queen's Bench Division, Commercial Court), London, England (the English Court). H Ilse is the son of F Ilse and his wife, M Ilse. All the matters arise from substantially the same background facts and they all raise the same legal issues, save that, in the matter of F Ilse, the defence of prescription has not been raised. The parties have hence agreed that the matters should, for the sake of convenience, be heard together.

[2] Mr *Thompson SC*, assisted by Mr *Joyner*, appeared for the plaintiff in all four matters, while Mr *Seligson SC*, with Mr *Fagan*, appeared for the defendants. The Court expresses its appreciation to them for their particularly useful presentations on behalf of the respective parties.

[3] The judgments against each of the defendants were, respectively, the following:

(a) M Romahn: the amount of \P277 013,79 and \P500 costs, granted on 22 December 1999 under 1999 folio No 1194;

(b) H Ilse: the amount of \P272 001,67 and \P500 costs, granted on 22 December 1999 under 1999 folio No 1192;

(c) M Ilse: the amount of \P435 747,73 and \P55 588,54 interest, together with agreed or taxed costs, granted on 11 March 1998 under 1997 folio No 1295;

(d) F Ilse: the amount of \P521 370,72 and \P292 646,10 interest, together with costs summarily assessed in the amount of \P6 000, granted on 13 May 2004 under 2002 folio No 868.

[4] In its provisional sentence summons, the plaintiff averred that the defendants had submitted themselves to the jurisdiction of the English Court in terms of a 'general undertaking' given by each to the plaintiff. This had occurred on 13 November 1986 (M Romahn), 3 November 1986 (H Ilse), and 23 October 1986 (M and F Ilse), respectively. In terms of clause 2.1 thereof, their rights and obligations arising from membership of the

plaintiff, the underwriting of insurance, or any other matter referred to in the undertaking, would 'be governed by and construed in accordance with the laws of England'. By virtue of clause 2.2, they irrevocably agreed that the courts of England would have the exclusive jurisdiction to entertain any dispute or controversy arising from or relating to their membership of the plaintiff or the underwriting of insurance business. They also agreed that a judgment in any proceedings

brought in English courts would be 'conclusive and binding upon each party and may be enforced in the courts of any other jurisdiction'.

[5] In supporting affidavits in all four matters, one N P Demery, a solicitor of the High Court of England and Wales currently employed in the 'legal and compliance department' of the plaintiff, stated that the respective judgments were 'final and conclusive' in favour of the plaintiff. Although the judgments could be taken on appeal, the appeal procedure had been exhausted or the time for noting an appeal had lapsed. In terms of the Judgments Act of 1838, he added, interest on a 'judgment debt' ran at the rate of 8% per annum.

[6] In their affidavits opposing provisional sentence, the defendants explained that they were underwriting members of the plaintiff, commonly referred to as 'names'. They admitted having entered into the 'general undertaking' agreement containing the cited clauses. They also admitted not having paid the plaintiff the amounts claimed from them. They denied, however, that the plaintiff was entitled to payment of such amounts. In this regard, they relied on a number of defences, three of which are still relevant. The first was that the claims in three of the four matters (excluding the claim against F Ilse) had prescribed in terms of South African law. The second was that the recognition and enforcement of the judgments would be contrary to public policy (*contra bonos mores*) in South African law, inasmuch as the defendants were precluded from raising fraud on the part of the plaintiff as a defence in English courts. The third was, likewise, that enforcement of the judgments would be against public policy in South African law, in that the plaintiff was entitled, in English courts, to rely on a 'conclusive proof' provision regarding the calculation of the amounts allegedly owing by the defendants.

[7] The defence of prescription was recently considered, under similar circumstances, in *Society of Lloyd's v Price; Society of Lloyd's v Lee.* 1(1) In those matters, to which I shall refer collectively as 'the *Price* case', Mynhardt J held that the claims in question had indeed prescribed. Although this Court is not bound by the reasoning of the learned Judge, it is, of course, of strong persuasive value and authority. I shall return to it in due course.

Background

[8] The background facts and circumstances giving rise to the present disputes have been set forth in the opposing affidavits of the defendants, with special reference to the case of *Society of Lloyd's v Fraser and Others.* 2(2) They were, likewise, dealt with in some detail in the replying affidavits of the plaintiff, deposed to by Mr Demery aforesaid. He professed to have had some 25 years of experience as a solicitor and to have been intimately involved in the plaintiff's litigation over the past decade. For

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purposes of dealing with the defences raised by the defendants, he provided an overview of the plaintiff's operations and the background to what is known as the Equitas reinsurance contract. I shall deal only with what I regard as the most salient aspects thereof for purposes of considering the relevant issues.

[9] Although the plaintiff may trace its origins to the 17th century, it was formally established only by Deed of Association in 1811 and was thereafter regulated by the Lloyd's Act of 1871, as amended on various occasions prior to its substitution by the current Lloyd's Act of 1982. Over the years it became a very powerful and influential financial institution in the world of insurance, both in the United Kingdom and elsewhere in the world of commerce, including the United States of America and Canada. It also provided investment opportunities, attracting a large number of investors who chose to become underwriting members or, as they have come to be known, 'names'.

[10] The increase in the number of names became particularly prominent during the 1980s, when the plaintiff's insurance market experienced an under-capacity arising, for the most part, from asbestosis claims emanating from the United States of America. It thereupon recruited a considerable number of new underwriting members through the good offices of members' and managing agents, who would advise them as to the syndicate or syndicates they should join for purposes of underwriting. Many of these syndicates and their members, however, soon found themselves in serious financial difficulties. Inasmuch as the plaintiff's relationship with them was not that of insurer and reinsurer, the liability in respect of the underwritten policies would fall squarely on the members of the syndicate which had underwritten the policy in question.

[11] To counter the inevitable losses facing them, groups of members took action and successfully instituted claims for damages against members' or managing agents and even against auditors who had attracted liability by their conduct. With a view to averting an anticipated avalanche of litigation, the plaintiff developed, by means of its bylaw 22 of 1995, a 'reconstruction and renewal scheme' (R&R scheme). This was directed at settling claims, by and against its members, by virtue of a mutual waiver of claims arising before the end of 1992. In effect, it was a 'compulsory reinsurance and run-off scheme' by which members were required to 'run-off' their outstanding liabilities and to reinsure them with a newly formed insurance body known as Equitas Reinsurance Ltd (Equitas). Those who accepted the scheme received the benefit of having their liabilities discounted by means of various debt credits. Those who refused to accept it, while forfeiting these benefits, were still compelled to reinsure with Equitas and to pay premiums in respect thereof.

[12] The plaintiff's power to make bylaws emanates from s 6(2)*(a)* of the Lloyd's Act 1982. This authorises the plaintiff's council to 'make such bylaws as from time to time seem requisite or expedient for the proper and better execution of Lloyd's Acts 1871 to 1982 and for the furtherance of the objects of the Society'. In accordance with this power, the

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council made bylaw 20 of 1983, which empowered it to appoint a 'substitute agent' to take over, wholly or partially, a member's underwriting business. Pursuant hereto, the council appointed Additional Underwriting Agencies (No 9) (AUA9), a company in the Lloyd's stable, as a substitute agent to take over all non-life insurance business of its members transacted before the end of 1992. It was, in fact, required to give effect to the R&R scheme by concluding with Equitas, on behalf of each member, a reinsurance and run-off contract effective from 3 September 1996. On 2 October 1996, Equitas duly assigned to the plaintiff its right to receive premiums payable in terms thereof.

[13] The obligation of the names to comply with the plaintiff's bylaws, including bylaw 22 of 1995 and, pursuant thereto, the R&R scheme, arises from the previously cited provisions of the general undertaking 3(3) given by each of the names on becoming members of the plaintiff. Of some significance in the present matter are clauses 5.5 and 5.10 of the R&R scheme, which read as follows:

> '5.5 Each name shall be obliged to and shall pay his name's premium in all respects free and clear from any set-off, counterclaim or other deduction on any account whatsoever including in each case, without prejudice to the generality of the foregoing, in respect of any claim against ERL [Equitas], the substitute agent, any managing agent, his member's agent, Lloyd's or any other person whatsoever, and:
>
> *(a)* in connection with any proceedings which may be brought to enforce the name's obligation to pay his name's premium, the name hereby waives any claim to any stay of execution and consents to the immediate enforcement of any judgment obtained;
>
> *(b)* the name shall not be entitled to issue proceedings and no cause of action shall arise or accrue in connection with his obligation to pay his name's premium unless the liability for his name's premium has been discharged in full; and
>
> *(c)* the name shall not seek injunctive or any other relief for the purpose, or which would have the result, of preventing ERL, or any assignee of ERL, from enforcing the name's obligation to pay his name's premium.
>
> . . .
>
> 5.10 For the purposes of calculating the amount of any name's premium as set out in clause 5.1*(b)* and the amount of any name's premium discharged by the transfer of assets or the amount realised through the liquidation of funds at Lloyd's for application in or towards any name's premium, the records of and calculations performed by the CSU [a division or arm of the plaintiff] shall be conclusive evidence as between the name and ERL, in the absence of any manifest error.'

Lloyd's litigation in English courts

[14] There has been a spate of litigation in the English courts arising from actions by the plaintiff, as assignee of Equitas, against names who have failed to pay their reinsurance premiums. These actions have been defended on a number of grounds, including that clause 5.5 of the R&R scheme is not enforceable, in that it obliges members to pay the

premiums despite allegations of fraud levelled against the plaintiff. The English courts have consistently held against the names for failure to pay such premiums on the basis that the said clause 5.5 is enforceable and that fraud may be raised as a separate claim against the

plaintiff, but not as a defence.

[15] Thus, in two hearings before Colman J, in the case of *Society of Lloyd's v Leighs and Others*, 4(4) the learned Judge held, *inter alia*, that allegations of fraud on the part of the plaintiff, in inducing individuals to become names, could not justify rescission of their agreement with the plaintiff. Clause 5.5, the 'pay now, sue later' clause, was hence valid and binding. An attempt, on appeal, to argue a point not raised before Colman J, namely that clause 5.5 had been introduced in bad faith, with the 'dominant purpose' of allowing the plaintiff to escape the consequences of its earlier fraud, was rejected. 5(5)

[16] In a subsequent case, *Society of Lloyd's v Fraser and Others*, 6(6) Tuckey J held that it would be an abuse of process for names to raise the bad-faith allegation as a defence directed at setting aside the R&R scheme. This, he stated, was in essence the issue already disposed of by the Court of Appeal in the *Leighs* case. In refusing leave to appeal against this decision, the Court of Appeal (*per* Hobhouse LJ) 7(7) held that clause 5.5 of the R&R scheme was enforceable despite the allegations of fraud by the names. The bad-faith argument was without merit, in that it provided no basis for distinguishing the previous decisions. In the absence of some persuasive evidence to the contrary, no inference of a 'dominant purpose' to defeat potential claims of fraud against the plaintiff could possibly be justified.

[17] Just as the attack by the names on clause 5.5 of the R&R scheme met with outright rejection by the English courts, so also was the attempt to invalidate clause 5.10 doomed to failure. In *Society of Lloyd's v Fraser and Others*, 8(8) Tuckey J dealt with the provisions of this clause in some depth and stated: 9(9)

> 'The words mean what they say: the records and calculations are to be conclusive evidence (that is to say the only evidence) unless there is a manifest error on the face of those records.'

With reference to clause 5.5, the learned Judge continued: 10(10)

> 'My conclusion about the effect of clause 5.5 underlines that what that clause and clause 5.10 were intended to achieve was cash flow. Clause 5.10 does not determine what CLSF ["combined litigation settlement funds"] or PSL ["personal stop loss"] recoveries a name is entitled to or what his FAL ["funds at Lloyd's"] are. It is only dealing with appropriation of those assets in discharge of the obligation to pay premiums. The records and calculations of MSU ["members'

> services unit"] are conclusive as to what assets have been appropriated but not as to what those assets are. A name may still assert his right to those assets in the same way he may assert any other claim despite clause 5.5.'

[18] Although the various challenges directed by names at escaping their obligation to pay the Equitas premiums were systematically and consistently rejected by the English courts, it did not deter them from instituting counterclaims (cross-claims) founded on alleged fraudulent misrepresentation by the plaintiff. The main action in which this allegation was raised was the 'Jaffray proceedings', brought by Sir William Jaffray and other names, and directed at resolving, as a preliminary issue, what was known as 'the threshold fraud issue'. This related to whether the plaintiff had made false misrepresentations to the names with a view to inducing them to become, or remain, members of the plaintiff, while it knew that

such misrepresentations were false, or while it was reckless, careless or unconcerned as to whether they were true or false.

[19] The Jaffray proceedings were initiated by an 'order for directions', issued on 29 October 1999 by Cresswell J in the Commercial Court. 11(11) Paragraph 8 thereof provided that any present or former names who wished 'to reserve the right to advance allegations that they were fraudulently induced to become or remain underwriting members of the Lloyd's market by reason of Lloyd's failure to disclose the nature and extent of the market's liability for asbestos-related claims', should give written notice to the plaintiff's solicitors 'confirming that they wish to become parties to the litigation'. Should they fail to do so, they would be precluded from advancing such allegations without the leave of the Commercial Court.

[20] The Jaffray hearing on the threshold-fraud issue commenced before Cresswell J on 4 March 2000 and lasted for some three months, judgment being handed down on 3 November 2000. Although the learned Judge allowed a further issue to be added, namely that relating to alleged negligent misrepresentation by the plaintiff prior to 5 January 1983, it was not considered in the judgment in terms of which the claims based on fraudulent misrepresentation (the tort of deceit) were dismissed. Leave to appeal was refused.

[21] The Court of Appeal subsequently granted leave to appeal on limited grounds. The appeal, however, likewise failed. At the end of their lengthy and extremely comprehensive judgment, Lord Justices Waller, Robert Walker and Clarke summarised their conclusion, in what they called 'this difficult and worrying case', in the following terms: 12(12)

> 'There was a representation in the 1981 brochure that there was in place a rigorous system of auditing which involved the making of a reasonable estimate of outstanding liabilities including unknown and unnoted losses. (Paragraph 321.)

(i) Subsequent brochures contained essentially the same representation, even though the word "rigorous" no longer appeared. (Paragraph 323.)

(ii) The 1981 brochure also contained a representation that Lloyd's believed that such a system was in place. So did subsequent brochures. (Paragraphs 321 and 323.)

(iii) The globals [global reports and accounts/aggregate results] contained no relevant representations. (Paragraphs 326 to 343.)

(iv) The representations in (i) and (ii) were, during the relevant period, untrue. (Paragraphs 375 and 376.)

(v) The names have however failed to prove that Lloyd's did not believe the representations to be true or that they either knew that they were or became untrue or were reckless as to whether they were true or untrue. (Section VII.)

(vi) It follows that the judge was right to determine the threshold fraud issue in favour of Lloyd's and to hold that Lloyd's is not liable to the names in the tort of deceit. It further follows that the appeal on the merits, which the names had permission to bring, fails and must be dismissed.'

[22] The plaintiff was hereafter allowed to enforce the judgments it had obtained against the names, while the names were given the opportunity to consider, if appropriate, raising negligent misrepresentation claims by way of amendments in the *Jaffray* proceedings. When

they did so, the plaintiff opposed the amendments on the basis of the immunity bestowed on it by s 14(3) of the Lloyd's Act 1982, such immunity being operative from the date of the Royal assent to the Act, namely 23 July 1982. In addition, it averred that any such amended claims would be time-barred in terms of the relevant provisions of the Limitation Act 1980.

[23] In *The Society of Lloyd's v Laws and Others*, 13(13) Cooke J considered the applications for amendment and held that the majority of names (also known as category 1 names) should not be granted permission to amend. He granted leave in principle, however, to a smaller group of names (category 2 names) to do so. This was subject to their filing properly particularised claims for consideration by the Commercial Court, and was subject also to whether or not they escaped being time-barred by virtue of their falling within the provisions of s 14A of the Limitation Act 1980. This section did not apply to 'statutory misrepresentation' and any claim based on a negligent or statutory misrepresentation causing loss after 23 July 1982, when the Lloyd's Act 1982 became operative, was barred by the immunity provision contained in s 14(3) thereof. In addition, the Human Rights Act 1998 could not affect vested rights by being accorded retrospective effect in interpreting the 1982 Act.

[24] Cooke J's ruling meant that those names in category 2 who were able to overcome the 'particularisation hurdle', would be left with severely limited counterclaims. In effect, such counterclaims would relate to damages suffered in the brief window period between the extended time-limit under the Limitation Act 1980 and the commencement of the plaintiff's immunity under the Lloyd's Act 1982. They

would probably be worth significantly less than the amounts claimed in the relevant statutory demands. 14(14) Cooke J then wrapped up the issue of leave to amend by granting such leave to only seven names (Messrs Allard, Garrow, Hardman, Ranald, Remillard, Wilkinson and Woyka) and refusing it to all the others. 15(15)

The prescription issue

General observations

[25] It is common cause that the plaintiff took judgment in English Courts against the defendants, save F Ilse, more than three years, but less than six years, prior to service on them of the South African provisional-sentence summons issued on the strength of such judgments. If English law should apply, as submitted by the plaintiff, the claims on the judgments would not have prescribed or become statutorily limited. In the event that South African law should apply, however, as submitted by the defendants, the claims would have prescribed, unless the judgments should be regarded as 'judgment debts', in which event they would not have prescribed.

[26] At the outset, it should be pointed out that, in terms of South African law, foreign judgments, such as those in the present matter, may be enforced by its courts provided there is compliance with certain prerequisites. This appears from the well-known *dictum* of

Corbett J in *Jones v Krok*: 16(16)

> '(T)he 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, the 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. . . .'

[27] The learned Chief Justice then pointed out that provisional sentence has long since been a recognised procedure in South African courts for the enforcement of foreign judgments. Although a foreign

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judgment was not a liquid document in the sense of 'a written instrument signed by the defendant or his agent evidencing an unconditional acknowledgment of indebtedness in a fixed sum of money', it was '*prima facie* the clearest possible proof of a debt due by the party condemned and that the latter must be taken in law to have acknowledged his indebtedness in the amount of the judgment . . .'.

[28] On the issue of prescription, it is common cause that, in English law, judgments founded in contract are subject to a six-year limitation period in terms of s 5 of the Limitation Act of 1980, which reads:

> '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.'

The limitation period for an action founded on a judgment is likewise six years, as appears from s 24 of the Act:

> '(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.
>
> (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.'

[29] The questions which arise in this regard are, firstly, whether the period of prescription (limitation) should be determined in accordance with English or South African law and, secondly, if South African law should be applicable, whether the prescriptive period is three or 30 years. The response to the second question depends on whether the English judgment should be regarded as 'any judgment debt', as referred to in s 11*(a)*(ii) of the South African Prescription Act 68 of 1969, in which event the prescriptive period is 30 years. If not, the period is, in terms of s 11*(d)* of the Act, three years.

[30] A related question arising in this regard is whether prescription extinguishes the action or simply bars the institution of an action to enforce it. In South African law it is the former,

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as appears from s 10(1) of the Act, which reads:

> 'Subject to the provisions of this chapter and of ch 4, 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.'

This means that prescription, in South Africa, is a matter of substantive law and is not simply procedural, as was the case under the old Prescription Act 18 of 1943, s 3(1) of which rendered a right of action unenforceable without extinguishing it. 17(17)

[31] English law hence differs from its South African counterpart in that the above-cited ss 5 and 24 of the English Limitation Act of 1980 are indicative of a procedural bar on bringing an action, rather than of extinguishing such action. It is thus clearly, in English legal context, a matter of procedural rather than substantive law. The English authorities are unequivocal in stating that matters of procedure are governed by the

domestic law of the country where the relevant proceedings have been instituted (the *lex fori*). Matters of substance, however, are governed by the law which applies to the underlying cause of action (the *lex causae*). This applies equally to statutes of limitation which bar a remedy, as opposed to those which extinguish a right: the former are procedural and the latter substantive. When the remedy is barred, the right continues to exist although it cannot be enforced by action.

[32] In this regard, it may be appropriate to refer to the discussion of rule 17 by *Dicey and Morris*, in their well known and frequently cited work on international private law. 18(18) This rule reads:

> 'All matters of procedure are governed by the domestic law of the country to which the court wherein any legal proceedings are taken belongs (*lex fori*).'

In their comment on the position at common law, 19(19) the learned authors point out that the *lex causae* and *lex fori* may differ in respect of their periods of limitation and in the nature of the limitation provisions. They illustrate this with reference to four different situations which may arise, the fourth of which reads:

> '(iv) If the statute of the *lex causae* is procedural and that of the *lex fori* substantive, strict logic might suggest that neither applies, so that the claim remains perpetually enforceable. A notorious decision of the German Supreme Court once actually reached this absurd result. But writers have suggested various ways of escape from this dilemma, and it seems probable that a court would apply one statute or the other.'

In this decision 20(20) the German Supreme Court (Reichsgericht) upheld a claim on a Tennessee bill of exchange which had prescribed under both German law (the *lex fori*) and the law of Tennessee (the *lex causae*). In doing so, the Court classified the German rule as substantive and that of Tennessee as procedural. According to *Dicey and Morris*, this decision does not appear to have been followed in more recent German cases dealing with the same issue.

[33] This is clearly no simple matter in the context of the conflict of laws, whether it be approached from the English or South African legal point of view. It would, of course, be a simple exercise to state that, inasmuch as prescription is, in English law, a procedural

matter, the *lex fori,* namely South African law, should be applied. But would, and should, that hold true where the *lex fori* itself regards prescription as a matter of substantive law which will have the effect of terminating the action and not just barring it? That is the real question which this Court will have to address.

The Kuhne & Nagel *case*

[34] In *Kuhne & Nagel AG Zurich v APA Distributors (Pty) Ltd*, 21(21) the plaintiff, a Swiss company, claimed an amount owing in terms of a contract which it had concluded in Switzerland with the defendant, a South African company. It was common cause that Swiss law governed

the transaction and that, in terms of art 127 of the Swiss Code of Obligations (Obligationenrecht), the claim prescribed after ten years. The defendant pleaded, however, that, in terms of s 11*(d)* read with ss 10(1) and 12*(d)* of the South African Prescription Act 68 of 1969, the claim had been extinguished within three years after the debt had become due.

[35] In considering the issue arising from this conflict of law, O'Donovan J observed as follows: 22(22)

> '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. . . .'

After pointing out that the distinction between the two kinds of limitation of actions was well established, the learned Judge proceeded to say: 23(23)

> 'One of the consequences of the view to which South African law is committed is that, in a case where the statute of limitations of the *lex causae* is substantive but that of the *lex fori* is procedural, the *lex fori* will apply if its limitation period is shorter than that of the *lex causae*.'

[36] O'Donovan J was not required to deal with the situation where prescription in terms of the *lex causae* is procedural and, in terms of the *lex fori*, substantive, as in the present matter. He made it clear, 24(24) however, that the extinction or creation of a right by prescription was a matter of substantive law, which was not affected by the deeming provision of s 10(3), or by any other provisions, of the Act. These provisions would have to yield to the clear wording of s 10(1).

[37] In the case where the statutes of limitation of both the *lex causae* and the *lex fori* were substantive, as submitted by the plaintiff, the learned Judge considered the lack of authority on such issue and observed: 25(25)

> 'Strict logic would suggest that in the case now postulated substantive statutes of limitation of the *lex causae* should be applied. Their application would also be in conformity with the trend of contemporary academic writing, which has become increasingly critical of the failure of Courts following Anglo-American conflict rules to protect rights still in existence in a foreign country.'

On this basis, O'Donovan J held 26(26) that the prescriptive period of the *lex causae*, and

not that of the *lex fori*, should apply to the plaintiff's claim. The special plea of prescription hence failed.

[38] The question inevitably arises whether, on this approach, a court may not be confronted with the dilemma that the prescription rules of neither the *lex causae* nor the *lex fori* may be applicable. This is known as

the 'gap' problem, with its associated problem of 'cumulation'. It arises when two or more conflicting rules from different legal systems apply to the same aspect of a case, and yet none of such rules, after undergoing the normal characterisation process, is applicable thereto. This was pointed out by Forsyth in his discussion of the *Kuhne & Nagel* case. 27(27) He repeated it in his discussion of the *Laconian* matter, where he suggested that the problem arising in this matter was not 'an idle academic puzzle', but was, in fact, a prospect that South African courts would have to face whenever the *lex causae* had procedural, and not substantive, prescription rules. 28(28) This could lead to the absurd situation that a solution might be sought which avoids the issue altogether, namely by formulating an *ad hoc* rule when the established rules of international private law fail to provide a solution. 29(29)

The Laconian *case*

[39] This brings me to the decision of Booysen J in *Laconian Maritime Enterprises Ltd v Agromar Lineas Ltd.* 30(30) The applicant in that matter was a Greek ship-owning and operating company and the respondent a Colombian charterer. The respondent's New York brokers and the applicant's London brokers negotiated by telex for a voyage charterparty, in respect of a ship owned by the applicant, for the carriage of grain from Buenos Aires to Barranquilla in Colombia. The charterparty was drawn up in New York and was signed and stamped by the respective brokers in New York and London. It provided for payment to be made in US dollars to a London bank and for disputes to be referred to arbitration in London. A dispute arose and an arbitration award was duly made. The applicant filed an action to enforce the award in the United States District Court for the Southern District of Alabama. The court held that the action was time-barred and fell to be dismissed. The applicant subsequently sought that the award be made an order of the South African court in terms of the Recognition and Enforcement of Foreign Arbitral Awards Act 40 of 1977. The respondent raised two special defences, namely prescription and the *exceptio rei iudicatae.* The latter was based on the fact that the United States court aforesaid had already given a judgment on the issue.

[40] After considering the 'theoretical basis' of the rules pertaining to the conflict of law, the learned Judge stated, at the outset, 31(31) that the first step a court should take, in attempting to resolve disputes arising in private international law, was to characterise, classify or qualify the relevant rules. The characterisation generally took place in accordance with the

lex fori, although certain academic writers appear to have favoured a *via media* or an 'enlightened *lex fori* approach', in the sense that the *lex causae* should also be given consideration. 32(32) This led the learned Judge to conclude: 33(33)

> 'It must be accepted that it is rules of law which are characterised.
>
> It must be stressed that the characterisation is but a tool in the process of reasoning in terms of which those rules are interpreted.
>
> Characterisation cannot be regarded as an independent means of establishing the proper choice of law and one must beware of indulging in "dishonest characterisation" in an attempt to make it so.
>
> Characterisation is part of the process of interpretation and all interpretation, unless regulated by rules of construction, be it of instruments or laws, is always that of the interpreter, the forum.
>
> It is thus not surprising that, in all cases but one in our Courts, categorisation has taken place according to the *lex fori*.'

[41] Booysen J was satisfied 34(34) that there was no reason for him to depart from what he termed 'the general rule of South African private international law', namely that classification is done in terms of the *lex fori*. He did not, however, deem it necessary 'to state the rule and its qualifications'. Yet he was unequivocal in his viewpoint 35(35) that the classification of competing rules of prescription, superannuation, time-barring or limitation was no simple matter. In this regard, the parties were in agreement that the relevant rules of the United States were substantive while those of England were procedural in character. They were likewise agreed that the rules of Colombia and South Africa were identical, but they disagreed as to the nature and effect thereof. This led the learned Judge to say: 36(36)

> 'Although I propose to classify these rules in terms of the *lex fori* it seems to me that the rules of each of the countries would be classified by each of the other countries in exactly the same way. It seems to be settled law that the statutes of limitation merely barring the remedy are part of the law of procedure whereas they are part of the substantive law if they extinguish altogether the right of the plaintiff. . . . It follows that in this case the *lex fori's* rules are substantive but that the *lex causae's* rules are either substantive, if the law of the United States applies, or procedural, if English law applies. If the *lex causae* is that of the United States then it follows that the applicant's claim would be prescribed. If the *lex causae* is English law the matter is not that clear. It would mean if these general rules were to apply that the *lex fori* being substantive would not apply but that the *lex causae* being procedural would also not apply.'

VAN ZYL J

[42] Booysen J recognised this as the problem identified by *Dicey and Morris*, 37(37) with reference to the 'absurd result' achieved by the notorious German decision cited by them, and observed: 38(38)

> 'I certainly have no wish to join the German Court in its notoriety although strict logic might so advise. The reason I will not do so, however, is that it seems to me 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 *Ehrenzweig'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.'

From this, it appears that, in the absence of a rule determining the applicable legal system, Booysen J opted for South African law on the basis that he was enjoined to do so by virtue of his judicial oath to apply such law. In addition, he regarded this 'residual *lex fori* approach'

as being consistent with reasonableness in the form of 'good sense'. The learned Judge found support 39(39) for this approach in the formulation of *Ehrenzweig*: 40(40)

> 'In the absence of a pervasive rationalisation of a general regime of either the *lex fori* or the *lex causae*, and the failure of any "weighing-of-interests" test, forum law remains the starting point.'

[43] Booysen J gave consideration 41(41) to the question whether the proper law of the charterparty should be regarded as United States law, whereas the proper law of the arbitration and award was English law and hence the *lex causae*. The answer, he suggested, 42(42) was dependent upon whether the award novated the rights of the applicant or not. That would be the case if it created a new right. If, however, it was obtained merely for purposes of enabling the applicant to enforce its contractual right to payment, the law of the contract would be the *lex causae* and not the law of the country where the award was made. On this basis, he was satisfied 43(43) that the *lex causae* of the contract was the governing law.

[44] In what appears to be an *obiter dictum*, Booysen J observed 44(44) that South African law recognised 'party autonomy' in establishing the proper law of the contract. Where the parties had hence agreed, expressly, tacitly or by implication, upon the law governing their contract, our courts would give effect to their intention. If they had not so agreed, the court could determine the applicable law by imputing an intention to the parties, on the basis of what they 'ought reasonably to have chosen'. Alternatively, it could establish the system of law with which the transaction in question has 'its closest and most real connection'. In practice, the different approaches would not lead to different

conclusions. Although the learned Judge preferred the 'most real connection theory', he was bound by the 'intention theory' as applied in the *Efroiken* case. 45(45) He pointed out, however, that, although it was not simply a matter of counting the factors in favour of one legal system or the other, 'a large number of factors pointing one way is a strong indicator'. 46(46)

[45] On this basis, he held that, in the case before him, English law was indicated because it was both the *lex loci contractus* and the *lex loci solutionis*, while London was the place where the arbitration had taken place. The claim for recognition had hence not prescribed by virtue of United States law. It had likewise not prescribed by English law. 47(47) In any event, the rules of English law, being procedural, were not applicable. In these circumstances, he proposed to apply the South African law as the *lex fori*. Inasmuch as the debtor had not been in South Africa since the debt became due, the period of prescription had not, in terms of s 13(1)*(d)* of Act 68 of 1969, been completed. The claim had therefore not prescribed.

The Efroiken *case*

[46] It may be convenient at this stage to refer to the case of *Standard Bank of South Africa Ltd v Efroiken and Newman*, 48(48) by which Booysen J regarded himself as being bound. In his judgment De Villiers JA stated the following: 49(49)

> 'The rule to be applied is that the *lex loci contractus* governs the nature, the obligations and the interpretation

of the contract; the *locus contractus* being the place where the contract was entered into, except where the contract is to be performed elsewhere, in which case the latter place is considered to be the *locus contractus*. That is, broadly speaking, the rule as it has been adopted. At the same time it must not be forgotten that the intention of the parties to the contract is the true criterion to determine by what law its interpretation and effect are to be governed. . . . But that also must not be taken too literally, for, where parties did not give the matter a thought, courts of law have of necessity to fall back upon what ought, reading the contract by the light of the subject-matter and of the surrounding circumstances, to be presumed to have been the intention of the parties.'

[47] This approach was confirmed by Trollip J in *Guggenheim v Rosenbaum (2)*: 50(50)

'According to English and our law the proper law of the contract is the law of the country which the parties have agreed or intended or are presumed to have intended shall govern it; and in the case of a contract concluded in one country to be performed in another, then in the absence of an express term or any other indication to the contrary, it can be presumed that the proper law is the law of the latter (*lex loci solutionis*).'

VAN ZYL J

The Improvair *case*

[48] Booysen J also had regard to *Improvair (Cape) (Pty) Ltd v Establissements NEU*, 51(51) in which Grosskopf J pointed out that the 'traditional' approach of imputing an intention to the parties was no longer followed in English law. Thus, in *John Lavington Bonython and Others v Commonwealth of Australia*, 52(52) Lord Simonds stated that 'the substance of the obligation must be determined by the proper law of the contract, ie the system of law by reference to which the contract was made or that with which the transaction has its closest and most real connexion' (the so-called *Bonython* formula). This led Megaw LJ, in *Coast Lines Ltd v Hudig & Veder Chartering NV*, 53(53) to comment as follows:

'I think it is not without significance to note that the connection which has to be sought is expressed to be connection between the *transaction*, ie the transaction contemplated by the contract, and the system of law. That, I believe, indicates that, where the *actual* intention of the parties as to the proper law is not expressed in, and cannot be inferred from, the terms of the contract (so that it is impossible to apply the earlier part of the *Bonython* formula, the system of law "by reference to which the *contract* was made"), more importance is to be attached to what is to be done under the contract - its substance - than to considerations of the form and formalities of the contract or considerations of what may, without disrespect, be described as lawyers' points as to inferences to be drawn from the terms of the contract.'

[49] In this regard, Grosskopf J made reference 54(54) to the discussion of this problem in Van Rooyen's authoritative treatise on contract in South African international private law, in which the learned author stated: 55(55)

'Indien daar geen werklike regskeuse was nie, is dit volgens oordeel van die skrywer onsuiwer om van 'n vermoedelike bedoeling te praat. Afgesien daarvan dat dit 'n *contradictio in terminis* is om 'n objektiewe faktor (vermoede) naas 'n subjektiewe faktor (bedoeling) in een asem te besig, is dit verder onrealisties om van 'n bedoeling te praat as daar geen bedoeling teenwoordig is nie. . . .

Dit word aan die hand gedoen dat daar, by gebrek aan 'n regskeuse, 'n ondersoek van die sosiale funksie van verbandhoudende regsreëls moet plaasvind. Sodra die sosiale funksie bepaal is, moet die feitelike aanknoping van die kontrak met die geldingsgebied van daardie regsreël ondersoek word en alleen só sal bepaal kan word of die kontrak binne die geldingsfeer van een regstelsel, ter uitsluiting van 'n ander, val; steeds moet die engste verbonde regstelsel aldus bepaal word. Mettertyd sal dit dan ook blyk dat die belange-swaartepunt gewoonlik by die een regstelsel (bv die reg van die verkoper) val. Op hierdie wyse sal die oplossings mettertyd 'n eenheidspatroon aanneem en sal internasionale regsekerheid toeneem. Daar

moet dus nie, in navolging van ons ou skrywers, 'n magiese en allesoorheersende betekenis geheg word aan die *locus contractus* of *solutionis* nie. Dit is dan ook te betreur dat ons howe soveel waarde heg aan die *locus solutionis*. Veel meer waarde kan volgens skrywer byvoorbeeld geheg word aan die gemeenskaplike domisilie; die domisiliêre regstelsel het juis die behartiging

van die kontraktante se belange ten doel en behoort gevolglik oor die algemeen 'n belangrike rol te speel. Dit is betekenisvol dat ons howe al by geleentheid die sosiale funksie van die moontlik toepaslike regsreel ondersoek het, eerder as om werktuiglik oor te gaan tot 'n toepassing van die *lex rei sitae*, die *lex loci solutionis* of die *lex loci contractus*.

Die *lex causae* is dus die gekose regstelsel of, by gebrek aan 'n keuse, die engste verbonde regstelsel.'

[50] With reference to these authorities, Grosskopf J concluded: 56(56)

'The above authorities demonstrate, in my view, that the modern tendency is to adopt an objective approach to the determination of the proper law of contract where the parties did not themselves effect a choice. From a practical point of view the different formulations would however seldom, if ever, lead to different conclusions. The legal system "with which the transaction has its closest and most real connection" (*Bonython's* case (*supra*)) or "die engste verbonde regstelsel" (*Van Rooyen* (*supra*)) would in most cases be the one which the Courts would presume to have been intended by the parties. Since I am probably bound by the rules laid down in *Efroiken's* case (*supra*) it is comforting to know that application of the *Bonython* formula, which, with respect, I prefer, would not lead to a different result.'

The Laurens *case*

[51] A refreshingly novel approach to determining the relevant legal system was that adopted by Schutz J in *Laurens NO v Von Höhne*. 57(57) This was a matter concerning a claim by the plaintiff, in his capacity as liquidator of a company registered and liquidated in Germany, for payment by the defendant of an amount allegedly owed by him in respect of his contribution to the share capital of the company. The defendant's plea was that no amount remained owing. An alternative plea was that the claim had prescribed after three years in terms of s 11*(d)* of Act 68 of 1969. The plaintiff's response was that s 195 of the German Civil Code (B\)rgerliches Gesetzbuch) was applicable, in which event the claim prescribed only after 30 years. The Court was hence called upon to characterise the issue in order to establish which legal system was applicable thereto.

[52] After stating 58(58) that 'procedural or adjectival questions are, ordinarily at least, tried according to the *lex fori*', Schutz J went on to say 59(59) that, in cases involving 'a multilateral conflict rule', the nature of the issue must be characterised before applying the 'connecting factor'. Such characterisation, and the determination of the applicable legal system, however, was problematic, in that it constituted a 'difficult question' on which there was no direct authority.

[53] With reference to some of the authorities dealing with the problem, the learned Judge observed 60(60) that the 'traditional rule has been that the *lex fori* characterises according to its own law without looking further'.

He referred in this regard, however, to Falconbridge, 61(61) who proposed a *via media* approach in accordance with which the court takes cognisance of both the *lex fori* and the *lex causae* before characterising the issue in question. This means that the conflict rules of the forum should be construed *sub specie orbis*, that is, from 'a cosmopolitan or world-wide point of view' which would make it 'susceptible of application to foreign domestic rules'. The court is hence required to consider the 'nature, scope and purpose' of the foreign rule in its foreign legal context. It should then, with reference to the applicable legal systems, make a 'provisional characterisation' before deciding on a 'final characterisation', which has regard to policy considerations. 62(62)

[54] Schutz J enunciated his understanding of the *via media* approach in the following words: 63(63)

> 'The *via media* approach, it is contended, serves a particularly useful purpose where a foreign institution is not known to the *lex fori*. If no regard is had to foreign law, what is likely to ensue is that the nearest analogue of the *lex fori* is laid on a Procrustean bed and subjected to a process of chopping off or stretching. . . . It is also contended for the *via media* that it tends to create international harmony and leads to the decision of cases in the same way regardless of which country's courts decide them. If one does not adopt this approach further evils may ensue, so argues Mr *Du Plessis* [counsel for the plaintiff], namely forum shopping and even a defendant choosing a forum whose laws best suit him. (It is not suggested that the defendant in this case deliberately did that.)
>
> Various of the academic writers, and also Mr *Du Plessis* in his argument, welcome the apparent reception of the *via media* by Booysen J in the *Laconian* case (above), but criticise his judgment for not really having seen the *via media* through by his falling back on a residual *lex fori* approach. It is not necessary for me to go into that. 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. Against this view it has been argued by Mr *Tuchten* [counsel for the defendant] that I am simply not entitled to adopt the *via media* in that I am bound by earlier decisions. I do not agree and I will say more on this subject below, but must emphasise now that private international law is a developing institution internationally, and that our own South African private international law cannot be allowed to languish in a straightjacket.'

[55] The learned Judge had no difficulty in disposing of the various arguments raised against the employment of the *via media* approach. He was careful, however, to point out 64(64) that, even should the *via media* be applied 'in a general sense', the authorities were clear that procedural matters should be decided in accordance with the *lex fori* 'because there

are good reasons for the rule'. He added 65(65) that 'not everything that appears in a treatise on the law of evidence has to be classified internationally as adjectival law'. In this regard, he observed 66(66) that, in determining characterisation, the Court would be deciding a question of law, and not just the facts of the case. In a later case, there might in fact be a different characterisation because different foreign rules of law might be proved. The difficulty was that Judges were not always conversant with foreign procedure and evidence, leading to the perception that this might be the reason why Judges have been led 'to relegate adjectival questions to the *lex fori*'. The learned Judge then concluded 67(67) that, in applying the *via media* and for the aforesaid reasons, his decision was that, as a matter of policy, the *lex fori* should determine the issue before him.

[56] On the issue of prescription, Schutz J stated: 68(68)

'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*. I find that the plea of prescription fails.'

The Abdul *case*

[57] In *Minister of Transport, Transkei v Abdul*, 69(69) the Court had to consider the jurisdictional competence of a counterclaim arising from a motor-vehicle collision in the formerly 'independent' Transkei, with a view to determining whether or not it had prescribed. The issue was whether the Transkeian legislation relied on constituted 'statutes of limitation', which simply barred the remedy if there were non-compliance with certain stated prerequisites, or whether such non-compliance extinguished the right of action. In considering the traditional distinction between substance and procedure, Alexander J stated 70(70) that the juridical significance of such distinction was that the court in which the action was brought would apply the *lex fori* should the *lex causae* be procedural. By contrast, it would apply the *lex causae* should it be substantive.

[58] After discussing the 'foreign' (Transkeian) limitation provisions, the learned Judge went on to say: 71(71)

'In deciding whether these provisions are substantive or procedural, it would appear that the Court seized of the matter is enjoined to pursue two items of enquiry. First, whether, according to its own principles of interpretation, they would be held procedural. Secondly, whether, according to the foreign law where

they have their being, they would be held procedural or substantive. . . .'

In view of the clearly procedural nature of the Transkeian provisions, the Court held that the *lex fori*, being South African law, should apply, in which event the special plea of prescription fell to be rejected. Significantly, Alexander J did not appear to consider the effect of the substantive nature of the currently applicable South African prescription provisions.

The Price *case*

[59] In the *Price* case 72(72) Mynhardt J accepted that the limitation of actions or prescription is procedural in English law and substantive in South African law. The underlying agreement or general undertaking signed by the parties, however, was, in English law, substantive and was hence governed by the *lex causae*. In terms of the *lex causae*, the actions would have become unenforceable after six years and would not have prescribed. If the *lex fori* should apply, however, the actions would have been extinguished, and hence prescribed, after three years. 73(73)

[60] Counsel for the plaintiff invited Mynhardt J to follow the approach advocated by Schutz J in the *Laurens* case. 74(74) The basis of the argument was that English law was the proper law of the contract and that the English law relating to limitation should, pursuant to the provisions of the English Foreign Limitation Periods Act of 1984, be classified as substantive. Mynhardt J held 75(75) that the said Act was irrelevant in that it related to foreign limitation provisions. The learned Judge then distinguished 76(76) the *Laurens* case

on the basis that, in that case, prescription was a matter of substance in both the *lex causae* and *lex fori*. There was hence no conflict between the two legal systems and the 'policy decision' made by Schutz J was, therefore, 'easy to make'.

[61] With this background, Mynhardt J then proceeded to say: 77(77)

> '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.'

The learned Judge then opted for the residual *lex fori* approach followed in the *Laconian* case, 78(78) namely that he was enjoined by his judicial oath and by 'good sense' to apply South African law where no rule determining the applicable legal system existed.

VAN ZYL J

[62] Mynhardt J also found support in the *Abdul* case 79(79) in which, as he saw it, 'the Court was faced with the same problem that this Court is faced with'. He then summarised the findings in that case as follows: 80(80)

> '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.'

[63] This led Mynhardt J to conclude 81(81) that he should apply South African law, in which event the plaintiff's claim for provisional sentence against the defendants had prescribed. He rejected 82(82) the plaintiff's suggestion that the defendants had 'implicitly waived' the right to rely on South African prescription rules by consenting, in the general undertaking, to the enforcement of an English judgment in a court of any other jurisdiction.

[64] Mynhardt J likewise rejected 83(83) the plaintiff's contention that the English judgments should be regarded as 'judgment debts' which would prescribe only after 30 years. Section 11*(a)*(ii) of Act 68 of 1969 did not, in his view, include a foreign judgment, inasmuch as it merely constituted a cause of action, which was not directly enforceable. Only if it were made an order of a South African court would it be regarded as a judgment debt in terms of the Act. 84(84)

Submissions on behalf of the plaintiff

[65] In his argument on behalf of the plaintiff, Mr *Thompson* discussed the aforesaid authorities, both English and South African, fully and submitted that this Court should follow the *via media* approach advocated by Schutz J in the *Laurens* case. 85(85) In doing so, it should take into account both the *lex fori* and the *lex causae*, and policy considerations would dictate the application of English limitation law.

[66] Mr *Thompson* argued further that, after the passing of the English Foreign Limitation Periods Act of 1984, South African law should classify English limitation provisions as substantive. The limitation provisions of the Limitation Act of 1980, including s 24 thereof, he

submitted, have, in fact, always been substantive 'in the South African sense'. Although English law traditionally classified statutes of limitation as procedural, the blurring of the distinction between rights and remedies had changed this. If the *via media* approach should be followed,

policy considerations would once again prompt the application of the English law of limitation.

[67] In the alternative, Mr *Thompson* submitted that, by agreeing, in clause 2.2 of their general undertaking, 86(86) that a judgment obtained in an English court 'may be enforced in the courts of any other jurisdiction', they had 'implicitly waived' any right to rely on foreign limitation or prescription rules.

[68] In the further alternative, Mr *Thompson* argued that, even if the South African prescription rules should indeed apply, the claims of the plaintiff were based on 'judgment debts' which prescribed after only 30 years. He relied in this regard on *E A Gani (Pty) Ltd v Francis*, 87(87) where it was held that a judgment, including that of a foreign court, novated the former debt, thereby creating a new debt on which a suit could be brought. He found further support for this submission in the *MV* Ivory Tirupati case, 88(88) in which it was held that a judgment not only 'reinforced and strengthened' an original cause of action, but could also create 'a new and independent cause of action enforceable between the parties in another court'. Accordingly, he submitted, the present cause of action was based on a 'judgment debt' and not on the underlying cause of action. It had hence not prescribed.

Submissions on behalf of the defendants

[69] In his argument for the defendants, Mr *Seligson* likewise dealt fully with the authorities discussed above and submitted that this Court should follow the decision of Mynhardt J in the *Price* case. 89(89) He found further support in the affidavit of Mr L S Kuschke, an advocate of this Court and a barrister of England and Wales, who opined that English common law generally classified laws of limitation as procedural rather than substantive. 90(90) This was also the way in which South African law, as the *lex fori*, classified the English limitation regime.

[70] The *via media* approach, Mr *Seligson* submitted, was of no assistance where the *lex fori* and the *lex causae* came to different conclusions regarding classification, because then there was no *via media*. This situation was different from that in the *Laurens* matter, 91(91) since there was, in fact, no conflict between the applicable systems of law. In any event, Schutz J's judgment on the application of the *via media*

was *obiter* in regard to conflict situations such as that in the present matter. In this regard, he submitted that Booysen J's approach in the *Laconian* matter 92(92) was, for reasons of policy, the correct one. It was far better, he suggested, for a court to apply the law it knows than that which it does not know. In many instances, it would be almost impossible to apply