CIV/APN/161/86

IN THE HIGH COURT OF LESOTHO

In the Application of:

THE STANDARD BANK AFRICA PLC — Applicant

V

THE MASTER OF THE HIGH COURT — 1st Respondent
SEAN McCARTHY — 2nd Respondent
BRIAN McCARTHY — 3rd Respondent

# J U D G M E N T

Delivered by the Hon. Mr. Justice M.L. Lehohla
on the 31st day of March, 1989.

Applicant in the above matter seeks against the respondents an order of this Court :

(a) Reviewing, correcting, and/or setting aside the decision of the 1st Respondent, at a meeting of creditors in the estates of 2nd and 3rd Respondents held on March 1986, to reject the creditor's claim of the applicant.

(b) Ordering the 1st Respondent to admit applicant's claim in the estate of 2nd and 3rd Respondents, in the amount of M221,123.94 being the debt of sequestration of 2nd and 3rd Respondents, plus such interest thereafter as is allowed by law.

(c) Alternatively, ordering 1st Respondent to afford the applicant a further opportunity to substantiate its claim and to debate the exact amount thereof.

(d) Granting such further or alternative relief as may be appropriate.

(e) Ordering 2nd and 3rd Respondents to pay the costs hereof jointly and severally, alternatively, making such order as to costs as may be appropriate.

"R A 26" at page 167 of the record gives background to three cases which involved the present parties.

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It appears that 2nd and 3rd Respondent stood surety for overdraft facilities advanced by applicant for an amount of M200,000.00 on behalf of McCarthy Construction (Pty) Ltd in 1976. The two respondents made an undertaking by which they were personally indebted to applicant. It was a specific term of the undertaking that the two respondents would be jointly and severally liable for payment of the above sum.

The company McCarthy Construction was liquidated in October 1979. The estates of the two respondents were sequestrated in 1980 to meet the liabilities of McCarthy Construction (Pty) Ltd.

For a long time the Master i.e. 1st Respondent was not able to convene a meeting.

Few years later i.e. around 1983 and 1984 the Master appointed a provisional trustee. Meantime 2nd and 3rd Respondents were desirous of being rehabilitated.

They applied for interdicts the effect of which was to prevent the trustee from carrying out his duties and at once lodged applications for rehabilitation.

Creditors objected to the rehabilitation pointing out that they wanted to prove their claims.

A meeting of creditors was held and claims were accordingly proved. But the meeting was invalid because the gazette had not been issued in time. Hence the meeting was set aside.

Eventually a valid one was held. At this proper meeting applicant's claim was rejected.

Consequently applicant lodged the current review proceedings in May 1986.

Meantime rehabilitation proceedings which had been pending were granted. However the rehabilitation orders granted by the High Court were appealed against and the Court of Appeal set them aside.

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The effect of this therefore is that 2nd and 3rd Respondents are still insolvent and unrehabilitated.

Because at the 1st meeting that was held applicant's claim was rejected on a point of law Mr. Edeling for applicant submitted that the Court is being requested to decide whether the claim should indeed have been rejected or whether applicant should have been given an opportunity to prove its claim.

He buttressed his argument by submitting that even if the amount of the claim was to be debated in principle the claim had to be proved nonetheless.

Page 170 of the record bears out that the Master's reason for rejecting applicant's claim was based on the point of law relating to whether applicant could be paid interest accrued after date of sequestration. See page 133 "R A 21" the proof of claim showing that Sean McCarthy was even at the time of the sequestration indebted to applicant in the sum of M449,209.38 read with Annexure "A" thereto being 2nd Respondent's personal gaurantee to the applicant.

At page 138 there appears a Bank Ledger identified as such showing McCarthy Construction (Pty) Ltd "under liquidation."

As at the date 21-2-1985 the balance according to the ledger was M250,134.60 whereas as at the date 21-1-86 the balance had shot up to M670,472.49. This clearly includes interest. Page 139 shows that after the first and final dividend from the liquidator had been received in the sum of M221,263.11 a balance of M449,209.38 remained outstanding. Mr. Edeling submitted in reference to paragraph 1 at page 133 that it is incorrect and misleading to regard M449,209.38 as the balance at the time of the sequestration because the ledger shows that this was not the debt in 1979 but was the amount less the dividend paid.

Furthermore as shown at page 138 the entry for the date 28.6.85 reflects a debit of M192,738.70 pushing the

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balance to M584,417.65.

The explanation for this is to be found in "R A 28" from page 172 to 174 being ledger sheets covering the years 1980 to 1986.

The amount of M190,000.00 reflected at page 173 was the first interim dividend paid. To understand the nature of its payment reference should be made to pages 32 and 33. In paragraph two at page 32 it is said by the liquidator to the applicant's manager

> "Kindly note that this payment (of M190,000.00) is made subject to the Master's approval of the liquidator's account to be drawn and lodged in the above company in liquidation."

At page 33 the applicant's manager wrote to the liquidator acknowledging the note referred to above relating to the M190,000.00 and in it the manager reiterated his understanding of the fact that

> "this payment is subject to the Master's approval and to your costs which have yet to be lodged with the Master of the High Court. We confirm that we will refund to you ..... costs and the interim payment referred to above in the event of non approval by the (sic) High Court".

As shown therefore at 173 the Bank paid the M190,000 into the account reducing the balance to M228,416.43. But on account of interest the balance grew again to M584,417.65 occasioned by a debit of M192,738.70 effected on 28.6.85.

How this works is set out at page 15 paragraphs 41 to 44 saying

> "The interim dividend referred to in paragraph 13 (i.e. M190,000) hereof was credited to the account on 28th March 1984 but this was incorrectly done as the 1st Respondent's approval had not been obtained at the time, as is made clear in the liquidator's letter dated 28th March 1984, Annexure "R A S" hereto. Applicant was therefore strictly not entitled to the payment because it was refundable at any time should the 1st Respondent disapprove."

42 "The error was discovered on 28th June 1985 when the interim dividend was reversed and credited to a securities realisation account."

43 "The same procedure was followed in regard to the sum of M2,430.00 received by applicant on 7th April 1984 in respect of certain rental payments made to applicant on behalf of the liquidator of the company."

44 "From the date when the interim dividend was received to the date of its reversal, interest was calculated on the reduced balance as reflected on Annexure "R A 28". This in fact resulted in a saving of interest because if the interim dividend had been invested elsewhere, it would have attracted a rate of interest lower than the rate debited to the overdrawn account of the Company."

For the assertion that 2nd and 3rd Respondents guaranteed their indebtedness to applicant the deponent Robin Alec Atkinson the Maseru Branch Manager of applicant relies on written terms of the guarantee at pages 64 and 65 of the record. The actual words appearing at page 64 read

"It is further agreed that in addition to our liability for interest as from the date hereof the amount of our liability to the said Bank under this guarantee shall also bear interest at the rate and in the manner charged by the said Bank to the Debtor in respect of the obligation hereby guaranteed from the date on which the Bank demands payment from us to the date of such payment.

The said Bank is furthermore irrevocably authorised to apply any moneys received by it from us in terms of this guarantee against the indebtedness to it of the Debtor in such manner as the Bank in its discretion may think fit."

"..... In the event of insolvency or compromise no dividends or payments which the said Bank may receive from the Debtor or others shall prejudice its right to recover from us to the full extent of this guarantee any sum which, after the receipt of such dividends or payments may remain owing by the Debtor."

It is common cause that the company was liquidated and that applicant proved a claim in that regard and was eventually paid a large dividend.

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The problem arose from the fact that applicant contended that there was still a balance owing to it. It accordingly proposes to claim this balance from the estates of 2nd and 3rd Respondents. In response to this, the respondents contend that the dividend paid by the liquidator of the company was more than the capital sum of the claim, and that the applicant cannot recover the interest from the present respondents.

Page 167 shows the insolvents' submissions to the Master supporting their contention that the present applicant's claim be rejected. The only objection I am able to glean from the proceedings therein is that a creditor is not entitled to interest after sequestration.

Paragraph 32 at page 12 has been referred to by applicant as representing an error resulting from applicant's following Form C prescribed in the first schedule to the Insolvency Proclamation No. 51 of 1957.

Applicant sought on its own motion to put right this error as adequately set out in paragraphs 40 to 45 appearing on pages 15 and 16. Suffice it to say applicant is prepared to reduce its claim against 2nd and 3rd Respondent by M29,951.84 representing the difference between M56,103.00 and M86,054.84 interest for the period 21st June 1985 to 20th January 1986 resulting from the calculation on the account if the interim dividend had been reversed. Reduced by the said amount of M29,951.84 the claim due to applicant would amount to M419,257.54. It was submitted that although the calculation was made in error it nevertheless did not mislead anybody.

Applicant thus submits that as the above represents the correct way of calculating interest, the first Respondent's decision to reject applicant's claims against 2nd and 3rd Respondents is bad in law and totally unfounded.

Heavy reliance was reposed on paragraph (c) on page 5 of applicant's heads that the amount of the balance owing

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i.e. M221,123.94 as at date of sequestration i.e. 25.10.1979 was not in dispute. This amount is reflected in the 2nd Respondent's supplementary answering affidavit at page 187 f(ii) read with (iii) and would appear to represent no dispute as set out in the papers.

It is again clear as appears on page 173 that on 22nd March 1984 the balance owing was M478,416.43.

The effect of payment made by the liquidator in the sum of M190,000.00 was to bring the balance to a new level of M288,416.43.

A further sum of M2,430.00 was paid by the Liquidator on 7th April 1984 bringing the balance to M285,986.43. See page 173.

On realising on 28th June 1985 that the interim payment should not have been credited to the account but should have been kept in a special securities realisation account applicant debited the interim payments to the normal account and credited the special account as reflected on page 155 read with paragraphs 41-44 at pages 15 and 16. The balance resulting from this operation came to M584,417.65 as at 28.6.85. See page 155.

The last sum appearing on the ledger as at 21st January 1986 is a balance of M670,472.49. Mr. Edeling submitted that this amount was used to calculate the claims submitted in the estates of 2nd and 3rd Respondents.

He submitted further that on 26th February 1986, the liquidator of the company made a second payment of M31263.11 to the applicant as borne out at page 166 of the acquittance "R A 25" or else see page 13 paragraph 35.

I have already made reference to the terms of the written guarantees except that I left out another at page 65 saying

> "The amount of the indebtedness of the debtor and of each of us hereunder to the said Bank at any time (including interest and the rate of interest)

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> shall be determined and proved by a certificate signed by any Manager or Accountant of the Bank (etc)....."

Thus Mr. Edeling submitted that the various affidavits signed by the Manager of the applicant Bank, and the signed copies of the ledger cards constitute certificates proving the amount of the indebtedness and the interest; and the interest rate as envisaged in the aforegoing quotation. See pages 138 and 155.

Paragraph 17 of applicant's heads throws some clarity on the issue although it does not dispel all the obscurity perhaps because of the manner of the language employed. I nonetheless opt to quote it in extenso:

> "It is an express term of the guarantee that the Bank can allocate the money, as it sees fit. Immediately before receipt of the first interim payment of M190,000.00 the total was M478,416.43, whereas at the date of the sequestration of the respondents the debt was M221,123.94. This means that before the interim payment by the liquidator, the debt consisted of
>
> (a) the debt at date of sequestration, plus
> (b) interest of M257,292.49 (being M478,416.43 less M221,123.94).
>
> Clearly the post sequestration interest was more than the dividend, and the Bank is entitled to allocate the entire interim dividend to interest, leaving the entire capital which was owing at date of sequestration, totally unpaid. Indeed, the facts show that even after receipt of the interim payment, the amount owing was M288,416.43, which consisted of the debt at date of sequestration, being M221,123.94, and the balance being in respect of interest."

For purposes of completion it is essential to proceed to head 18 reading:-

> "It is therefore abundantly clear that no payments in respect of the capital have been made, and the only effect of any interim payments, was to reduce the indebtedness for or in respect of post sequestration interest."

On the assumption that the above exposition represents the correct approach it was urged on me that respondent's allegations would seem to be devoid of any merit whatsoever

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and that the review should accordingly succeed. It was urged on me as a rider to the above submission that the Master assumed wrongly that the capital had been paid, whereas in fact that was not the case.

As an alternative or an addition to the foregoing Mr. Edeling argued in reference to section 50(1) of the Insolvency Proclamation 51/1954 that

> "when a debt bearing interest became due before the sequestration of the debtor's estate, the creditor to whom that debt is owing may include in his claim against the debtor's estate in respect of that debt any interest thereon, which is in arrear, to the date of the sequestration."

It would seem therefore that the amount of the claim as at date of sequestration can only include interest up to date of sequestration.

It was urged on me notwithstanding the logical conclusion reflected above that section 50 including case law does not go further and say that a creditor may not be paid in respect of interest after sequestration. It was submitted that all it says is that the amount of the claim as at date of sequestration, can only include interest to that date.

Reference to sections 96(1), 103(1) (b) and 103(2) of the Proclamation shows that interest is payable even after date of sequestration. It seems that the Insolvency Proclamation makes a distinction between two classes of creditors i.e. the secured and the unsecured. The secured creditors are secured by real right in property. The proclamation recognises only four such i.e.

(a) special mortgage
(b) landlord's hypothec
(c) pledge and
(d) right of retention.

Interest on these categories is to be calculated in the manner provided in section 103(2) from date of sequestration to the date of payment.

I agree with the submission that this principle

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applies both in respect of secured and unsecured creditors. It therefore escapes me how 2nd and 3rd Respondents come by the notion that because applicant is a secured creditor section 103 therefore does not apply. On paragraph 16 at page 178 2nd Respondent avers

> "The applicant was a secured creditor. It has not proved any claim against the insolvent estates of the respondents. Section 103 does not therefore apply under such circumstances."

Page 171 shows that the Master laboured under this illusion too because she said notwithstanding that section 103 provides for interest to be paid after sequestration

> "that condition does not apply as the Standard Bank is a secured creditor."

It was submitted that as undoubtedly the two classes of creditors are entitled to interest after sequestration the only difference relates to the order of preference which they may enjoy. Further that on the facts it is only in relation to 2nd Respondent that there is partial security to the extent of M13,000. See pages 134, 141 and 151 paragraphs 4 read with head 26.

Section 84 (12) of the Proclamation as paraphrased by Mr. Edeling provides that

> "when a claim is partly secured and partly unsecured where the claim of a secured creditor exceeds the amount which can be paid to him out of the proceeds of the encumbered security, such creditor is an unsecured creditor in respect of the balance."

It would seem therefore that the mistake committed by all concerned including the Master arose from consideration of events after the sequestration which was immaterial and unnecessary in view of the fact that section 95 provides that it falls to the trustee's lot to indicate in his accounts which parts are secured and which are not and that in going about this exercise he must pay heed to provisions of sections 96 through 104.

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Sections 90 and 96 deal with securities and sections 97 to 103 deal with free residue. If the proceeds of the security are insufficient to pay the secured creditor then section 84(12) shows the balance of the claim is unsecured. In recognition of this it was submitted that because part of applicant's claim against 2nd Respondent is secured then it followed the balance is unsecured. Further that the entire claim of applicant against 3rd Respondent is unsecured. Relying on section 96(1) Mr. Edeling argued that applicant is entitled to be paid interest after sequestration on the secured portion of the claim. And that in terms of section 103(1)(b) applicant is entitled to be paid interest after sequestration on the unsecured portion of its claim.

Mr. Edeling further submitted that there can be no objection to the applicant's claims. It is common cause that at the date of sequestration applicant's was M221,123.94. See page 187.

It was submitted that in terms of the express wording of the guarantee, no dividends or payments received by the Bank or by anybody will prejudice the Bank's right to recover any amount which remains owing. That applicant's claim is therefore for the amount owing at date of sequestration and if there is enough in the estate applicant is entitled to be paid that amount plus interest thereon, less payments received on account.

In reply Mr. Unterhalter demurred at the attempt in this application seeking to hold the 2nd Respondent's liable for collosal amounts of interest. Expressing disbelief that the amount of interest sought to be realised spans no less a period than between 1979 and 1986 he boggled at the fact that year after year passed till the first meeting was held in 1984 and drew attention to the fact that address advanced on behalf of applicant was on equity and not based on principles of Roman Dutch Law which excludes equity.

Mr. Unterhalter observed that applicant is seeking an

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order reviewing the decision of 1st Respondent, to reject creditor's claim of the applicant, given at a meeting of creditors in the insolvent estates of 2nd and 3rd Respondents, held on 20th March 1986.

Further that orders be made in terms of amended prayer (b) in the notice of motion and costs be granted against 2nd and 3rd Respondents jointly and severally.

Mr. Unterhalter demurring that the fact that it is learnt only today that the amount is now reduced represents a negligent approach to applicant's cause and therefore the claims ought to be dismissed in their entirety.

Because I am of the view that the submission is valid that it is not proper that apart from the long period which expired before this application was brought it is in addition bedevilled by the negligence referred to, its full impact should come out in the wash.

Observing that applicant's original claim for the sum of M449,209.38 has been altered to M221,123.94 Mr. Unterhalter pointed out that this original sum as indicated in the affidavits is said to be in respect of a personal guarantee. The guarantee, dated 14th December 1976, was executed by 2nd Respondent and one other, in terms whereof they bound themselves to the applicant, jointly and severally, as sureties for the repayment ondemand of all sums that McCarthy Construction (Pty) Ltd (the Company) might owe to the applicant. See pages 135 and 152 of the record.

The company was placed in liquidation on or about 15th October 1979. See page 8 paragraph 10.

The liquidator of the company applied for the sequestration of the estates of 2nd and 3rd Respondents and provisional orders were granted against them on 26th October 1979, and final orders on 11th February 1980. See page 8 paragraph 11.

I was referred to section 2 of the proclamation wherein

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"sequestration order" is said to mean "any order of court whereby an estate is sequestrated and (to) include a provisional order, when it has not been set aside." It was accordingly shown that the estates of 2nd and 3rd Respondents were sequestrated on 26th October 1979.

Mr. Unterhalter protested that Counsel for applicant suggested applicant is entitled to do it as it wishes yet nowhere has it said it has appropriated the amount to interest or to Capital. See page 9 paragraph 13.

He accordingly submitted that this was the occasion when applicant should have said it appropriated the amount but it did not. Neither has this been canvassed at 32 or 33. Applicant should have said it has effected the appropriation in an affidavit. On page 166 there is an acquittance and in it there is no reference to appropriation. Nowhere is reflected a statement by the liquidator that this is to be appropriated to interest first and to capital afterwards.

Accordingly the Roman Dutch Law says if there is no appropriation by debtor or creditor then Common Law steps in. Hence by operation of this principle it was submitted that when the two amounts paid by the liquidator were received by applicant they should have been appropriated to wipe out the amount owed to surity and the principal creditor. See page 131 of Burge's Commentaries On the Law of Suretyship where it is said

> "The payment is to be applied to the debt for which the debtor had given surities, rather than to which he owed singly."

Further

> ".....The reason assigned by Polthier is, that in discharging it he exonerates himself from the liability of two creditors, that is, from his principal creditor, and from his surety, whom he is obliged to indemnify; and that he has more interest in being acquitted against two creditors than against a single creditor."

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But on the same page the learned writer goes on to say

> ".... In debts carrying interest, the application is made to the interest before the principal." ..... "Even when the acquittance expresses that sum was paid on the account of the principal and interest."

However at page 404 of Stiglingh vs French (9 SC.) 1892 read with Gane's translation, V. 7 of Voet, 46.3.16 says

> "where there are various accounts, and the parties have not specifically appropriated a particular payment, it must be appropriated to the most onerous."

Thus in that case rent, being secured by the tacit hypothec on defendant's movable in the premises, was found to be of a more onerous nature than the loan. See also Pothier's Law of Obligations (v. 1 Evans' translation) Corollary V at pages 426 and 427.

At page 426 of Christie's book:

The Law of Contract in South Africa the same principle is supported by reference to the fact that failing appropriation by the debtor and the creditor, "the payment is appropriated according to the Common Law rules."

An elaboration of these rules indicates that

> "The general principle is that the payment ought to be appropriated to the debt which the debtor had the most interest in discharging i.e. the debt bearing most heavily upon him,"

but it is worth noting that the author is however quick to point out that

> ".... the rules should be used as a guide towards that end, bearing in mind the circumstances of the particular case."

2. " the limitations upon the creditor's right to appropriate must also be recognised if he has not appropriated. So an admitted debt must be paid before a disputed debt, a debt that is due must be paid before one not yet due, and an enforceable debt must be paid before an unenforceable one."

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Making reference to a debt on which the debtor faces civil imprisonment rule 3 ends with a warning that

> "..... the accruing of interest and an acceleration clause would rank as penalties for this purpose."

Rule 4 states that

> "A debt that is secured by a mortgage or pledge or a surety should be paid before an unsecured debt, a debt for which the debtor is solely liable before one for which he is jointly or jointly and severally liable, and one for which he is liable as principal before one for which he is liable as surety."

Referring to the fact that the agreed debt is the one in the amended notice of motion Mr. Unterhalter submitted that it remained then to be determined whether or not this debt had been paid. He pointed out that the two amounts paid extinguished the debt entirely if they were appropriated to capital. If so then the sureties are free. Therefore no amount remains to prove against them at creditors' meeting.

However if it is applied to interest sureties are not free. Thus the claims can be proved against them. But on the basis of common law procedure appropriation is to capital.

Mr. Unterhalter went further to show that even an amount of M23000.00 paid as rental has not been credited anywhere and conjectured that the difference may even be larger.

He referred me to Central Africa Building Society vs. Pierce N.O. 1969(1) S.A. (Rhodesia Appellate Division) which he submitted might appear to be against him whereas subsequent factors would prove otherwise. This case was concerned with interpreting our section 103 of the Insolvency Proclamation. The result was that the lower court was overruled and the judges held that interest is applied in priority to the capital debt. See section 88 of Rhodesian Insolvency Act.

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He pointed out that the difference between that case and the instant one is that the Rhodesian case had nothing to do with suretyship in regard to the debt whereas the instant case has.

He further indicated that in Bezuidenhout vs Sackstein N.O. EN Andere 1986(1) SA. 493 where there had been appropriation to capital first and not to interest De Wet J.A. said that was wrong.

Mr. Unterhalter relied on section 96(2) to illustrate what happens in the event of late proof of claims; namely that during the period coming a year after confirmation an application has to be made to the Master. Thus Mr. Unterhalter submitted in this there is a suggestion that capital should be appropriated first and then interest afterwards. Consequently he referred to this as furnishing additional means of distinquishing the Rhodesian case to the present one.

I do endorse the submission that sureties are not to be exposed to the danger of interest mounting and mounting in the event that some upwards of six or more years are spent before finality of the matter is reached as is the case in the current matter.

Referring to page 64 on which counsel for applicant relied for holding the view that the Bank can apply moneys received by it as it deems fit, Mr. Unterhalter submitted that this can only apply where it is sureties who effect payments, but because the payments were made by the liquidator that should not be the case. He pointed out that Mr. Edeling was wrong to rely on this and that he could rather rely on appropriation made by the Bank if the Bank had appropriated but here no appropriation to interest rather than to capital was made by the Bank.

He denounced Mr. Edeling's submission that applicant could charge interest (see page 64) for in his submission interest here is in terms of section 103 of the Proclamation not interest in terms of suretyship deed. Thus on the

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footing of Central Africa case above he submitted that interest has to be simple interest not compound interest. In any event this he argued as an aside for there is no interest at all, he submitted.

He denounced reference to page 178 where the deponent had said section 103 does not apply as a submission merely by a layman and not by a lawyer. He further demurred at reference to page 171 as a sheer recitation of an argument by Mr. Mphalane for nowhere does it say this is the decision of the Master.

He concluded by drawing attention to paragraph 15 of his heads. He denied that there was either non performance or wrong performance of the statutory duty, and submitted that the debt has been fully paid by applicant to capital therefore there is nothing to send to the meeting for the Master to approve. That would only incur more expenses.

Mr. Edeling hastily camped on the trail of counsel for 2nd and 3rd Respondents by observing that he had said if payment is correctly appropriated to interest surities are not free and payment can be proved. See paragraph 17 of applicant's heads. He observed that a great deal turns on question of appropriation.

Starting from paragraph 13 on pages 10 to 13 of respondents heads it seems that they say lets split the debt into two i.e. interest and Capital. Then they proceed by saying there are two debts i.e. the capital debt and interest debt.

Mr. Edeling demurred at this approach as fallacious. Then the two respondents made an attempt to choose one rule of appropriation that suits them and conclude that no interest is owing. Mr. Edeling submitted that there are fundamental errors in this approach.

Indeed it is well worth noting that rules of appropriation are only applicable if there are more than one debt. One chooses which debt is being paid.

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In the instant case there is one single debt i.e. that of the company to the Bank - An overdraft debt where interest is added regularly to form part of the capital. Section 103(2) says interest is to be at 6%.

At page 1012 of Suretyship paragraph 4033 it is said

> "Pomponious and Ulpian hold that if there has been no appropriation, then the payment is to be appropriated rather to a debt secured by sureties than to one for which the debtor alone is bound. Troplong questions the correctness of this view."

But Mr. Edeling referring to paragraph 4035 of Suretyship above observed as buttressing his earlier submission that

> "The creditor's right to appropriate if the debtor has not done so is confined to cases where the debts are distinct and separate: Where accounts are regarded by the parties as one account, there can be no appropriation."

At page 64 the guarantee itself shows that the rate and the manner in which the guarantee shall bear interest shall be as charged by the Bank to the debtor in respect of the obligation hereby guaranteed from the date on which the Bank demands payment ..... to the date of such payment. This accords with the provision in section 103(2) that higher interest rate can be claimed and calculated by virtue of a "lawful stipulation in writing."

Thus Mr. Edeling argued that all the submissions about appropriation were inapplicable for here what is being dealt with is one debt and not more than just that one debt.

One of the rules of appropriation is if a debtor owes two debts to a creditor, two debts means debts contracted at different occasions.

If there is surety for only one of those and there is no indication or rule of appropriation, then payment is regarded as payment for which there is no surety.

But if there are sureties for both debts then this

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rule does not help.

Mr. Edeling attacked the attempt by two respondents' counsel to distinguish between capital and interest; and the subsequent choice by the latter of the rule that appropriation was applied to capital.

Cataloguing the fallacy in this attempt he submitted that it couldn't follow because

(a) there is one debt and not two or more;
(b) even if it were to be divided into capital portion and interest portion one would not be justified in saying;
(c) only capital is secured by sureties and not interest.

It would do violence to the language of the guarantee and fly in the face of common sense because the guarantee says "we guarantee interest as well."

A logical submission was therefore made that sureties are in respect of the capital portion as well as in respect of the interest portion.

It would seem therefore the criticism is valid that the two respondents' counsel's chosen appropriation rule presupposes that there is a debt for which there is a surety and another for which there is no surety. Such a situation does not exist in this given set of facts hence that rule is not applicable. At page 426 of Christie's Law of Contract it is shown that the rules set out in Wessels paras 2306-13 do not apply if parties agree to the contrary. Thus it is important to note that even in Christie's version interest has a very important preference.

Stiglingh vs. French at 404 above refers to various accounts but here we deal with only one debt.

Wessels on Termination or Discharge at 640 (xi) says

"where a debt produces interest, the money paid must be applied in the first instance to the payment of the interest and then to the Capital".

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This is so even if the payment is made on account of principal and interest.

> "If no mention is made of the principal, but only to the interest, the surplus after paying the interest will nevertheless be appropriated to the capital."

Mr. Edeling submitted that this is the correct rule that accords with facts of this application.

Caney on The Law of Suretyship at 165 shows that by ordinary rules is meant ordinary common law rules. In a foot-note marked 22 it appears that ordinary rules take precedence over special rules on which Respondents' counsel reposed much of his confidence.

Passages relied on by two respondents at 131 of Burge are to the effect that it is better for the debtor to be discharged from the creditor and surety at once i.e.

> "that he (the debtor) has more interest in being acquitted against two creditors than against a single creditor",

or from a creditor and surety.

Analysing this jig saw puzzle to its component parts Mr. Edeling showed that

(i) the debtor here is the company McCarthy Construction (Pty) Ltd.
(ii) The creditor is the Bank
(iii) Sureties are the McCarthy Brothers.

The debtor desires to be freed from more creditors than one i.e. (ii) and (iii) Lets see: the debtor had been placed in liquidation. The surities didn't prove any claim in the estate of the debtor. Now the debtor made payment to the Bank. Whatever the Bank does with that money there is no question that the sureties will claim right of recourse against the debtor company.

Thus the rule contended for cannot apply because

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the special circumstances of this case destroy its very foundation.

Page 110 of Gane's translation above shows at (iv) that

> "In case of doubt the laws will have it that what is paid shall be credited first to interest which admits of collection, and then to the principal debt. The crucial point was made in a foot-note that
>
> "the rule that law will appropriate to most onerous debt applies only as between principal debts and not as between a capital sum and interest thereon."

Mr. Edeling pointed out that many authorities were cited to highlight the rule but regrettably the rule sought to be highlighted did not apply. He submitted that what applies is the necessity to prove the claim as set out in heads 18 and 19.

Replying to specific points Mr. Edeling affected bewilderment at the fact that the two respondents' counsel, despite his vehement disapproval of resort to equity, has made incessant appeals to fairness and good exercise of discretion all of which are clear equity.

He pointed out that applicant's case is based on the law, therefore the court has no discretion. He thus referred me to page 119 where in a judgment of this court it was noted that

> "It is not through the creditors' fault that no meetings of creditors have been held."

See CIV/APNS/52 & 56/85 Sean McCarthy & Another vs Lemena & Another (unreported at 3).

Hence all there is to be decided is whether at time of the sequestration there was a debt owing.

It appears that on the question whether the Bank said they were appropriating in fact they never said that nor on the other hand did they waive their right to appropriate according to their choice.

/Because

Because it is provided in the law that appropriation should be made it is condoned that absence of papers mentioning this fact poses no obstacle for this has been adequately dealt with at paragraph 17 of applicant's heads. Not only that but it is also shown in the heads how allocation is to be effected.

To the extent that the Bank's conduct has been shown to be consistent with wiping out of debts I have no reluctance in accepting the submission the Bank was going to effect the allocation. See Wessels at page 1012 paragraph 4032 saying

> "The appropriation of the debt may, however, be implied from the surrounding circumstances even if nothing specific was stated."

Mr. Edeling submitted that Bezuidenhout above is not the ratio and that it cannot be the authority to rely on for attempting to overthrow recognised rules set out in the Digest, Voet and Wessels etc.

Denouncing the other parties' reference to section 96(2) of the Insolvency Proclamation Mr. Edeling submitted that factors envisaged therein constitute special considerations justifying late claims.

Indeed we are dealing here not with late claims but with the first meeting, albeit delayed, that was properly consituted as the meeting of creditors.

My evaluation of section 96(2) comes to nothing other than that to some extent it protects a creditor who is sleeping on his rights and to a certain extent penalises him in the sense that, he won't get as much interest as he would if he didn't sleep on his rights. This does not seem to me to change the law between interest and capital.

Mr. Edeling raised his heckles at, and called in question the soundness of the submission that fairness requires that the court should decide in favour of the insolvents; and submitted that fairness is not relevant

/here

here save that if it is, then it demands that the application be granted. He vehemently enquired if it is fair to deny creditor the interest that was relied on and stressed that the insolvents applied for the loan and guaranteed to pay interest. Why should they complain when required to pay!

Attacking respondents' head 14 where it was submitted the Master didn't err Mr. Edeling very properly submitted that it is an error to make a wrong decision on law and facts resulting in the rejection of a legitimate claim.

Stung to the quick by this onslaught Mr. Unterhalter having acknowledged to the Court that he had not the right to reply stated that there was not only one debt for there was another arising from suretyship and yet another from the statutory provision about interest and referred me to 640 (vii) on suretyship in Wessels above.

Having considered the arguments advanced and read and perused the papers before me I come to the conclusion that the application be upheld in terms of prayers (a) and (b) as amended plus 90% costs being costs in the sequestration.

Mr. Qhomane for 1st Respondent undertook to abide the decision of the court. No costs are awarded either for or against his client.

J U D G E.
31st March, 1989.

For Applicant : Mr. Edeling
For 1st Respondent: Mr. Qhomane
For 2nd & 3rd Respondents : Mr. Unterhalter.