IN THE SUPREME COURT OF ESWATINI

JUDGMENT

HELD AT MBABANE **CASE NO. 89/ 2017**

In the matter between:

USA DISTILLERS (PTY) LTD **Appellant**

And

UMCEBO MINING (PTY) LTD **Respondent**

Neutral Citation: **USA Distillers (Propriety) Ltd vs Umcebo (89/2017) [2018] SZSC 28 (24TH August, 2018)**

Coram : SP DLAMINI JA; MJ DLAMINI JA; JP ANNANDALE JA

Heard : 24 May 2018

Delivered: 24 August 2018

Summary: *Private International Law – Conflict of laws – Proper law of contract – Characterization – Via media, 'gap', 'cumulation' considered;*

Roman Dutch Common Law incorporating Section 16 of the Placaat of Emperor Charles V of 5th October 1540 – Meaning of 'koopmaschap ter slete gelevert*';*

Prescription – Applicability of section 16 of the Placaat in eSwatini – Prescription Act No 68 of 1969 of South Africa – Special pleas – Interruption.

Prescription in eSwatini is in terms of the Roman Dutch Law which incorporates Article 16 of the Placaat of Emperor Charles V of 5th October, 1540. In terms of that article, the price of merchandise ter slete gelevert *must be claimed by legal action within a period of two years from date of delivery of the goods purchased.*

Prescription under the Placaat is a matter of procedural law as such it only bars the remedy and make the claim unenforceable in law. Under the South African Act of 1969, prescription is a matter of substantive law not only barring the remedy but also extinguishing the right of action in the claim.

The contract between the Parties was entered in South Africa for the delivery of coal in eSwatini. The proper law of the contract being the law with which the transaction has the closest and most real connection with the dispute is the law of South Africa.

Defendant filed two special pleas pleading that in terms of the law of the Kingdom of eSwatini and the law of the Republic of South Africa, respectively, plaintiff's claim has prescribed and cannot be claimed by legal process or it has been extinguished.

Interruption falls to be construed in terms of the proper law of the contract. Under that law no interruption arises since the proceedings in terms of the first served summons in Kwa-Zulu Natal High Court were withdrawn and terminated by the plaintiff.

JUDGMENT

Introduction

[1] During the month of August or October 2007, at the Wimpy in Emalahleni (Witbank), South Africa, or at Umcebo House, Wilge Power Station, Mpumalanga, South Africa, by their lawful representatives, the **plaintiff**, (respondent herein), a company with limited liability and registered according to the laws of the Republic of South Africa, having its principal place of business at Umcebo House, Wilge Power Station, Voltargo, South Africa, entered into an oral agreement with the **defendant**, (appellant herein), a company with limited liability, registered according to the laws of the Kingdom of eSwatini and having its principal place of business at USA Distillers Park, Big Bend, eSwatini. The agreement was that the plaintiff offered to sell and defendant agreed to buy coal merchandise on certain terms and conditions set out in a **Statement of Agreed Facts** (the *Statement*) of the parties. The *"plaintiff was obliged to deliver quantities of coal from South Africa to the defendant's principal place of business in eSwatini"*, and the defendant *"acquired the coal [delivered] for the purpose of consumption and in particular for the purpose of heating its boilers"*. Payment by defendant was to be at a *"designated bank in South Africa"*, to wit, Middleburg branch, paid from defendant's account in Swaziland. But the plaintiff and defendant *"did not expressly agree as to which law would constitute the proper law of the contract"*.

[2] The plaintiff, on 14 September 2011, instituted action against the defendant in the KwaZulu-Natal High Court, Durban, for payment of an aggregate sum of E12

286 900 together with interest at 15.5% p.a. By special plea defendant opposed the Durban action arguing that the Durban court had no jurisdiction over the defendant. The plaintiff sought to have the proceedings transferred from Durban to the Pretoria North, High Court, but again defendant opposed on that court also having no jurisdiction over the defendant which had no assets in South Africa. The application to transfer the action was accordingly dismissed and plaintiff withdrew the Durban proceedings on 8th November 2012 and issued summons out of the High Court of eSwatini on 9th November 2012 and served defendant on 22nd November 2012.

[3] To the plaintiff's action defendant filed two special pleas summarised as follows-

First special plea. On a proper interpretation of the 1907 Proclamation importing section 16 of the Placaat of 5th October, 1540 regulating prescription merchandise '*ter slete gelevert'* plaintiff's claim for payment of the purchase price of the coal has prescribed and cannot found an action at law in the courts of the Kingdom of eSwatini;

Second special plea. On the basis that the proper law of the contract is South African law (the *lex loci contractus*) the South African Prescription Act 68 of 1969 applies and the debt has been extinguished in terms of section 11(d) of that Act it not having been claimed timeously. The 1969 Act forms part of the substantive law of South Africa.

[4] Accordingly, the first special plea contends that the payment claimed is not maintainable in the courts of eSwatini because the time or period within which it should have been legally claimed by court process as per section or article 16 of the Placaat has prescribed. Even though an Imperial Statute, article 16 is part of the Roman-Dutch common law received in this country at the beginning of the last century. Thus, the first special plea proceeds on the basis that the proper law of the contract is the law of eSwatini (the *lex fori*). The second special plea is predicated on the proper law of the contract being South African under whose Prescription Act, No. 68 of 1969, the debt is alleged to have been extinguished by lapse of time. In the result, so defendant submits, the summons having been served on 22nd November 2012, the payment claimed has been extinguished by prescription. Defendant also filed a plea over.

[5] Plaintiff replicated to both of defendant's special pleas by denying that the Placaat is part of the Roman Dutch common law applicable to eSwatini; denied defendant's so-called 'proper interpretation' of the words *'ter slete gelevert'* in section 16 of the Placaat or that *"the coal constituted goods sold by retail or in small quantities as contemplated by the words* 'ter slete gelevert". Plaintiff also denied that South African law applies to the agreement or that any of its claims has prescribed in terms of the South African Act of 1969. Plaintiff put defendant to proof of its averments and prayed for the dismissal, with costs, of both special pleas.

[6] The majority judgment of the High Court dismissed defendant's special pleas. In para [49] that Judgment reads:

"The defendant has urged this court to find that the contract is regulated by the lex fori *and the* lex causae. *Literature on this issue demonstrates that the gap created by the questions of choice of law renders the laws cumulative as opposed to alternative. The position of the law in this matter does not change. Even if one were to consider* lex causae, *it is clear that the debt has not prescribed under both the South African Prescription Act, No. 68 of 1969, and the Swaziland law as provided under section 16 of the 1540 Emperor Charles V placaat, considering that summons was first served upon the defendant on 14th October 2011"*. To note that this date refers to the Durban Proceedings.

[7] The defendant, "being dissatisfied with the whole of the judgment and order" of the majority court *a quo*, has appealed. The relief claimed by the parties is stated in para 5 of their *Statement* to be *"as set out in the defendant's first and second special pleas and the plaintiff's replication respectively"*. In their *Statement* the parties agreed that *"the issues arising from the defendant's special pleas would be adjudicated upon prior to and in advance of any other issues"*. The **issues for determination** in terms of the special pleas are set out in para 3 of the *Statement* as follows:

3.1 Whether the plaintiff's claim, or any portion thereof, does not found an action at law and is accordingly not maintainable in the courts of the Kingdom of Swaziland **(First Special Plea**). In particular –

3.1.1 Whether Swazi law incorporates the Roman Dutch Common Law as applicable to Swaziland since 22nd February 1907, including

section 16 of the Placaat of the Emperor Charles V dated 4 October 1540 [Volume 1 of the Groot Placaat Boek (The Big Statute Book)];

3.1.2 If so, whether the said section applies to the goods forming the subject-matter of the plaintiff's action;

3.2 Whether the proper law of the contract is South African law or Swazi law (**Second Special Plea**);

3.3 Whether, if it is held that the proper law of the contract is South African law, the plaintiff's claim for payment of the sums of E7.822,384.60 and E1,591,827.67 have been extinguished by prescription and fall to be dismissed (Second Special Plea);

3.4 Whether the defendant's contention (defendant's reply to plaintiff's enquiries at the Pre-Trial Conference) to the effect that the special pleas can be raised cumulatively, and not in the alternative, is sustainable as a matter of law.

Background

[8] **Rood's Trustees v Scott and de Villiers**[1] is a case involving sale in Johannesburg of land and interest in land situate in eSwatini by persons who were domiciled in the Transvaal. For failure to deliver the sold property free of encumbrances, the purchaser applied for rescission in the Transvaal High Court. Innes CJ made the following statement:

> *"It may be convenient to point out here that in 1888 native law and custom – the will of the chief, approved, where necessary, by his council - prevailed*

[1] 1910 TPD 47

> *throughout Swaziland. When, however, the Joint Commission was appointed by the Governments of Great Britain and the South African Republic, a proclamation was issued by Shepstone the 'Agent and Adviser of the Swazi nation', directing that the Roman –Dutch law, as administered in South Africa, should be applied by the Commission 'in reference to all matters in dispute between or relative to, whites or wherein whites are concerned".*[2]

[9] By the Convention of 1890 (Art 2 (a)) the high contracting parties (Great Britain and the South African Republic), whilst recognizing the independence of eSwatini, determined that 'the law to be administered by all courts of justice in Swaziland to be the Roman Dutch law in force in South Africa' subject to any legislative amendments accepted by the contracting parties. The Convention also continued 'the laws, ordinances, proclamations and regulations at present in force in Swaziland'. Innes CJ continues[3]: "*By the Convention of 1894 the right of legislating for Swaziland was given to the South African Republic and thereafter the local laws of Swaziland were (with a few unimportant exceptions) repealed and the existing and future laws of the South African Republic were declared to have effect in their stead….. These conditions remained unchanged till the conclusion of the war.* In 1898 the South African Republic secured an amendment to the 1894 Convention and obtained virtual control over the Swati state. So, it was that when Britain in terms of the articles of capitulation assumed the administration of eSwatini (from the S.A.R) in 1902, the common law of eSwatini was virtually the Roman Dutch common law as in force in the Transvaal. The new administration recognised and reconfirmed as might be necessary the administrative arrangements which were in place, including the laws applicable.

[2] Ibid at pp 53 - 54

[3] Ibid at p 54

[10] By Proclamation of 18th December 1889, Queen Regent, (Tibati), proclaimed that the then recently established Committee of Management, concerning the government of the white immigrants, was to exercise power and jurisdiction 'in accordance with the principles of the Roman Dutch Law as administrated in South Africa' (Art 3)[4]. And by Organic Proclamation of 13th September 1890 King Bhunu established a Government Committee of three officers representing the Swazi state, the South African Republic and Great Britain. A Chief Court for white matters was also established, and *"the laws to be administered by all courts of justice shall be established under this Proclamation to be the Roman Dutch Law as in force in South Africa …"* (Art 8)[5]. By Proclamation No 3 of 1904, the laws of the Transvaal as far as the same may be applicable were to apply in eSwatini.

[11] The crowning Proclamation was No 11 of 1905, which became effective on 22 February 1907 as Proclamation No 4 of that year. This Proclamation may also be said to have been the first constitution for the Swati state. Article 2 of that Proclamation provided as follows:

> *"2 – (1) The Roman – Dutch Common Law save in so far as the same has been* heretofore *or may from time to time hereafter be modified by statute shall be law in Swaziland and all statute law which is in force in Swaziland* immediately prior to the date *of the taking effect of this Proclamation shall save in so far as the same is hereby amended or altered or is inconsistent herewith or may hereafter be amended or altered shall be the Statute Law of Swaziland"* (My emphasis).

[4] **Privy Council Appeal (Sobhuza ll v A M Miller)** compiled by JSM Matsebula, p 142
[5] Ibid, p 145

Section 252 of the Constitution reads:

"(1) Subject to the provisions of this Constitution or any other written law, the principles and rules that formed, immediately before the 6th Day of September,1968 (Independence Day), the principles and rules of the Roman Dutch Common Law as applicable to Swaziland since 22nd February 1907 are confirmed and shall be applied and enforced as the common law of Swaziland except where and to the extent that those principles or rules are inconsistent with this Constitution or a statute".

[12] It will be noted that the current General Administration Act No. 11 of 1905, (see Laws of Swaziland, Cap 25) has the 'effective' date of '22 February 1905'. In my view the year '1905'is a misprint during revision of the Statutes of Swaziland: the correct year should be '1907'. There was a two - year transition allowed in 1905 when the Proclamation was first passed. Thus, from 1905 what had hitherto been the common law for immigrants was extended to the whole of eSwatini people. That was the Roman Dutch common law as administered or in force in the Transvaal Colony. That was before the Transvaal Colony became self-governing in 1906, as it prepared for Union in 1910. In the result, the Transvaal (South African Republic) cases relative to the Placaat of 4th October 1540, in particular article or section 16 thereof, are legitimate authorities for the Kingdom of eSwatini. It is to these cases (and authoritative writings) we must look up to for the relevant precedents for our general law of prescription today. It will be noted that the Transvaal passed its Prescription Act in 1908, which must be the date when article 16 of the Placaat ceased to be law in the Transvaal as had been the case in the Cape Colony since 1861. Thus, in our case the seed of the Roman Dutch common law had been planted as far back as the 1880s. Roman Dutch law is also

the common law of Lesotho (1884), Botswana and Zimbabwe (1891) and Namibia (1920).

[13] Even though the latest version of the 1907 Proclamation does not expressly refer to the 'common law as in force or administered in the South African Republic or the Transvaal' the adverb '*heretofore*' clearly takes us back to the law as it was in the Transvaal Republic or Colony before 1905. For, the reference to 'Roman Dutch Common Law' is not complete unless it is indicated where this Roman Dutch Common Law would come from or be found, since in particular because this legal system had long been obsolete or repealed (1809) in the country of its origin in Holland. In Southern Africa the Roman Dutch law was not necessarily identical in the four Colonies in about 1900. The same is largely true of statute law. So, the British administration of justice in eSwatini in 1903 did not begin on a clean slate, as it were. And that is how section 252(1) of the Constitution, 2005, is to be understood with respect to the Roman-Dutch common law of eSwatini and its genesis.

[14] According to Hallo and Kahn[6] "as its name so clearly indicates, Roman-Dutch law was the off-spring of the union between the law of Holland and Roman Law". The expression 'Roman-Dutch law' is attributed to Simon van Leeuwen's writing in 1652. It is then said that the infiltration and reception of Roman law in Germany and its dependencies, of which Holland was one, reached its climax and consummation during the fifteenth and sixteenth centuries. The result of this merger was the transformation of '*deutsches*' into '*romisch-deutsches*' law. Holland then became the cradle of Roman-Dutch law. *"The Roman Dutch law flourished in Holland until the year 1809, when it was abolished by Napoleon and*

[6] **The South African legal system**, 1968, p 514

since that date it has, in the land of its birth, had no legal force, but has been of historic interest only", says Gibson[7]. On 7th April, 1652, the day and year of the landing of Jan Van Riebeeck at the Cape of Good Hope, Roman-Dutch law was planted in South Africa with its seed in the Cape. One of the main sources of Roman-Dutch law was legislation compiled in the Groot Placaat-Boek by eminent Dutch jurists such as, among others, Simon van Leeuwen and Johannes van der Linden. From the Cape, as personal law of the voortrekkers, Roman-Dutch law was adopted in the Transvaal in 1844, in Natal in 1845 and the Orange Free State in 1854. Thus, from about 1860 Roman-Dutch law was the common law of South Africa, say Hahlo and Kahn. Of this legal system, Hahlo and Kahn have written:

> *"Roman Dutch law is one of the world's great legal systems. It represents in the form of a common-law system the civilian tradition at its best. Of its great qualities universality is not the least. As Sir Johannes Wessels said[8] Roman Dutch law 'sweeps into its system all the legal learning accumulated by the great Italian, French, and German jurists' and 'can draw for the solutions of legal problems upon the vast learning and experience of all the great European jurists who expounded the Civil Law in its practical application to the affairs of men".*[9]

The Roman Dutch common law proclaimed in 1907

[15] Relevantly to the issue before Court: What was this Roman Dutch Common Law that eSwatini received in 1907? In the following cases, being decisions of the Supreme Court of the South African Republic or the Transvaal Colony, section 16 of the Placaat of Charles V of 4th October, 1540, was adjudged to be part of that

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[7] **Wille's Principles of South African Law,** 6th ed, p 29
[8] **The Future of Roman Dutch Law in South Africa** (1920) 37 S.A.L.J. 265 at 267-8
[9] Op cit. at 595

Roman Dutch Law, namely **Spiller v Mostert** [10], **Loteryman & Co v Cowie** [11], **Peycke & Co v Estate Bauman** [12]**.** The list is not exhaustive. In the last mentioned case, Innes CJ observed: *"It has been several times decided by the late High Court and more than once decided by this Court that the Placaat of Charles V is in force in this country;…"*. In **Little v Rothman** [13], Kotze CJ wrote: *"In **Van Diggelen v Wepener** (1 Off Rep, p31), this Court decided that this prescription of two years, introduced by the placaat, is still in force… We were, however, of the opinion that the two years' prescription had been recognised as being in force in South Africa by the Supreme Court in the Cape Colony and by the High Court in Bloemfontein …*"

[16] In **Loteryman & Co v Cowie,** Wessels J had concluded: *"Therefore, in the circumstances I am of opinion that the Placaat is still in force in this country…"*, to which Mason J concurred. The first headnote to **Loteryman & Co** reads:

> *"The Placaat of 4th October, 1540, is in force in the Transvaal, and under sec 16 thereof a debt for the purchase-price of merchandise* ter slete geleverd *is prescribed in two years"*.

Section 16 of the Placaat of 1540 is then cited in **Little v Rothman** at p 199:

> *"That all fees of advocates, attorneys, secretaries, doctors, surgeons, apothecaries, clerks or notaries, or other workers, wages of male or female servants, as well as the price of merchandise* 'ter slete gelevert', *and payments of sums borrowed, must be claimed by legal process within two years of the date of service, or work done, of the delivery of the goods, or of*

[10] 1904 TS 634 904
[11] 1904 TS 599
[12] 1905TS 70
[13] 1895 (2 Off Rep) 197, 199

the borrowing of the sums of money, before the said period has expired, in order to be able to found an action at law thereon, unless there be a bond or written acknowledgment of debt, in which case such debts can be enforced against the principal debtor up to ten years." (1 Gr. Plac. Bk. p 311).

[17] The headnote in the case of **Little v Rothman** reads: *"The prescription of two years in the placaat of Emperor Charles V, 4th October 1540, section 16, which is in use in this country, only refers to the purchase amount of goods which are sold in small quantities and for consumption, or, as it is put in the placaat,* 'Koopmanschap ter slete gelevert'". Shortened, and for our purpose in this case, section 16 of the Placaat provides that '*The price of merchandise* ter slete gelevert*…must be claimed by legal process within two years of the date….of the delivery of the goods….before the said period has expired, in order to be able to found an action at law thereon'.* The nature of the goods liable to possible prescription under the section is as expressed by the phrase *'koopmanschap ter slete gelevert'*, 'applied to goods sold not only in small quantities, but sold for consumption, or to be used up'. The heading of the case itself reads: "PLACAAT OF CHARLES V, SECTION 16 – PRESCRIPTION – *THE MEANING OF 'KOOPMANSCHAP TER SLETE GELEVERT'"*

[18] Innes CJ, in **Peycke & Co,** referring to Kotze CJ in **Little v Rothman's** case, in stated: *"I take it, reading this judgment, that what he meant to lay down was this ...that regard should be had to two considerations were the goods of such a nature that they were sold to be used up or consumed, and were they sold by retail or in small quantities"* (at p72). The learned Chief Justice further referred to **Loteryman v Cowie** where it is stated: *"If the sale consists of goederen ter slete*

gelevert, that is to say, of goods sold in small quantities and of such a nature that they are consumed or become deteriorated by use, then such sale falls within the section of the Placaat". The learned Chief Justice then also referred to **Spiller v Mostert** where it is stated: *"If the goods were bought for consumption and if they were bought in the quantities we have before us here, we think the statute ought to apply, and that such a sale falls within the statute".* In the latter case, as Innes CJ notes, the 'court did not neglect either of the two considerations: was the sale a retail one; and was it a sale of goods which would be use up or consumed'.

[19] In **Speycke & Co,** Innes CJ further explained the essential meaning of the troublesome expression *'koopmanschap ter slete gelevert'* as follows:

> *"Clearly the expression does not merely mean goods purchased to be consumed in the sense of being eaten; it includes goods which perish by use, which are used up. A pair of shoes would be used up by wear, and the material of which the shoes were made would also be used up; and they would be consumed in that sense.* What is meant then by goods sold in small quantities? *That is a matter to be decided on the facts of each particular case. There is no statutory definition of it. All we can say is that it is one of the points to be considered in applying this placaat whether the goods have been sold in small quantities, that is, have been disposed of by retail. The public generally know what a retail sale is, and that appears to be the best working definition which we can lay down…(and) the most definite rule we can adopt is that for a transaction to be prescribed* the goods sold must have been of a nature to be used up or consumed by use, *and* the sale must have been a retail one. *More definite than that, we cannot be; ,..*" (pp 73 -74).

[20] Of section 16 of the Placaat, Wessels J says in **Spiller v Mostert**, p 636; "*The principle which actuated the legislature in passing the statute of 1540 was that it is very difficult, when the thing itself is recovered and goes out of being, to prove years afterwards exactly what amount was delivered and what it was that was delivered. The corpus is gone, and the action should be brought whilst the memory is still green, and therefore the statute provided that after the lapse of two years the claimant could no longer enforce his claim*". Nicholas concurs [14]: *"Prescription is an inroad on the inviolability of ownership – the principle that a man should not lose ownership without his consent – and is justified by the public interest… that rights* in rem *shall be readily ascertainable".* And Schulze *et al* write: *"The underlying idea of prescription is to bring about legal certainty. It would not be beneficial to the operation of the law if a state of affairs that has continued for a long period of time were later to prove legally unjustified. The legal position has to be adapted to correspond with the factual situation".*[15]

[21] The dissenting opinion raises among other issues the meaning of the words *'koomanschap ter slete gelevart'* appearing in article 16 of the Placaat and consequently the adequacy of the stated facts for the determination of the issue before court. The learned Judge considers that "the whole section was (thus) required". Before this Court the whole article 16 of the Placaat has been tendered in Dutch and English. With respect, it does not appear to me that the rest or other parts of the article make much, if any, difference to the four words stated herein. The whole article is reproduced in paragraph 16 above. On the basis of the earlier decisions in which article 16 is considered there seems to be sufficient explanation

[14] **Roman Law** (1962) at p 129
[15] **General Principles of Commercial Law**, 8th ed (2015), p148.

as to what the four words mean. But for the language employed the expression is part of our law and therefore should not ordinarily require an expert for its interpretation. I agree though that not everything in the Stated Facts should be taken as 'gospel' truth by the court.

[22] We can now safely say that prescription in our kingdom is regulated by the Roman Dutch common law incorporating article 16 of the Placaat of 1540. It has been said that in the Roman-Dutch common law prescription is a matter of procedural and not substantive law; that it must be raised specially by the party relying on it, and cannot be taken *mero motu* by the court; and that, if successful, its effect is merely to bar the plaintiff's remedy, not to extinguish the plaintiff's cause of action against which it is pleaded. See **Reuben v Meyers** 1957 (4) SA 57 (SR) 58B-C, **Montagu Wine Co. Ltd v Robie** 1915 TPD 483. RW Lee [16] also writes: "*The **praescriptio** was so-called, Gaius tells us, because it was inserted before the formula, and therefore, properly speaking, was not part of it. The purpose of the **praescriptio** was to limit the scope of the action, so that future claims arising out of the same transaction might not be consumed by **litis contestatio***". Along the same vein, Bryan O'Donovan also writes:[17] "*There was also in Roman Law a prescription or limitation of action, whereby a person entitled to an action lost his remedy by his failure to prosecute it within a specified time. The distinction between it and usucapio was that the latter caused the actual dominium in the thing possessed to vest in the possessor, but the former merely deprived the owner of his remedy and entitled the possessor to defend any action at his instance by means of an exceptio… In due course… by the time of Voet and Van Leeuwen usucapio was obsolete. Prescription alone was recognised but with*

[16] **Elements of Roman Law** (1956) para 740, p449

[17] **Mackeurtan's Sale of Goods in South Africa** 4th ed (1972) p174

the rider that where the right to property was in issue prescription not only barred the remedy of the true owner, but actually entitled the possessor to assert his right to be declared the owner in virtue of his possession, and that where the ownership of property was not in issue, its effect was simply to bar the plaintiff's remedy". Thus, the roots of our Roman-Dutch law of prescription are clearly traceable in Roman law.

Does the Placaat apply *in casu?*

[23] Following the promulgation of the Transvaal Prescription Act 26 of 1908, Blackwell commented on the legislative changes to the common law of the Transvaal: [18]

> "The latter of these bills (Act 26 of 1908) is due in a large measure to the statement made by the Transvaal Chief Justice in the case of *Peycke & Co v Est. Bauman* (1905 TS 70), emphasizing the remark of Mr. Justice Curlewis in a former case, that the common law on the subject of prescription was in a very confused state, and needed early legislative reform. There has been a considerable amount of litigation in the Transvaal of recent years on the subject of prescription, the greater portion of which has been concerned with the 16th article of the Placaat of Charles V of 1540. The Cape escaped all this by Act 6 of 1861, sec 4 of which repealed the article in question…. In the Transvaal it was decided by the pre-war case *Little v Rothman* (2 Off Rep 197) that the Placaat was still in force and since then there has been endless trouble over its interpretation. The words '*ter slete gelevert*' occurring in it had been variously interpreted by different judges, until the Supreme Court in case of *Peycke & Co v Estate Bauman* (1905 TS 70) set

[18] **'*Some Recent Legislative Changes in our Common Law*'** South African Law Journal (1908), p 435-6

> the matter at rest by deciding that for a commercial transaction to be governed by the Placaat, two conditions must be fulfilled – (1) the goods, whether in large quantities or small, must be sold by retail; and (2) they must be of such a nature as to be used up or consumed by use".

[24] We have seen that our law of prescription developed from Roman and Roman-Dutch law. We have also seen that under the Roman law *praescriptio* was introduced to limit the scope of the action resulting in a person entitled to an action but losing his remedy for failure to prosecute the action within a prescribed period. Thus, the Roman-Dutch law of prescription only bars the remedy without affecting the cause of action. We have seen further that the price of merchandise '*ter slete gelevert*' must be claimed by legal process within a period of two years from the date of delivery of the goods. The question is whether article 16 of the Placaat "applies to the goods forming the subject-matter of the plaintiff's claim". The answer to this question is a response to paragraph 3.1.2 of the Statement under the First Special Plea. The relevant portion of article or section 16 reads as follows: "*…. The price of merchandise* ***ter slete gelevert****… must be claimed by legal process within two years of the date …. of the delivery of the goods …. in order to be able to found an action at law thereon*". What might be of concern are the four Dutch words of the article; but, happily, sufficient explanation is available in the precedents referred to above. Like most general principles, the words of the article must be tested against the specific facts of the dispute before Court.

[25] In simple terms, the question is whether the section applies to the goods (the coal) bought and delivered in terms of the (oral) agreement between the parties in these proceedings. To a similar question, Kotze CJ in **Little v Rothman**, at p.200,

answered the question thus: *"This depends upon the meaning of the words '**koopmanschap ter slete gelevert**' which appear in the placaat"*. And, according to Voet, the Dutch expression translates to '*goods sold by retail, or in small quantities'*, or '*mercium minutim distractarum'* in Latin. Kotze CJ further states: *"The noun '**sleet**' is derived from '**slyten**', which means 'to consume', as well as 'to sell in small quantities'. **Koopmanschap ter slete gelevert** means goods sold not only by retail but sold in small quantities for consumption or to be used up. **Sleet** is equivalent to consumption, and **ter slete gelevert** is nothing else than bought for consumption"*[19].

[26] The headnote in **Spiller v Mostert** in part states that the article of the Placaat *"applies to the price of goods bought and sold for consumption, and it is immaterial whether the goods are bought in large or small quantities"*. In that case, the learned Mr. Justice Wessels goes on to say: *"The only test we can apply to a case of this kind is whether the goods were bought for the purposes of consumption and sold for the purposes of consumption. It they were bought for the purposes of consumption, **then whether five bags were bought, or whether a bale of chaff was bought, would make no difference**"*. (p 636). [My emphasis]. And, in **Loteryman and Co** Wessels J further elaborates on the Dutch expression of section 16 as follows: *"It appears to me it does not matter whether it is a wholesale dealer or whether it is a private individual who sells. If the sale consists of **goederen ter slete geleverd**, that is to say, of goods sold in small quantities, and of such a nature that they are consumed or become deteriorated by use then such a sale falls within the section of the Placaat"* (p. 601).

[19] **Little v Rothman**, op cit, p 201

[27] In **Peycke & Co,** the headnote reads: *"In deciding whether a claim for goods sold and delivered is prescribed under the Placaat of Charles V, the Court will inquire whether the articles were of a nature to be used up or consumed by use, and whether the sale was a retail one"*. Again, the Dutch expression in the section came up for interrogation. After reviewing the earlier judgments on the placaat, in particular Kotze CJ in **Little v Rothman,** Innes CJ, in **Peycke & Co,** summarized the last-mentioned case to have laid down that "… *regard should be had to two considerations: were the goods of such a nature that they were sold to be used up or consumed, and were they sold by retail or in small quantities"*. (p72). The learned Chief Justice had concluded by remarking that "… *if the matter is to be put upon an entirely satisfactory footing it must be done by legislation"*. The learned Chief Justice then associated himself with the remarks of Curlewis J in **Spiller v Mostert** (p 636) that 'the matter is one which cries for legislation'. In the real world of today, it is also clear that 'small quantities' is a relative expression, depending on the facts of individual cases. Ultimately, the actual amount or quantity of goods involved is not critical to the rule: what seems critical is that the goods must be bought or sold for the correct purpose and actually consumed by use or deteriorated in the course of the use - taking note that consumption is not necessarily eating in the literal sense.

[28] The goods sold and delivered in the present case consist of coal 'for the purpose of consumption and in particular for the purpose of heating [defendant's] boilers', delivered to defendant's place of business 'during the period August 2007 to March 2010'. In light of the above authorities and considering the purpose for which the coal was needed, I have no doubt in my mind that the goods sold and bought fit the understanding of the section of the Placaat: the goods sold were of

the nature to be used up or consumed by use in the boilers of defendant, and the sale was a retail in that it was not wholesale. Accordingly, section 16 of the Placaat would apply if the transaction were to be subject to the law of eSwatini in terms of the first special plea. As to the amount or quantity of coal involved, it all depends on the number and size and rate of consumption of the boilers. This renders the quantity to be relative and uncritical to the applicability of the section to the subject-matter of the contract. As the authorities ordain: it is immaterial whether the goods are bought in large or small quantities so long as they are bought to be consumed by use or used up. To say whether the Placaat applies or not we must fully understand the meaning and application of the section as the Roman-Dutch jurists and our predecessors in southern Africa understood and applied it.

The proper law of the contract

[29] Where there is alleged that there is a possibility that another legal system other than the law of the forum (*lex fori*) applies to resolve the dispute or part of the dispute before court, the question of the choice of law – the proper law of the contract is pushed to the fore-front. The process for determining the proper law involves classification or characterization of the relevant legal issues raised by the dispute. North writes:[20]

> *"The problem of ascertaining the lex causae is more perplexing in the case of contracts than in almost any other topic. In most situations the decisive connecting factor upon which the ascertainment depends is reasonably clear…. But in the case of a contract there may be a multiplicity of connection factors: the place where it is made; the place of performance,*

[20] **Cheshire's Private International Law,** 9th ed , pp202 - 203

> *the domicile, nationality or business centre of the parties; the situation of the subject matter; the nationality of the ship in the case of a charter-party and so on….*
>
> *"In the world of today several different solutions have been reached… Most of the countries of the European continent eschew anything in the way of a rigid test and, instead, adopt the doctrine of autonomy under which the parties are free to choose the governing law, though divergent views obtain on the question whether their freedom is absolute or is restricted to the choice of a law with which the contract is factually connected".*

[30] Forsyth writes[21] : *"Once it is determined that the dispute in question falls within the ambit of a choice of law rule, it is then a matter of determining which legal system is indicated by the connecting factor.…Once it has been determined which legal system is the lex causae, the content of the relevant rules must be proved by expert evidence to the court, before the lex causae can be applied to solve the dispute. …it will be clear that the predominant method used in our law for determining which law should be applied to resolve a dispute with foreign elements is the method of the multilateral conflict rule. Such a rule consists … of a category and a connecting factor; the category indicating the type of case to which the rule applies, and the connecting factor being some fact common to such cases, including the legal system which ought to be applied".* It is also said that the choice of law rule is designed to select the appropriate legal system to resolve the dispute and that where the selection of the lex causae selects two conflicting leges causae, the process has failed. This is the problem known as 'cumulation'. There is the related problem of 'gap', where no rule from either the lex fori or the lex

[21] **Private International Law** , 2nd ed, pp 9, 58 – 59, 65

causae is applicable because the lex fori's rule classifies itself as relating to a category that is not linked to a connecting factor pointing to the lex fori, and the relevant rule from the lex causae classifies itself as relating to a category that is not linked to a connecting factor pointing to the lex causae.

[31] Grosskopf J in **Improvair** writes:[22]

"By the proper law of a contract is meant the system of law which governs the interpretation, validity and mode of performance. It is often said that the proper law is ascertained in terms of what the parties agreed or intended or are presumed to have intended…. Where the parties expressly agree that their contract is to be governed by a particular legal system, there is usually no difficulty in finding that the agreed system constitutes the proper law of the contract. Difficulties arise, however, where there is no express agreement…The true problem arises where no express or tacit agreement was concluded. The traditional solution to the problem is to impute an intention to the parties".

[32] In **Hamlyn & Co**[23] Lord Herschell LC is reported as follows:

"Where a contract is entered into between parties residing in different places, where different systems of law prevail, it is a question, as it appears to me, in each case, with reference to what law the parties contracted, and according to what law it was their intention that their rights either under the whole or any part of the contract should be determined. In considering what law is to govern, no doubt the ***lex loci solutionis*** *is a matter of great*

[22] **Improvair (Cape) Ltd v Establishments NEU** 1983 (2) SA 138 © at 145
[23] **Hamlyn & Co v Talisker Distillery & Ors** (1894 AC 202) at p

> *importance. The* ***lex loci contractus*** *is also of importance. In the present the place of the contract was different from the place of performance. It is not necessary to enter upon the inquiring ….to which of these considerations the greatest weight is to be attributed, namely, the place where the contract was made, or the place where it is to be performed. In my view they are both matters which must be taken into consideration, but either of them is, of itself, conclusive, and still less is it conclusive, as it appears to me, as to the particular law which was intended to govern particular parts of the contract between the parties. In this case, as in all such cases, the whole of the contract must be looked at and the rights under it must be regulated by the intention of the parties as appearing from contract".*

[33] And Story lays it down as a general rule that *"in the interpretation of contracts, the law and custom of the place of the contract are to govern in all cases where the language is not directly expressive of the actual intention of the parties, but it is to be tacitly inferred from the nature, and objects, and occasion of the contract".* The learned author further states that where, expressly or tacitly, the contract is to be performed at a place other than the place where it was made, then *"the general rule, in conformity to the presumed intention of the parties, that the contract as to its validity, nature, obligation and interpretation, is to be governed by the law of the place of performance."*[24] Fry LJ poses this question:[25] *"Looking at the subject matter of this contract, the place where it was made, the contracting parties, and the things to be done, what ought to be presumed to have been the intention of the contracting parties with regard to the law which was to govern this*

[24] **Conflict of Laws**, pars 272 and 280

[25] **In re Missouri Steamship Company,** 42 Ch. D (CA) 321, 340-341

contract? By that I mean to determine its validity and its interpretation." No doubt the list of connecting factors is not exhaustive.

[34] De Villiers JA contributes to the determination of the proper law of a contract where same is not expressly stated as follows: "*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 (Spurrier v La Cloche, 1902 AC 446). 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."* Thus, the question of which law applies to govern a contract is not as easy as it may appear at first flash where there is a foreign element. A variety of factors of differing weight and importance compete for priority consideration. What is stated as the general rule is nevertheless hedged with qualifications and exceptions to the extent that even the intention of the parties is not always conclusive of the issue.

[35] In the **Laconian** case **(***op cit.*) (p525I) the learned Judge observed: *"Where the parties have not expressly or impliedly selected the proper law of the contract the Court has to determine it. Our Courts have in common with the Courts in*

England approached the determination of this question in two ways. The one is that the proper law of a contract is chosen on the basis of what might be called the 'intention theory' and the other that it is chosen on the basis of the 'most real connection' theory. In terms of the 'intention theory' the intention of the parties is regarded as the true criterion. In order to find an answer where no proper law was either expressly or impliedly agreed the theory is as it were extended by imputing an intention to the parties … In terms of the 'most real connection' theory the proper law of the contract is 'the system of law with which the transaction has its closest and most real connection". In the two theories, we are faced with a case of subjective versus objective test. And, Booysen J further points out that the modern tendency is to adopt an objective approach to the determination of the proper law of a contract where the parties did not themselves effect a choice. see also **Improvair**, *(0p cit.*) pp146H – 147A). Whilst acknowledging being bound by South African law, Booysen J clearly favours the objective approach to the subjective approach of determining the proper law of contract (p526I). Reference is also made to the English Court of Appeal case[26] where Lord Denning MR and Widgery LJ respectively expressed the test of the proper law as *"what is the system of law with which the transaction has the closest and most real connection"* and "*the proper law of the contract is the law which the parties intend should govern its operation"*.

[36] In the absence of the express or implied agreement as to the proper law, it is now clear that the traditional solution of imputing the relevant intention to the parties and the so-called 'true criterion' fall short of the generally accepted test for the proper law of a contract. There has now been a movement away from the

[26] **Whitworth Street Estates (Manchester) Ltd v James Miller and Partners Ltd** [1969] 1 WLR 377 (CA) 380, 383.

traditional, intention-based approach towards a fact or circumstance – based test of the proper law. The latter approach tends towards the objective and realistic, in terms of the ‘closest and most real connection’. The traditional, intention-based, approach was itself largely based on English law authorities which had been abandoned since 1951 in *Bonython v Commonwealth of Australia* 1951 AC 201 at 219, a Privy Council decision delivered by Lord Simmonds in these terms: “… *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 which the transaction has its closest and most real connection.*” Grosskopf J, after citing some South African cases reflecting a shift away from the traditional approach, continued as follows: *“ … the modern tendency is to adopt an objective approach to the determination of the proper law of a 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’(…) would in most cases be the one which the courts would presume to have been intended by the parties.”*[27] The trend is thus towards the system of law that weighs more on the transaction, accepting that there may well be a multiplicity of factors, including the nature and purpose of the contract, competing for recognition in the search for the proper law of the contract. That is the approach and test which I believe this Court should also follow.

[37] *In casu*, it is common cause that the parties did not expressly agree as to which legal system would constitute the proper law of the contract. That being the case, plaintiff submits that *“the Court needs to assess the legal system with which*

[27] **Improvair (Cape) (Pty) Ltd v Establishments NEU** (op cit). at 146-147

the contract has the closest and most real connection". The ***lex loci contractus*** and ***lex loci solutionis*** were also touted as likely to point at the ***lex causae.*** The place where the contract was entered into provides but one connecting factor as does the place of performance; but none is necessarily conclusive. In an effort to persuade the Court to accept South African law as the proper law of the contract, the plaintiff points at the coal, the subject-matter of the agreement, being sourced from South Africa where the agreement itself was entered into and payment made in South African currency. There could be no agreement without the coal. In para 22 of its heads of argument the plaintiff further submits that the law which creates and governs the contract is usually termed the 'proper law of the contract' and may either be the law chosen by the parties or the law with which the contract is most closely connected.

[38] Further, having taken into account various principles by learned writers and other relevant considerations, plaintiff submits that the law of eSwatini 'plainly has the closest and most real connection with the agreement', pointing at the place of performance (*locus solutionis*) being the place where the goods (coal) were to be delivered, at the defendant's principal place of business in eSwatini; the purpose for the acquisition of the coal being consumption by heating the boilers of the defendant; the source of funding being in eSwatini; and that in light of the nature of the contract, the delivery of the coal in eSwatini was the prerequisite for payment; the defendant's objection to the Durban proceedings in favour of proceedings in eSwatini was', so plaintiff argues, 'indicative of an election to choose eSwatini law in preference to South African law; and the defendant is a company duly registered according to the laws of the Kingdom of eSwatini where defendant's principal place of business is also located' – all being connecting

factors which 'carry substantial weight in deciding the law of the contract as the law of eSwatini'.

[39] Seemingly defendant's stance is non-committal, if not somehow confusing, as to the proper law of the contract. This position is inferred from the special pleas. Whilst acknowledging the need to determine the proper law, defendant submits that if the proper law be the law of eSwatini "*then it is not necessary to consider the possible application of the South African Act*" (Act No 68 of 1969). But if the proper law is South African law, "*it is necessary to reconsider whether the South African Prescription Act or the Placaat should be applied*". The defendant nevertheless expresses the view that "the proper law of the contract is South African law" (Second Special Plea), in which case the Prescription Act of 1969 should apply on the issue of prescription. As we have seen above, the proper law of a contract is said to be the law which governs the interpretation, validity and mode of performance of the contract. In the search for the intention or possible intention of the parties, one has to consider whether the parties, sitting as they did at the Wimpy restaurant in Emalahleni, South Africa on that propitious day, could possibly have had the law of eSwatini on their mind as the law to govern the contract. I do not think so. In the pursuit of the objective approach to the determination of the proper law, Grosskopf J, in **Improvair,** states: "*The legal system 'with which the transaction has the closest and most real connection' (…) would in most cases be the one which the Courts would presume to have been intended by the parties.*" (at p 147). In that case, looking at the totality of the surrounding environment and circumstances, I am of the opinion that the parties would have had South African law in mind as the law to govern the contract. As de

Villiers JA says [28]: *" … where the 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".*

Characterisation

[40] In the **Laconian**,[29] Booysen J writes:

> *"In argument before me, counsel did not refer to the concept or principles of characterization or classification. It seems to be generally recognised, though, that the first step a Court should take in an attempt to resolve disputes to which private international law applies is that of classification, characterization or qualification"*, (p 517E). The learned Judge went on to state that: *"It must be rules of law that are characterized. It must be stressed that characterization 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 a 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"* (pp 519I – 520A). And Forsyth *(Private International Law,* 58) is reported as observing: " … ***when a characterization dispute arises it is clear that one litigant asserts there exists a rule (or rules) of some legal system which allows him to win and***

[28] **Standard Bank of South Africa Ltd v Efroiken and Newman** 1924 AD 171, 185
[29] **Laconian Maritime Enterprises Ltd v Agromar Lineas Ltd** 1986 (3) SA 509 (D & CLD)

which ought to be applied; while the other litigant disputes exactly that … Thus the object characterised is a rule of law.” Thus conflict of laws presupposes at least two potentially applicable systems of law which on application may or may not yield the same result. The choice of which system will apply is not mechanical; it has to follow certain generally acceptable international rules and procedures predicated on a policy to do justice to both litigants regardless of the forum.

[41] North[30] writes:

“What is meant by the ‘classification of the cause of action’ is the allocation of the question raised by the factual situation before the court to its correct legal category, and its object is to reveal the relevant rule for the choice of law. The rules of any system of law are arranged under different categories, some being concerned with status, others with succession, procedure, contract, tort, and so on, and until a judge seized of a foreign element case, has determined the particular category into which the question before him falls, he can make no progress, for he will not know what rule for the choice of law to apply. He must ascertain the true basis of the plaintiff’s claim. He must decide, for instance, whether the question relates to the administration of assets or to succession, for in the case of movables left by a deceased person, the former is governed by the lex fori, *the latter by the* lex domicillii*”*

Via media** and **‘gap’

[30] **Cheshire’s Private International Law,** 9th ed, pp 42-43

[42] The plaintiff has also argued as follows*: "It is respectfully submitted that the principles of via media and the like only become relevant and require consideration, once it is found that the proper law of the contract is South African"*. That, indeed, is what we have found and done. In para 15.5 of its heads of argument, the respondent states: *"The court [a quo] erred in applying the via media approach and should have considered both South African law as well as the law of eSwatini* …" It is pertinent therefore to say something in this judgment about 'gap' and via media and, may be, also 'cumulation'. All of this involves characterization.

[43] In **Coutts & Co,**[31] the defendants owed money to the plaintiff, a bank in the United Kingdom. Defendants pleaded that the claim had prescribed under the prescription law of Zimbabwe, even though it was still 'green' under English law. By section 14 of the Zimbabwe Prescription Act, prescription is substantive as it extinguishes the debt and not merely bar the remedy. Under the English law of 1980, by section 24 limitation is a matter of procedure, barring remedy only. The Zimbabwe High Court held: The traditional approach in private international law is that the lex fori characterizes according to its own law without looking at the *lex causae*. Given the problem created the better approach to untangle the issue is to apply a *via media* approach which allows the court to exercise judicial discretion in relation to the choice of law, taking into account the consequences of deciding the case one way or the other, such as international comity and a balance of justice and convenience.

[31] **Coutts & Co v Ford & Another** 1997 (1) ZLR 440(H)

[44] The problem that arose in **Coutts & Co** was that by the *lex fori* (Zimbabwean law), the matter was referred to the English law, the *lex causae*, which however treated the matter as one of procedure and could not therefore deal with it, except to refer it back to Zimbabwe, the *lex fori.* Thus a 'gap or l*acuna* showed up, hence the resort to the *via media* approach. Nevertheless, even though English law (the *lex causae*) considered the issue to be one of procedure the Zimbabwe Court determined that English law must deal with the matter. Accordingly, the special plea was dismissed since under English law the debt had not prescribed. Apparently, Chidyausiku J aligned himself with Schutz J in **Laurens NO** (op cit.).

[45] An example of the problem giving rise to the employment of the *via media* approach is better described in the following paragraphs of **Society of Lloyd's** judgment:

> *"[21] It follows that I am in agreement with the conclusion of the court below that the prescription question in the present case has to be approached on the basis that prescription is, in terms of the lex fori, a matter of substance, and in terms of the lex causae, a matter of procedure …*
>
> *"[22] In view of the above, we are now faced with the problem of the 'gap' in the choice of law rules; under South African law (the lex fori), prescription is a matter of substance, not procedure, and therefore the South African law relating to prescription does not apply; under English law (the lex causae), the s. 24 limitation provision is procedural in nature and so the lex causae also does not apply… This was precisely the problem which arose in **Laconian Maritime Ltd**. In that case Booysen J described the*

problem of the 'gap' as follows:[32] ***'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'."***

[46] Following the learned Justice van Heerden in **Society of Lloyd's** case, the first stage in the *via media* approach is to determine according to the law of eSwatini, the *lex fori,* whether prescription in terms of the Placaat is procedural or substantive. In terms of the Placaat, as we have seen, prescription only bars the remedy without extinguishing the right. This means that prescription is characterized or classified by eSwatini law as procedural, rendering the right of action unenforceable without extinguishing it. The second stage requires a determination of whether, according to the principles of South African law (the *lex causae*), prescription law is procedural or substantive. Section 16 of the Placaat does not have the effect of extinguishing the right in question, but merely imposes a procedural bar on bringing an action to enforce it. Prescription in terms of this section is thus, according to the 'traditional' characterization/classification 'a procedural matter, and not one of substance: the right continues to exist even though it cannot be enforced by action'. When the third stage of the *via media* is invoked, the Court must take into account policy considerations in determining which legal system has the closest and most real connection with the legal dispute before it. But this last stage is resorted to where there is the gap dilemma. And this gap will be present where neither of the potentially applicable systems of law applies to resolve the issue before Court. In our case the South African law applies.

[32] 1986 (3) SA 509 at 524 B-F

[47] The trial court in para [38] concluded that there was a gap that had to be closed in the characterization process. That gap was said to be "demonstrated at paras 32 and 33" of the judgment. It is however not clear to me how the gap is thereby demonstrated. In para 33 of the judgment the learned trial Judge refers to competing rights and dichotomy in the construction of the proper law applicable. In para 32 there is reference to prescription under the Placaat being matter of procedure while under the South African Act of 1969 it is a matter of substance. In the result, the former only stops the action while the latter extinguishes the debt. A gap is not indicated.

[48] The problem of 'gap' arises where characterization fails to yield a working solution. This will happen when the rules of the legal system indicated by the lex fori fail to respond as expected, that is, *"where no rule from either the lex fori or the lex causae is applicable because the lex fori's rule classifies itself as relating to a category that is not linked to a connecting factor pointing to the lex fori, and the relevant rule from the lex causae classifies itself as relating to a category that is not linked to a connecting factor pointing to the lex causae"*, says Forsyth, (2nd ed, at page 65). Where that happens, that is, where none of the preferred legal rules applies, a 'gap' would result. To resolve this impasse, in the form of the 'gap', the *via media* approach is then recommended. In other words, 'gap' occurs when neither *lex fori* nor the *lex sausae* applies. Where this happens the *lex fori* may apply its prescription rules only because it is the court where the action has been initiated. Forsyth then makes the following example flowing from **Laconian**. In that case enforcement of an arbitral award made in London arose and because English law of prescription (limitation) is procedural South African law, the lex fori, classifying prescription as substantive pointed to English law, the lex causae,

to apply. In the result neither English nor South African law applied. Forsyth concludes: *"As I have argued elsewhere an informed choice of one of the alternative leges causae is preferable to a mechanical recourse to the lex fori*", as Booysen J. did in **Laconian.** "But the 'gap' is a difficult problem and some recourse to ad hoc rules is inevitable", Forsyth concludes.

[49] The *via media* approach is thus introduced in the course of classification to temper with the mechanical recourse to the *lex fori* in the event none of the indicated legal rules applies. The *via media* theory as propounded by Falconbridge is a two-stage theory. It begins with the *"classification of all potentially applicable rules according to the system from which they come, i.e. he classifies first by the leges causae. In this process some of the hitherto potentially applicable rules may, … exclude themselves. … Having classified the various potentially applicable rules by their leges causae, and, having discarded those which 'exclude themselves' the lex fori aspect of Falconbridge's via media comes into play".* This then leads to a second-tier classification of the potentially applicable rule in the process of which the conflicts rule is to be "construed *sub specie orbis*, that is, from a cosmopolitan or world-wide point of view …" In the result the interpreter's personal law, that is, the *lex fori*, is not to be chosen mechanically or as a matter of course, just because it is one's legal system the upholding of which the judge may be sworn to. Thus, the second stage is characterized by an 'enlightened' approach which reaches out in search of 'international harmony in decision-making and the principle of equality of legal systems', and the 'balance of justice and convenience'. The *via media* approach is thus an informed approach to choosing either system in the choice of law rules, which, however, tends to favour the *lex causae.*

[50] **Society of Lloyd's v Price and Lee** is the best example of 'gap' and via media. In that case a problem arose because under South African law as the *lex fori,* prescription was substantive in terms of the Prescription Act No 68 of 1969, and as such fell to be governed by the English law, the *lex causae,* which characterized prescription as procedural and fell to be governed by the *lex fori,* i.e. South African law. "This resulted in a 'gap' in which neither South African nor English law applied". That problem then attracted for a solution the application of the *via media* approach, introduced by van Heerden JA as follows: *"Not only does it take cognizance of both the lex fori and the lex causae in characterising the relevant legal rules but it also enables the court, after this characterization has been made, to determine in a flexible and sensitive manner which legal system has the closest and most real connection with the dispute before it*". Justice van Heerden then dealt with the three stages: (1) A provisional determination of whether in terms of South African law prescription was substantive or procedural; (2) a provisional determination of whether, according to the principles of English law *(lex causae),* prescription was substantive or procedural; and (3) a final hurdle in terms of which *"the Court must take into account policy considerations in determining which legal system has the closest and most real connection with the legal dispute before it"*. See paras [14], [15], [17] and [26] of the judgment.

[51] We have determined that the proper law of the contract is South African law, that is, the systems of law with which the transaction has the closest and most real connection: the *lex causae.* The learned trial Judge found that there was a 'gap' in the choice of law rules which needed to be closed by applying the *via media* approach in the charisterisation process. But the defendant disagrees and states

that the trial Judge erred in so finding and in the consequent application of the *via media*. To test whether a 'gap' does exist I propose to follow the three stages of characterization indicated by Van Heerden JA in **Society of Lloyd's v Price and Lee**. In the first place and to avoid any unintended unfortunate result, the *lex fori* will not just look at its own internal rules but will also look at the *lex causae* sees it as matter of substance. The *lex causae* will therefore reject the referral as it were. This is the second stage of provisional characterization which involves a determination whether South African law of prescription is substantive or procedural. This classification will tell if the *lex causae* will adopt and deal with the matter. If south African law, the *lex causae*, treats prescription as a matter of procedure to be relegated to the lex fori, then a *lacuna,* or void or 'gap' is indicated, "arising from the absence of any rule or principle governing the particular situation".

[52] The third and final stage of determination must be undertaken, taking into account policy considerations in deciding which legal system between South African and eSwatini law has the closest and most real connection with the dispute before court. It is at this final stage that 'considerations of policy, international harmony of decisions, justice and convenience' will be used to guide the court in coming to its decision. This is what I understand van Heerden JA and the other proponents of the *via media* approach to be proposing as a solution to a situation that could turn out to a vicious cycle. (See **Society of Lloyd's v Price and Lee**, para [14]. On that account van Heerden JA proposed that the *via media* approach was the appropriate mechanism for dealing with the kind of problem with which the court was then confronted, since the *via media* takes cognizance of both

systems of law in the process of characterizing the relevant rules of law in determining the system most closely connected with the dispute before court.

[53] I accordingly agree with defendant in its ground 3.1 of appeal that the Court *a quo* ought to have held that it was not faced with a 'gap' and therefore the *via media* should not have applied to 'close the gap'. The explanation is easy to see: when the *lex fori* refers the matter to the *lex causae*, the proper law of the contract, that system has no difficulty dealing with the matter. Thus, characterization in this matter does not go beyond the second stage. I should add that on this ground of appeal defendant further states that the characterization created *"a situation where potentially both Swaziland and South African prescription law applies. It is not necessary to adopt a via media approach. Instead, the court can and should consider both laws"*. Subject to what I have already said, I disagree with the submission that the court should have considered both laws, which it seems to have done.

[54] In my opinion, however, the extended scenario suggested by the defendant does not normally occur in the course of characterization. This is so because as Grosskopf J[33] observes: *"An indivisible contract laying down reciprocal rights and obligations can, as a matter of logic, not be governed by more than one proper law. … The rule that a contract is normally subject to a single proper law has, however, one exception, or apparent exception. …" In casu* no such exceptional circumstance or agreement has been shown to exist. If both systems are potentially applicable but produce different results, the critical question becomes which one of

[33] Improvair (Cape) (Pty) Ltd vEstablishmenys NEU 1983 (2) SA 138 © p147

the two systems must be given effect. So even if both systems are potentially applicable at the beginning of the characterization process, finally one must trump the other. That is the business of the *via media* approach to resolve any resulting ‘gap’ or *lacuna*. The Court then cannot ‘consider both laws’ if the intention is to apply both laws, except provisionally at the first or second tier of characterization. Considering both laws is for the purpose of determining which of the two has the balance of justice and convenience on its side the application of which would be least invidious as Justice Chidyausiku observed. The ‘gap’ dilemma can lead to a vicious cycle, if an appropriate solution is not interposed. The *via media* approach presents itself as a handy solution. The resolution of the dilemma of the ‘gap’ involves making a policy choice between two competing legal systems. This takes place at the third stage and the final characterization of the issue. The court must take into account policy considerations in determining which legal system has the closest and most real connection with the legal dispute before it.

[55] Forsyth (pp172-3) after noting that “the most common judicial response to the problem of characterization is to suggest that it should be resolved by the application of the *lex fori*”, points out that the *lex fori* is not an adequate solution capable of responding to all arising cases. He observes: *“Once it is plain that rules drawn from foreign legal systems may need to be characterized it is equally plain that the lex fori will not be able readily to allocate every foreign rule that might arise for consideration into the appropriate category”*. The alternative of characterizing by the *lex causae* is itself unlikely to be satisfactory. According to Forsyth, the court would soon be faced with the “problem, well-known in the literature, of ‘cumulation’,” with its “related problem of ‘gap’” where “no rule from either the *lex fori* or the *lex causae*, characterized by the legal system from

which it comes, is applicable …. In the result it is generally suggested by scholars that some form of *via media* between the *lex fori* and *lex causae* be adopted". Following the dicta of Schutz J in **Laurens No v Von Holne**[34], the *via media* approach has been unequivocally adopted in South Africa and since been approved by the Supreme Court of Appeal in **Society of Lloyds**.[35] And Murray CJ expressed similar sentiments when the said: *"The present matter is one purely of procedure, and the modern tendency of courts administering the Roman Dutch law has been to depart from the formalism of earlier days and to afford litigants greater latitude in regard to the determination of all questions in controversy between then"*.[36] And Booysen J observed that 'South African writers seem to favour a *via media* or enlightened *lex fori* approach'. (Op cit, p 518H).

[56] Van Zyl J in **Society of Lloyds v Romahn** observes: "[33] … *It would, of course, be a simple exercise to state that, in as much 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 question which this Court will have to address"*. This is the very reason for characterisation. Falconbridge writes:[37] *"The purpose of characterization is to determine whether the legal question to which a given rule relates is subsumed under the legal question specified in a given conflict rule, and consequently, whether the rule of*

[34] **Op cit. passim**
34 **Society of Lloyds v Price and Lee** 2006(5) SA 363(SCA)
35 **Reuben v Meyers** 1957(4) 57 (SR), p60A
[35] 36 **Essays on Conflict of Laws,** 2nd ed Chap 3

[36]
[37]

law is applicable to the factual situation". The court is not supposed just to act or characterize in a mechanical manner. The choice of law has to be informed, hence the reference to an 'enlightened *lex fori'*.

[57] In **Kuhne & Nagel**, O'Donovan J, after stating it as settled law that procedural matters are governed by the law of the place where the action is brought (*lex fori)* whilst matters of substance were an issue for the proper law of the transaction *(lex causae*), noted that *"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*" (at 538A - B). Such a practice would, in my view, import a mechanical approach to classification which may have been acceptable in earlier times but no longer followed in modern conflict of laws. For instance, in the present case it would mean that eSwatini law as the *lex fori* should apply as against the *lex causae*, in which case the action might be barred whilst still possibly very much alive under the *lex causae* with its longer period of prescription. O'Donovan J, however, conceded that Anglo-American conflict rules were somehow inadequate by their too much reliance on the *lex fori*, contrary to *"the trend of contemporary academic writing, which has become increasingly critical of the failure of Courts … to protect rights still inexistence in a foreign country"*. The learned Judge concluded by holding that the longer prescriptive period of the *lex causae* should apply.

[58] Van Zyl J, after observing that *"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…"[38], went on to consider which law should determine the period of prescription between English and South Africa law. From a South African stand point, the problem raised in the case referred to was due to the fact that under English law prescription is procedural therefore referring the matter to the South African law whose prescription is substantive, even though South Africa was also the lex fori. Some kind of juggling with the conflict rules become necessary to avoid an unhealthy situation where a country prefers its own law (the *lex fori)* as against the law of a foreign state.

[59] The predicament giving rise to the *via media* approach was described by Mynhardt J in **Society of Lloyd's**[39] as follows:

> *"Strictly speaking, and logically, the South African law relating to prescription cannot apply to the present matters because prescription, in terms of the* lex fori, *the South African law, is a matter of substance 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".* And Forsyth (p178) says that "…. *it was clear that whenever the lex causae has procedural and not substantive prescription rules the problem of 'gap' would arise before a South African court".*

[38] **Society of Lloyd's v Romahn**, op cit. at para [25]
[39] **Society of Lloyds v Price & Lee** 2005 (3) SA 549 (T), p563

It would seem to follow that where the *lex causae* has substantive and not procedural prescription rules the problem of 'gap' would arise in an eSwatini court. That is the situation *in casu*. Whether none of the two systems apply or both systems apply, the situation cannot be left hanging. Either way, the *via media* approach is implicated, with or without the gap and cumulation.

Cumulation

[60] On the issue of 'cumulation', Professor Forsyth writes:[40]

> *"One particularly difficult case is that of 'cumulation'. If the* lex fori *characterizes its prescription rules as procedural and the* lex causae *characterizes its prescription rules as substantive, then it appears that both (presumably conflicting) rules are applicable! Chaos threatens and a choice will have to be made between the rules. Uniformity of decisions would favour the application of the* lex causae *(and the exclusion of the* lex fori*'s rules) but the local judge will generally be tempted by his or her own law. …*
>
> *"It must be frankly recognised that many judges facing cumulation will be unable to resist the wiles of the* lex fori*. Only a paragon of virtue in the field of private international law will be so infused with the principle of the equality of legal systems and the importance of uniformity of decision that he or she will exclude the* lex fori *in cumulation cases… Indeed, the move in Canada and Australia away from the common law stance of the* lex fori *governing limitation towards the* lex causae *governing, may be seen as just such an enlightened choice by the judges involved resisting the* lex fori*. But, in any event, cumulation in this area will be rare in the modern law. As we*

[40] "**Mind the Gap Part II"** October 2006 at pp 429-430

> *have seen, whether through legislation, or as the development of the common law, or the adoption of the* via media *the consensus is growing that prescription is governed by the* lex causae. *Cumulation cannot arise amid such consensus".*

[61] Considering that the operation of conflict rules is not a simple exercise, Van Zyl J, in **Society of Lloyd's v Romahn**, (Op cit), observes that *"[38] The question inevitably arises whether, on this approach, a court may not be confronted with the dilemma that the prescriptive 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*". It will be recalled that the learned trial Judge found that there was a gap that needed to be closed by applying the via media approach (para [38]).

[62] In my respectful opinion, the matter before this Court does not raise the vexed dilemma of gap and its associated problem of cumulation. I have come to this conclusion because even though the matter may be said to be susceptible to both eSwatini and South African law in the first place, the *lex fori* would happily refer the matter to the *lex causae*. The *lex causae* which is also the proper law of the contract would have no choice but deal with the problem as presented. Thus, in my view, at the second stage level of characterization we are not confronted by a gap requiring resort to the *via media* approach to close it. And one does not have to be a paragon of virtue in private international law to accept the wisdom of the equality of legal systems and the importance of uniformity of decision preferring

the exclusion of the *lex fori*. I am indeed enjoined by the bulk of judicial and academic opinion to construe the conflicts rule *sub specie orbis* and to choose the *lex causae* instead of the *lex fori*. To do otherwise, for the *lex fori* itself to apply in the matter even as its prescription rule is procedural in nature, would be to fly in the face of the strong body of judicial and academic opinion in favour of the *lex causae* as against the *lex fori,* and, would be retrogressive.

The Special Pleas

[63] I do not agree with the plaintiff where it submits *"58.4 Ultimately, policy and equity considerations do not require South African substantive law regarding prescription to trump eSwatini procedural law on the point"*; nor where the plaintiff, says that *"the prescription issue is to be decided with reference to eSwatini procedural law regarding prescription"* (para 58) or that *"the prescription should be considered and determined with reference to eSwatini law, irrespective of whether South African law is held to be the proper law of the contract"* (para 59). These submissions on behalf of the plaintiff appear to be contrary to the current trend in characterization in conflict of laws. The plaintiff's submissions simply reverse the order of the law. What plaintiff would seem to be submitting is to pretend that there is no rule requiring characterization. Or else plaintiff's case is very confused. One would have thought the plaintiff would strongly urge the application of South African law with its longer prescription rules. However, in our preference of South African law as the proper law of the contract I suppose we have succeeded to 'resist the wiles of the *lex fori*', as urged by plaintiff.

[64] Defendant has asserted two special pleas to plainttif's action. Both pleas aver prescription based on the law of eSwatini (as we have seen it above) and South African law. Underlying both pleas is that the proper law of the contract is the law of eSwatini and of South Africa. This duality is of course untenable: it must be one or the other, unless it be the particular issue raised that requires to be dealt with in terms of a particular forum, for instance, an issue of procedure. We have also noted that prescription may bar the remedy or extinguish the cause of action; *"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".*[41] O'Donovan J made a similar statement: *"It is settled law that procedural matters are governed by the law of the place where 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 (….*[42] *) 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".*[43]

[65] For the purposes of the defence based on prescription, we have not been told the exact dates when the coal was delivered. This is in respect of both special

[41] **Society of Lloyd's v Romahn & 2 0ther cases**. 2006 (4) SA 23 (CPD) para [31]
[42] **Curtis v Johannesburg Municipality 1906 TS 308; Slabbert Federated Employers Insce Co 1979(3) SA 207 (T)**
[43] **Kuhne and Nagel AG Zurich vAPA Distributors** 1981 (3) SA 536 (WLD), 537H - 538

pleas. The parties in their Statement have apparently agreed on the dates when payments(s) became due. This should suffice on the understanding that the dates when payment became due carry with them the dates when delivery was made. In other words, the date when payment becomes due is the flip-side of the date when delivery was effected in the absence of any special agreement as to date of payment. It is the duty of the defendant to establish dates of delivery, for understandable reasons; in some transactions it might take weeks or even months for goods to move from seller to buyer. And payment is, of course, ordinarily against delivery.

First special plea

[66] In para [44] of its judgment, the trial court adopts and uses paragraph 2.14 of the Statement to show (as an admissible fact) that summons was served on 14 October 2011. In para [45] of its judgment, the trial court records that *"… It is reflected that the plaintiff first instituted legal action against the defendant on 14th October 2011 as per the Registrar's date stamp. This matter was prosecuted by the plaintiff and was concluded on 25th October 2012".* In that regard, the court *a quo* was referring to summons issued out of the Kwa Zulu-Natal High Court and the 'Registrar's date stamp' is that of the Registrar of the Kwa Zulu Natal High Court. In para [46] the judgment continues *"It is against this date* (14th October 2011) *that this court is to ascertain whether the debt was …. kept 'green"*.

[67] The Durban proceedings were concluded on 25 October 2012, a couple of weeks before these proceedings commenced at the High Court. The service of the summons in these proceedings was then held to interrupt the running of

prescription. The contract, its validity and all, is to be interpreted in terms of South African law, the *lex causae.* Sharrock writes:[44] *"Prescription is interrupted either by an express or tacit acknowledgment of liability by the debtor or by service on the debtor of any (judicial) process (for example, a summons or a notice of application) whereby the creditor claims payment of the debt (s 14.1). … But if the creditor, after serving process on the debtor, does not successfully prosecute his claim to final judgment, or if he abandons the judgment or if the judgment is set aside, prescription is not deemed to have been interrupted (s 14.2)".* Visser *et al* [45] agree: *"Interruption takes place where on the happening of a particular event, prescription begins to run afresh. Prescription is interrupted by (i) acknowledgment of liability by debtor, express or tacit; or (ii) service of process on the debtor, claiming payment of the debt (judicial interruption)".* The authors are also in agreement that where the creditor does not successfully prosecute his claim after service of summons to final judgment or does so and then abandons the judgment or the judgment is set aside, prescription is not interrupted. We have been told that the Durban proceedings under summons served on 14 October 2011 were withdrawn and accordingly effectively abandoned or not successfully prosecuted to final judgment. The plaintiff has not pleaded interruption and correctly so in my respectful opinion. Accordingly, the date of 14th October cannot be used to support argument for interruption in favour of plaintiff as court a quo seems to have done. (See also Herbstein and van Winsen, **The Civil Practice of the Superior Courts in South Africa,** 3rd ed p 199).

[68] Under para [47] the trial court reproduced paragraphs 2.20 to 2.20.3 of the Statement as is and continued in para [48] as follows: *"Obviously from the above,*

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[44] **BUSINNESS Transactions Law**, 8th ed at 706

[45] **Gibson South African Mercantile and Company Law,** 8th ed at 102

it is clear that the plaintiff instituted legal actions (sic) within the two-year period provided under section 16 of 1540 placaat. I appreciate that the first sum of E7, 822,384.60 is out by fourteen days". The trial court discounted weekends and public holidays and concluded that *"the claim by the plaintiff could not be said to have prescribed as plaintiff. instituted legal process within the stipulated period, thereby keeping the debt alive or green as it were… even though the debt was pursued in the wrong forum"*. With respect, I do not see how the debt could have been kept alive or green by legal proceedings not only out of jurisdiction but also pursuant to a different law, to wit, Act 68 of 1969. It is part of defendant's appeal that the *"court a quo ought to have found that the date against which it determine whether or not the 'debt was kept green' (….) was the date of service of summons issued out of the High Court…..in 25 October 2012"* (sic). I agree with defendant in this submission. For whatever it is worth, the claim was out by forty-four days not fourteen. And there is no basis for discounting weekends and public holidays in computing a period expressed in years.

[69] I should also state that in my opinion the 'policy underlying the law of prescription' is indeed to maintain the public policy regarding the finality of litigation and the need to prosecute claims while within easy memory. The prescription policy therefore should not be used to trump the finality of litigation policy or public interest in the timely prosecution of claims. It must have been 'tardy' of plaintiff to continue the proceedings in South Africa for an entire year. As soon as pleadings were joined it should have been clear that South Africa was in the circumstances an inconvenient forum. It is, however, not necessary for me to decide here whether a discrepancy of fourteen or forty-four days avoids prescription or not, even as a matter of procedure. Normally under our civil

procedure rules, a party who has not complied with the Rules has to seek condonation therefor. Be that as it may, if 14 October 2011 is the date for the issue of summons (which we respectfully disagree with) then in terms of the Placaat the sum of E7 822,384.00 as per due date of 31st August 2009 would have prescribed by 30 August 2011 (a difference of forty-four days to 14 October 2011). Only the claims under paragraphs 2.20.2.1 and 2.20.2.2 and 2.20.3 would be saved from prescription under the Placaat. But all of the proceedings under the Placaat do not avail the plaintiff since the agreement must be interpreted and executed in terms of its proper law (the lex causae) to which we must now turn.

Second special plea

[70] We must now look at the South African law regulating prescription to see what it makes of the claim(s) and the second special plea. That is, have all or some of plaintiff's claims prescribed and become extinct? We have said it above that South African law is the proper law of the contract and accordingly competent to deal with all aspects of the contract. It is also undisputed that the South African Prescription Act, 1969, treats prescription as matter of substance and not procedure as does the Roman Dutch common law of eSwatini, as per section 16 of the Placaat. The defendant's case may be stated as follows: In terms of section 11(a) read with sections 10(1) and 12 (1) of the South African Prescription Act 68 of 1969, plaintiff's claim has not been claimed within three years after the debt had become due, and, has accordingly prescribed and become extinct. These sections read as follows:

> "10(1) Subject to the provisions of this Chapter and of Chapter 1V, 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.

"11 The periods of prescription of debts shall be the following:

(d) save where an Act of Parliament provides otherwise, three years in respect of any other debt.

"12(1) Subject to the provisions of subsections (2) (3) and (4), prescription shall commence to run as soon as the debt is due"

[71] In its heads of argument plaintiff in effect concedes that if the proper law is the law of South Africa, Act 68 of 1969, then its claims of the sum of E7822 384-60 and the sum of E1079 399.80 due respectively not later than 31 August 2009 and 31st October 2009 have become extinct by prescription. In that case only the sum of E1329 446-20 and E2055 670.50 due for payment not earlier than 30 November 2009 and 28 February 2010 respectively remain possibly valid and payable on the basis that the summons was served on the defendant on 22 November 2012. In ground 3.2 of its appeal, the defendant avers that the proper law of the contract is South African law, that the Prescription Act of 1969 is substantive in nature and accordingly applies to the contract and plaintiff's claims of E7822, 384.60 and E1591, 827.67 as set out in para 3.3. of Statement have been extinguished by prescription and fall to be dismissed. In this Statement para 2.20.1 the parties agreed that the claim of E7,822,384.60 fell due for payment by no later than 31st August 2009. Three years down the line we reach 30 August 2012. The summons having been served on defendant on 22 November 2012, defendant submits that the claim of E7822,384.60 has been extinguished. There being no interruption or delay pleaded by the plaintiff, the claim has indeed prescribed and

become extinct. This finding is in line with the opinion of Advocate de Kok on the law of South Africa.

[72] As already stated, this matter falls to be resolved in accordance with the *lex causae*. It serves no meaningful purpose to spend any more time deliberating on what the result might be in respect of the claims submitted by the plaintiff under the law of eSwatini. It is enough to state that, speaking generally, the contract is amenable to the provisions of section 16 of the Placaat. It is clear in my mind that the coal supplied and delivered to defendant in terms of the contract for the purpose of heating the boilers of defendant, regardless of the quantities involved, places the transaction within the terms of section 16 in that the coal constitutes goods sold by retail for the use or consumption by use by the defendant.

Conclusion

[73] I have come to the conclusion, therefore, that the proper law of the contract, the *lex causae,* must apply to the claim(s) arising from the same contract across the board. By South African law the crucial date under the Act is the date of the service of the summons on the defendant. In the case at hand that date is 22 November 2012. For the times on which the various debts constituting the claim became due we have used the dates given by the parties under paragraph 2.20 of their *Statement*. This has helped to overcome the problem of discrepancies in some of the figures and dates found in some paragraphs in the pleadings. We have assumed that ‘not later than’ is the same as ‘no earlier than’. Depending on when the debts fell due, the claims will prescribe or not prescribe in terms of Act 68 of 1969 as follows-

1. The sum of E7, 822,384.60 fell due for payment by no later than 31 August 2009. Add three years, period of prescription: 30 August 2012. The claim **has** prescribed**.**

2.1. An amount of R1,079 399.80 fell due for payment no later than 31 October 2009. Add three years, period of prescription: 30 October 2012. The claim **has** prescribed.

2.2. An amount of R1,329, 446.20, fell due for payment by no earlier than 30 November, 2009. Add three years, period of prescription: 29 November 2012. *The claim has* ***not*** *prescribed.*

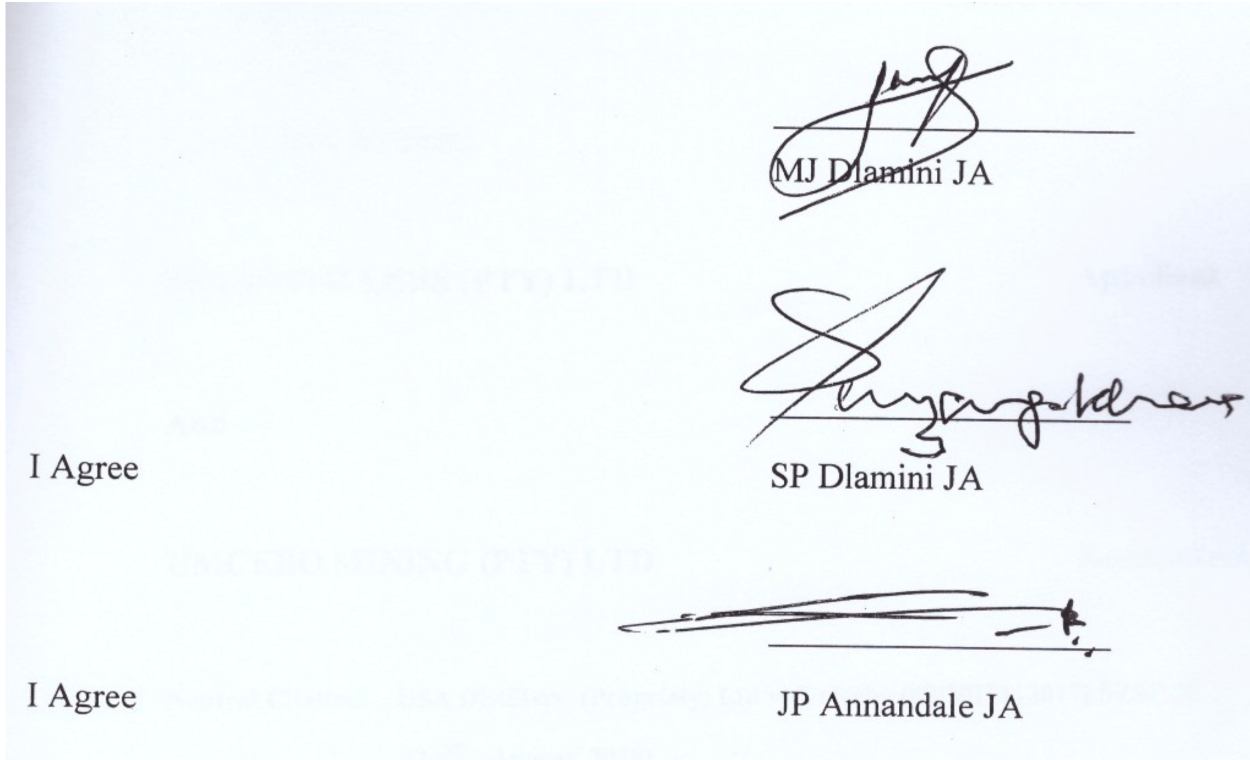
3. The amount of R2,055670.50 fell due for payment by no earlier than 27 February 2010. Add three years, period of prescription: 27 February 2013. *The claim has* ***not*** *prescribed.*

[74] In the result, the defendant's Second Special Plea -

(1) succeeds and is upheld as against the amounts of E/R7,822,384.60 and E/R1,079,399.80;

(2) fails and is dismissed as against the amounts of E/R1,329,446.20 and E/R2,055,670.50

(3) In view of the fact that both parties were partially successful, each party is to bear its own costs both before this Court and the court ***a quo.***



RJS Perry	for Appellant
J Henwood	for Respondent