IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No:1890/2012

In the matter between:

UMCEBO MINING (PTY) LIMITED **Applicant**

And

USA DISTILLERS (PTY) LIMITED **Respondent**

Neutral citation: ***Umcebo Mining (Pty) Limited v USA Distillers (Pty) Limited (1890/2012) [2017] SZHC 202 (6th Octobe**r **2017)***

CORAM: **S. B. MAPHALALA PJ**

M. D. MAMBA J

M. DLAMINI J

Heard: **04 October 2016**

Delivered: **6th October 2017**

Roman Dutch Law as received: - **4th October 1540 Placaat by Emperor Charles V - Section 16 thereof – applicability – "*ter slete gelevert*" – case law – goods sold not for wholesale but retail - merchandise for consumption – irrespective of quantity – but for consumption –**

Conflict of laws: - ***lex fori* – placaat 1540 procedural - *lex causae* – Prescription Act No.68 of 1969 (South Africa) substantive – international law follow procedural rule – where one is procedural and other substantive – gap created – via media approach – cumulative and not alternative.**

- ***lex fori* and *lex causae* prescription laws – debt not prescribed – pleas dismissed.**

By M. DLAMINI J

Foreword: I must commence by pointing out that this judgment has been inordinately delayed for reasons beyond my brother, the presiding judge and myself. We can only pass our sincere apology to the litigants herein and assure them that nonetheless, the principle of our law "*justice delayed is justice denied*" still holds true. May I thank both senior Counsel for providing us with the necessary material for this matter. I would like to also extend my sincere gratitude to Ms.Vanja Karth[1] for providing me with the full set of the Placaats. My special thanks also goes to Godknows Tafadwza Mudimu[2] who assisted me greatly with the research in this subject. I am humbled.

[1] Director of Democratic Governance and Rights Unit, University of Cape Town
[2] Master of Laws student at the University of Cape Town

Summary: By combined summons served upon the defendant and filed in this court on 9th November 2012, the plaintiff claims the total sum of E12 286.00. The defendant has raised two special pleas. Firstly, that plaintiff's claims have prescribed in terms of the common law of Swaziland under section 16 of the placaat. Secondly, as the contract of sale was concluded and payment of purchase price received in South Africa and in its currency, the applicable law is that of South Africa and therefore in terms of sections 10(1) and 11(d) of the Prescription Act No. 68 of 1969 of South Africa, the plaintiff's claims have prescribed.

Procedure

[1] Although the defendant did plead over, following that it excepted by raising special pleas, the procedure as per the Rules of this court is that the court should deal with the special pleas. The parties have filed a statement of agreed facts, each party pointing out that the veracity of same on factual matters is admitted only for purposes of adjudication on the special pleas.

The Parties

[2] The plaintiff is "*Umcebo Mining (Proprietary) Limited, a company with limited liability registered according to the laws of the Republic of South Africa and who, at all material times hereto had its principal place of business at Umcebo house, Wilge Power Station, Voltargo, Mpumalanga, South Africa.*"[3]

[3] The defendant is "*USA Distillers (Proprietary) Limited a company with limited liability registered according to the laws of the Kingdom of*

[3] at page 2 para 2.1. of the Statement of Agreed Facts

Swaziland and who, at all material times hereto, had its principal place of business at USA Distillers Park, Big Bend – Lavumisa Road, Lubombo District, Swaziland."[4]

Statement of agreed facts

[4] The parties' statement of agreed facts is very concise on the *causa*, defence, issues for determination and relief sought. It is imperative therefore, that I quote it *ipsissima verba* and proceed to adjudicate on the matter within its four corners.[5]

*"2. **Agreed Facts***

2.3 The plaintiff's claim against the defendant arises from an oral coal supply agreement ("the agreement") concluded between the parties during or about August 2007, alternatively October 2007, at Emalahleni, Mpumalanga, South Africa.

2.4 It was a material term of the sale agreement that the plaintiff undertook to sell to the defendant who undertook to purchase from the plaintiff coal on certain terms and conditions for the duration of the agreement.

2.5 Pursuant to the terms of the agreement the plaintiff during the period August 2007 to March 2010 supplied and delivered quantities of coal to the defendant.

2.6 Particulars of the tonnages of and months during which coal was supplied and delivered to the defendant by the plaintiff, for the period August 2008 to March 2010, appear from annexures POC1, POC2, POC3 to the particulars of claim. (It is to be noted that these particulars, including tonnages, can be assumed to be correct for purposes of the special pleas. The defendant does not admit the tonnages delivered, but this is a matter to be determined should the matter proceed in respect of the plea over.)

2.7 In terms of the agreement, the plaintiff was obliged to deliver quantities of coal from South Africa to the defendant's principal place of business in Swaziland.

2.8 The quantities of coal forming the subject matter of the plaintiff's claim were delivered by the plaintiff to the defendant's principal place of business in

[4] at page 2 para 2 of the Statement of Agreed Facts
[5] see page 2 from para 2 – 5 of the Statement of Agreed Facts

Swaziland. The defendant acquired the coal for the purpose of consumption and in particular for the purpose of heating its boilers.

2.9 *The plaintiff designated a bank account in South Africa for purposes of payment of any amounts due by the defendant in terms of the agreement. Such amounts as were paid by the defendant to the plaintiff, were as a matter of fact paid from the defendant's account held by it in Swaziland to the plaintiff's bank account held by it at Middleburg Branch of First National Bank in Mpumalanga, South Africa, under account number 6206686751.*

2.10 *The plaintiff did not hold any bank account in the Kingdom of Swaziland.*

2.11 *The price agreed to was in South African Rand and all invoices were rendered in South African Rand.*

2.12 *In terms of the agreement payment of any amounts due by the defendant to the plaintiff would be effected within thirty (30) days of statement.*

2.13 *The plaintiff and the defendant did not expressly agree as to which law would constitute the proper law of the contract.*

2.14 *The plaintiff instituted action against the defendant from the KwaZulu Natal High Court, Durban ("the Durban Court") under case number 10292/2011 (The ("the Durban action"), in which it claimed payment of the sum of E12 286 900.00 together with interest thereon at the South African legal rate (then 15.5% per annum). This Honourable Court is referred to the summons and particulars of claim commencing at page 118 of the bundle."*

2.15 *The defendant filed a special plea in the Durban court, in which it contended that the Durban Court did not have jurisdiction over the defendant to determine the action and objected to the Durban Court exercising jurisdiction over it. This Honourable Court is referred to the plea commencing at page 132 of the bundle.*

2.16 *The plaintiff applied for an order directing that the proceedings be transferred from the Durban Court to the Gauteng Provincial Division of the High Court of South Africa, Pretoria ("the Pretoria Court"). The defendant opposed the application, contending that the Pretoria Court did not have jurisdiction over it, inter alia relying on an absence of consent or a prior attachment of its assets. The defendant furthermore objected to the North Gauteng High Court exercising jurisdiction over it and stated that the proper course is for the plaintiff to institute proceedings against it in the Kingdom of Swaziland.*

2.17 Full and further particulars of the parties' various contentions and allegations in those proceedings, appear from the relevant pleadings, applications and affidavits, which will form part of the agreed bundle to be submitted to this Court.

2.18 The plaintiff's application to transfer the action to the Pretoria Court was dismissed on 25 October 2012 and the plaintiff subsequently withdrew the action instituted against the defendant in the Durban Court on 8th November 2012.

2.19 The plaintiff's summons in this Court was thereafter served on the defendant on 22nd November 2012.

"2.20 With regard to the amounts claimed by the plaintiff from defendant –

2.20.1. the sum of E7 822 384.60 (annexure POC1 tothe particulars of claim) fell due for payment by no later than 31st August 2009;

2.20.2. of the amount of E2 408 846.15 (annexure POC2 to the particulars of claim –

2.20.2.1. an amount E2 079 399.80 fell due for payment by no later than 31 October 2009;

2.20.2.2. the balance, in the amount of E1,329.446.20 fell due for payment by no earlier than 30 November 2009;

2.20.3. the amount of E2 055 670.50 (annexure POC3 to the particulars of claim) fell due for payment by no earlier than 28th February 2010."

2.21 The defendant has delivered an expert summary in respect of the opinions of Adv. A de Kok, an Advocate of the High Court of South Africa. The parties agree that the contentions of Adv. de Kok in paragraphs 3.1 to 3.15.4 correctly reflect South African law. It is accordingly not necessary for the defendant to call Adv. de Kok as a witness and this Honourable Court can accept that the South African law is as set out in her expert summary.

3. ***Issues for Determination***

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 Court of the Kingdom of Swaziland (First Special Plea). In particular:

3.1.1. Whether Swazi law incorporate the Roman Dutch Common law as applicable to Swaziland since 22nd February 1907, including section 16 of the Plakaat of the Emperor Charles V dated 4 October 1540 [Volume 1 of the Groot Plakaat 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 claim;

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 claims 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.

4. ***Documents and Agreed Bundle of Documents***

The parties have agreed to a bundle of documents, to which reference will be made during argument. These documents are what they purport to be. The truth of their contents is not admitted.

5. ***Relief Sought***

The relief sought by the parties, with reference to the defendant's special pleas, is as set out in the defendant's first and second special pleas and the plaintiff's replication respectively."

Reception of the Roman - Dutch Law in Swaziland

[5] Robert Warden Lee points out that the term "*Roman Dutch Law*" was coined by Simon van Leeuwn under his writing "*Paratituta Juris Novissimi of 1652*."[6] It refers to the system of laws once practiced in Holland under the Republic of the United Netherlands. It is a collection of Germanic customs and Roman law. Codex Theodosians (A.D. 438) worked

[6] see his book "An Introduction to Roman Dutch Law"

extensively on the tribal customs of Holland and Belgium. Then there was an infusion with the Frankish Monarchy, the Church and the Cannon law under Rome. Roman law was thus received into Germany and Holland. With the fall of the Frankish Empire which left a vacuum on legislative enactments, Roman law was resorted to. From this, it is not surprising therefore that customary law co–existed with common law.

[6] Roman-Dutch law was carried to various parts of the world, namely East and West Indies, Cape of Good Hope, Cylon and part of Guiana by the Dutch East India Company and Dutch West India Company established in 1602 and 1621 respectively. By the end of the eighteenth and beginning of nineteenth century it obtained under some of the British colonies inclusive of Rhodesia (today's Zimbabwe) after it was passed by the Crown of Great Britain. It was later adopted by the Dutch Settlers during the Colonial era. What is ironic though is that although Roman-Dutch law is still regulating the lives and affairs of the former British colonies today, it is completely phased out and without any trace in the country of origin. Literature shows that it was in fact practised only for a thousand years.

[7] Since time immemoriable, Swaziland, like the rest of the African countries, regulated its affairs in terms of its indigenous or customary law. The scramble for Africa by colonial masters however, introduced a legal regime peculiar to the settlers. Customary law continued to regulate the lives of the indigenous people in so far as it was not repugnant to the dictates of morality and natural justice. Van Riebeek (Dutch origin) settled in the Cape Colony with the sole intention of establishing a half way station for purposes of trade with the East. Eminent Senior Counsel J.H. Pain SC authored:

> *"So it was that, at the time the reception instruments (*ordinances, orders-in council and proclamations*) were passed, there was no policy of empire in Africa, no thought of permanent acquisition, no desire to become responsible for the government of millions of diverse peoples inhabiting vast and little known hinterlands. The introduction of English Law (*Roman Dutch law as the case may be*) was, therefore, essentially personal, not territorial.* ***It was introduced to serve the needs of the small immigrant communities – to save them the journey to Westminster, to protect their land and property, and to regulate their contacts through trade with indigenous inhabitants***."(my own and emphasis)

[8] So it was therefore, that the Dutch settlers in the Cape Colony carried with them their own native laws which later spread into inlands. This took the form of Ordinances, Orders-in-Council, Edicts and Proclamation. Administration was also established in Transvaal and Swaziland was not spared. She was at all material time during the colonial era administered by the Transvaal Administration under first the Afrikaner regime.

[9] In 1903 the British, having celebrated victory in the Anglo- Boer War, took over the administrative reigns in the Transvaal. Swaziland remained under the Transvaal Administration but only with a shift from the upper hand of the Afrikaner to the lesser grip of the British, as it were. On 22nd February 1907, the British passed the General Law and Administration Proclamation No. 4 of 1907. Section 3 read:

> *"(1) The Roman Dutch common law, save in so far as the same has been herebefore or may from time to time hereafter be modified by statute, shall be the law in Swaziland;*
>
> *(2) Save and except in so far the same have been repealed or amended the statutes in force in the Transvaal on the fifteenth day of October 1904 and the statutory regulations thereunder shall* ***mutatis mutandis*** *and as far as they may be applicable be in force in Swaziland..."*

<u>The Plakaat/Placaat/Placaet</u>

[10] During the reign of the emperors in Holland, a number of statutory laws referred to as placaats were enacted. They addressed a number of issues such as marriage laws, land and hypothec, contract of sale, succession and etc. The learned Senior Counsel Pain *op. cit.* writing on received laws of the settlers pointed out:

> "*On principle they would not apply unless expressly declared to be applicable, or at least unless locally promulgated; but some may have been accepted by custom as part of the common law*."[7]

[11] It is not surprising therefore that case law demonstrates that not all the placaats were adopted under the Cape Colony. For instance the court held **In re Insolvent Estate of London, Discount Bank v Davies, (1829)1 Menz** at page 388:

> "*When this Colony was settled by the Dutch the general principles and rules of the law of Holland were introduced here, but by such introduction of the law of Holland it did not follow that special and local regulations should also be introduced; accordingly the provisions of the placaat of 15th February 1665, as to the payment of the 40thpenny (3.G.P.B 1005) have never been part of the law of this Colony, because this tax has never been imposed on the inhabitants of this Colony by any law promulgated by the legislative authorities within this colony. In like manner until a law had been passed here creating a public register the provisions of the placaat of 1st February 1580(...) were not in force or observance here*"

[12] Again in **Herbert v Anderson (1839)2 Menz 166**, a number of placaats classified under fiscal and revenue laws of Holland were excluded as applicable in the Cape Colony. **De Villiers CJ** however in **De Vries v Alexander (1880) Foord** at page 47 expatiated that the court in **Herbert** confined itself to Edicts which were of fiscal or purely local in nature.

[7] See Comperative and International Law Journal of Southern Africa VII, Issue 2, July 1978 page 137 – 167 at page 143 -144

Where, however, they were incorporated in the laws of Holland, they were forcefully applicable in the Cape Colony. This observation by the learned Chief Justice became settled law that the placaats were applicable in Cape Colony as part of the Roman-Dutch law.

Prescription in Swaziland

[13] Section 252 of the Constitution of Swaziland (Act No.1 of 2005) reads:

> *(1) Subject to the provisions of this Constitution or any other written law, the principles and rules that formed, immediately before the 6th 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.*
>
> *(2) Subject to the provisions of this Constitution, the principles of Swazi customary law (Swazi Law and Custom) are hereby recognized and adopted and shall be applied and enforced as part of the law of Swaziland.*
>
> *(3) The provisions of the subsection (2) do not apply in respect of any custom that is, and to the extent that it is, inconsistent with a provision of this Constitution or a statute, or repugnant to natural justice or morality or general principles of humanity."* (my emphasis)

[14] The above quoted section (252) of the Constitution must be read with section 3(1) and (2) of the Proclamation No. 1907 together with section 3 of the General Administration Act No. 11 of 1905. Section 3 of the 1907 Proclamation reads *pari materia* to section 3 of the General Administration Act of 1905 which still exist in our statutory books.

[15] It is apposite to point out that Swaziland, unlike South Africa, has no general law of prescription. There are provisions in certain legislations such as the Limitation of Legal Proceedings against Government Act No.

21 of 1972 addressing prescription in civil suits against the government. From the 1907 Proclamation quoted under paragraph 9 of this judgment and section 252 of the Constitution together with the *ratio decidendi* by **de Villier's CJ** in **Alexander's** case *op. cit*, one can say with authority that the 4th of October 1540 placaat by Emperor Charles V is part of the law of Swaziland. To find otherwise would create a vacuum in the law, an untenable situation. I say this much alive to the customary principle that there is no prescription in terms of Swazi law and custom (*licala kaliboli – a suit does not decay*). However, the vacuum would still entail because Swazi law and custom regulates matters of customary law and the parties to the suit must all be Swazis. It is not so *in casu* and therefore common law as found under Section 16 of the 4th October 1540 placaat must be applicable by reason that it falls under Roman-Dutch law as received in the Cape Colony as demonstrated by **de Villiers CJ**.

Is section 16 of the 4th October 1540 placaat applicable in the present case?

[16] Section 16 of 4th October 1540 placaat reads as extracted from the judgment by **Kotze CJ** in **Little v Rothman 1895 TS 197** at page 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 sum borrowed, must be claimed by legal process within two years of the date of the service, or work done, of the delivery of the goods, or of 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."*

[17] The Learned Chief Justice first addressed the question of whether the section was applicable. He made reference to the case of **Drew v Executors of Wolfe (Buck. 68, p.119) and Rabie v Neebe (O.F.S** page 27) and held that in the Supreme Court of Cape Colony and High Court in Bloemfontein respectively, the section was in full force.

[18] In order to effectively apply section 16, it is important that one understands the rationale behind the principle of prescription: **Wessels J** in **Spilller v Mostert 1904 TS 635** at 636 wisely expanded on the reason behind prescription:

> *"The principle which actuated the legislature in passing the statute of 1540 was* ***that it is very difficult when the thing itself is removed 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.*"(my emphasis)

[19] Section 16 of the 1540 plakaat calls for the creditor to claim by means of court processes the price of merchandise "*ter slete gelevert*" within the period of two years from the date of delivery of the goods.

The merchandise

[20] **Kotze CJ** states:[8]

> "*As the prescription of two years introduced by the court is still in force, the question arises whether section 16 is applicable to the articles mentioned in the account on which the action has been brought. This depends upon the meaning of the words 'Koopmanschap ter slete gelevert' which appears in the placaat*."

[8] in Rothmans case at page 201 - [see para [16] of this judgment

[21] The goods in **Rothman**'s case were sugar, coffee, tobacco, medicine, cotton, shoes, watch, chain, window, sashes, doors, iron plates and others. The learned Chief Justice (**Kotze CJ)** rejecting Voet's translation of the words "*Koopmanschap ter slete gelevert* to mean "*mercium minutim distractarum* (goods sold by retail, or in small quantities, held as follows:[9]

> "*Voet must be understood as speaking only in general terms, and must not be taken too literally, for otherwise it would follow that when a person, instead of drinking his wine in an inn or wineshop (in popinis et tabernis), takes it with him to his house in a can or flask, the exception of the two years' prescription cannot be set up against the innkeeper or host (cauponem), and yet the liquor would (in the words of the placaat) have been ter slete gelevert."*

[22] He then concluded:[10]

> *"I am satisfied that neither in the time of Charles V nor in the years of Voet would people in the Netherlands have spoken of doors, sashes, and other building material as merchandise or goods ter slete gelevert. The noun "slete" 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 brought for consumption.*

[23] The learned Chief Justice then ruled:[11]

> "*Some of the articles which appear in the account consequently fall within, and other without, the placaat; in other words, the claim for payment for those goods which were delivered for consumption is prescribed, but not for those goods which were not ter slete gelevert. The Landdrost ought to have gone carefully into the items in the account, instead of allowing the exception against the account as a whole."*

<u>Quantity of merchandise</u>

[9] ? Rothman's case at page 201
[10] n[9]
[11] n[9]

[24] In 1904 **Wessels, Bristowe and Curlewis JJ**, sitting in the Supreme Court of Transvaal[12] were concerned with the quantity of the merchandise. The court stated:

> "*In this case the only question to decide is where goods are bought in the circumstances under which each individual transaction might be considered as a retail purchase --- where a large amount of various articles are bought in one day --- whether that can be said to fall within the Placaat, yes or no*."

[25] Citing **Little v Rothmans**, the court enquired:[13]

> *"... if I buy in small quantities goods that are not consumed, then the Placaat does not apply, leaving open the question whether, when goods are sold for consumption and are bought for the purpose of consumption, they have to be sold in very small quantities in order to make the Placaat apply, or whether the statute will apply if the goods are sold for the purpose of being consumed and the quantities in which they are sold are not very small.*"

[26] The court expanded on the quantities:[14]

> *"... we would be brought to a very absurd conclusion if we were to hold that, if a man had a large household and a large staff of servants, and he bought at the grocer's goods to a proportionate value for the purposes of consumption by his household, that being a large quantity when compared with the household of a husband and wife only, in the one case the claim will not be prescribed, and in the other case it will be prescribed.* ***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. If 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.***

[12] in Spiller case – para 18 of this judgment at page 635
[13] *n*[12]
[14] *n*[12] at page 636

> *Under these circumstances, therefore, when we consider that the purchaser was a contractor who had a number of horses and servants, and when we consider that there were sold lots of five bags, ten bales, and so on, and if we also consider that he was constantly buying the same goods during the month, we cannot come to any other conclusion but that the goods were actually bought for consumption. If the goods were bought for consumption, then, 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. The appeal is therefore dismissed with costs."*

[27] From the above, I accept that section 16 of the placaat of 1540 applies where the merchandise is for consumption by the purchaser and not for resale irrespective of the quantity. Before I determine the applicability of the above stated principle of law (prescription) in terms of section 16 of placaat of 1540, may I digress to decide on an issue raised by the parties in the statement. Which is that; which law is applicable to the parties' contract between the common law practiced in Swaziland as per the dictates of the placaat and the Prescription Act of South Africa No.68 of 1969.

Law applicable: Swaziland's Common law under section 16 of placaat or South African Prescription Act No. 68 of 1969 – conflict of laws:

[28] The general principle of law addressing the question of which law governs the terms of the contract was well articulated by **de Villiers JA** in **Standard Bank of South Africa Ltd v Efroiken and Newman 1924 AD 171** at187. His Lordships pointed out that where parties have expressly shown their intention of choice of law, that chosen law should be applied. Sometimes from reading the contract as a whole, the court could be in a position to deduce the intention of the parties on the law to be applied, that is, it could be the law of the place of where the contract was concluded (*lex locu contractus*) or where it was to be performed (*lex locu solutionis*). Where the terms of the contract are such that it is difficult for the court to

conclude on the tacit intention of the parties as to the choice of law, their Lordships quoted **Lord Esher** in **Hamlyn and Co. v Talisker Distillery & Others**(**1894 AC 202**) who articulated:

> "*If a contract is made in a country to be executed in that country, unless there appears something to the contrary, you take it that the parties must have intended that that contract, as to its construction, and as to its effect, and the mode of carrying it out (which really are the result of its construction), is to be construed according to the law of the country where it was* ***made. But the business, sense of all business men has come to this conclusion, that if a contract is made in one country to be carried out between the parties in another country, either in whole or part, unless there appears something to the contrary, it is to be concluded that the parties must have intended that it should be carried out according to the law of that other country. Otherwise a very strange state of things would arise, for it is hardly conceivable that persons should enter into a contract to be carried out in a country contrary to the laws of that country.*** *That is not to be taken to be the meaning of the parties, unless they take very particular care to enunciate such a strange conclusion. Therefore the law has said, that if the contract is to be carried out in whole in another country, it is to be carried out wholly according to the law of that country, and that must have been the meaning of the parties. But if it is to be carried out partly in another country than that in which it is made, that part of it which is to be carried out in that other country, unless something appears to the contrary, is taken to have been intended to be carried out according to the laws of that country."*(my emphasis)

[29] It is trite that due to the complex nature of contracts today, for instance parties may transact over the internet for goods manufactured not in the place of the creditor but elsewhere to be delivered in another place, away from the debtor and this may bring out a challenge to the *lex locu solutionis* approach. Fredericks[15] reveals that the tendency of the courts is to move

[15] (2006) 18 SA Merc LJ 75 at 80

away from this approach. The courts would begin to engage in a process of assignment of the law applicable. They enquire on the presumed intention of the parties failing which the centre of gravity or the seat of the contract is navigated.

[30] It must be born in mind that in the present case, it is imperative to address the question of the choice of law. What is paramount is the characteristics inherent by the two different prescription laws operating in South Africa and Swaziland. The question for the choice of law is important for a second reason. As pointed out by the parties, the oral contract of sale was concluded in South Africa. Payment to be received in South Africa and in South African currency. The plaintiff is domiciled in South Africa. On the other hand, delivery of the coal which is performance of the contract by the plaintiff was to be done in Swaziland and the defendant is domiciled in Swaziland.

Nature of the law of prescription in South Africa and Swaziland

[31] Writing on the nature of prescription law of South Africa, **Van Zyl J**[16] eloquently stated:

> "*A related question arising in this regard is whether prescription extinguishes the action or simply bars the institution of an action to enforce it. In South African law it is the former, as appears from section 10(1) of the Act which reads:*
> *Subject to the provisions of this chapter and of chapter IV, a debt shall be extinguished by prescription after the lapse of the period which in terms of the relevant law applies in respect of the prescription of such debt.*
>
> *This means that prescription, in South Africa, is a matter of substantive law and is not simply procedural, as was the case under the old Prescription Act 18 of 1943 of which rendered a right of action unenforceable without extinguishing it.*"

[16] Society of Lloyds v Rothmahn, Society of Lloyd's v llse; Society of lllyd's v llse; Society of Lloyd's v llse (5108/03, 5105/03, 8588/04) [2006] ZAWCHC; 2006(4) SA 23 © (3 March 2006) at para 30

[32] From the above and a host of other authorities, it is clear that the words "*the debt shall be extinguish*" in the Prescription Act No. 68 of 1969 of South Africa borders on substantive question. Section 16 of the 1540 placaat states of the debt "*in order to be able to found an action at law thereon"*. Obviously, these are matters of procedure. Comparing the two laws on prescription, in South Africa, the debt is completely extinct once the relevant period lapses before the creditor can lodge a claim in court. However, in Swaziland, the bar is to the effect that the creditor cannot claim the purchase price following lapse of time. The debt is kept alive as the right is not extinguished but the remedy[17].

[33] In view of the above competing rights, the question remains which law should be applied in the parties' contract. Should I find that the contract is governed by the *lex fori* (law where the parties have brought the action – Swaziland) or the *lex causae* (law of the underlying cause of action)? This question is raised because of the dichotomy in the construction of the proper law applicable. **O'Donovan J**[18] articulated:

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

[34] **Van Zyl J** *supra*, discussed comprehensively case law that dealt with the choice of law in instances where the nature of prescription differed under *lex fori* and *lex causae*. The learned judge, after citing various decided

[17] See Langerman v Van Iddekinge 1916 TPD 123 at page 125
[18] In Kuhne & Nagel AG Zurich v A P A Distributors (Pty) Ltd 1981 (3) SA 536 at 537

cases, then adopted the via media approach. This approach was well enunciated by **Schutz J** in **Laurens NO** v **von Hohne 1993 (2) SA 104.** The learned Justice posed on which law was to determine the "*quantity, nature and quality of the proof of payment*". He immediately expounded at page 116:

> *"When our law prescribes that a matter is to be decided in our Courts according to a foreign lex causae, that means the whole of the lex causae (Sperling v Sperling 1975 (3) SA 707 (A) at 721E) excepting that procedural or adjectival questions are ordinarily at least tried according to the lex fori, which in the case postulated is South African law."*

[35] His Lordship then observed on via media approach:

> *"The traditional rule has been that that lex fori characterizes according to its own law without looking further. In some cases this can lead to unfortunate results and because of that various writers, Falcombridge being an important early one, have much stirred the question. Falcombridge's approach is a via media according to which the Court has regard to both the lex fori and the lex causae before determining the characterization.*
>
> *According to hi, although the matter is one for the law of the forum, the conflict rules of the forum should be construed 'sub specie orbis', that is from a cosmopolitan or world-wide point of view, so as to be susceptible of application to foreign domestic rules.*
>
> *In doing so it will pay full attention to the "nature, scope and purpose" of the foreign rule in its context of foreign law. What the forum should do, so it is contended, is to make a provisional characterization having regard to both systems of law applicable, followed by a final characterization which takes into account policy considerations.*
>
> *The via media approach, it is contended, serves a particularly useful purpose where a foreign institution is not known to the lex fori. If no regard is had to foreign law, what is likely to ensue is that the nearest analogue of the lex fori is laid on a Procrustean bed and subjected to a process of chopping off or stretching.*
>
> *It is also contended for the via media that it tends to create international harmony and leads to the decision of cases in the same way regardless of which country's courts decide them. If one does not adopt this approach further evils may ensue…namely forum shopping and even a defendant choosing a forum whose best suit him."*

[36] Adopting the via media approach, **Chidyausiku J**[19] commented:

> *"It appears to me to be more enlightened and likely to achieve international comity. It is more amenable to the achievement of the balance of convenience and justice on the facts of any individual case."*

[19] In Coutts & Co v Ford & Another 1997(1) ZLR 440 at 445

[37] **Corbett JA**[20] had also propounded that where there is no clear authority, the court should consider where the balance of convenience and justice lies. Similarly in **Society of Llody's v Price and Lee(327/05) [2006] ZASCA 88; [2006]SCA 87 (RSA) (I June 2006)** their Lordships adopted the via media. In this case, in terms of the *lex fori* (South African law) two default judgment obtained in London had prescribed while in terms of the *lex causae* (English law) they had not. The court considered the procedural aspect of the English law of prescription and also the substantive characteristic of the South African law of prescription. It pointed out that there was a gap and the court held:

> *"At this stage of the via media approach, the court must take into account policy considerations in determining which legal system has the closest and the most real connection with the legal dispute before it…* ***The selection of the appropriate legal system must, of course, be sensitive to considerations of international harmony or uniformity of decisions, as well as the policies underlying the relevant legal rule….****[I]n my view, considerations of policy, international harmony of decisions, justice and convenience require the dilemma of the 'gap' in the present case to be resolved by dealing with the issue of prescription in terms of the relevant limitations provisions of the lex causae, the English law."*

[38] From the above persuasive decisions, it is my considered view that the case at hand would best be dealt with by closing the gap demonstrated at paras 32 to 33 of this judgment by applying the via media approach. The question is in consideration of the "*policy, international harmony of decisions, justice and convenience"* as per **Corbett JA** s*upra.* The appropriate law of prescription applicable would be that of the *lex fori.* This means that the law of prescription obtaining in Swaziland must apply. This is because prescription is procedural and thereby bars the remedy whereas the *lex causae*, prescription is substantive, rendering the debt

[20] Sperling v Sperling 1975 (3) SA 707

completely extinct. This via media approach renders international harmony as a cursory view of the judgments where the question of the choice of law was in issue on limitation points that the courts have been inclined to adopt the law of prescription which is procedural in nature. It is therefore an established principle of international law that in matters of prescription, the law applicable is one where the prescription is procedural and not substantive. The bulk of decided cases bear testimony to this principle. Forsyth writing from the South African perspective post 1969 put this position of the law as follows:[21]

> "*It was for long assumed by many, including myself, that the rules of prescription fell into the category of procedure, and, therefore, prescription was governed by lex fori. However, prior to the 1969 Act, the rules of prescription were 'weak': they simply barred the remedy; they did not extinguish the debt. The 1969 Act changed this. Now the rules were 'strong'; the debt was extinguished. This had the effect, O'Donovan J. argued in Kulne & Nagel AG Zurich v APA Distributors (Pty) Ltd of transmitting prescription into a matter of substance, not procedure, and hence governed by the lex causae."*

[39] The learned Justice in the case of **Kulne** proceeds to highlight that adopting the law which is procedural is in line with contemporary writers who are critical of the courts who fail to follow the "*Anglo-American conflict rules to* ***protect rights still in existence in a foreign country***.[22]*"* as per **Kulne** case. (my emphasis) In other words prior 1969, the law on prescription in South Africa was like the law in Swaziland, *viz*., procedural. Where there was the question of the choice of law, the court followed the *lex fori*. However, as soon as the position changed from procedural to substantive by virtue of Act No. 68 of 1969, the court applied *lex causae.* Again **O' Donovan J** correctly observed:

[21] Forsyth, "Conceptual Problems in Choice of Law" Private International Law, 5 Ed page 85
[22] Kuhne & Nagel AG Zurich v APA Distributors (Pty) Ltd 1981(3) SA 536 at 539

> *"[I]n a case where the statute of limitation 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"*

[40] The position described by **O'Donovan J** obtains in Swaziland. The limitation law has a shorter period than that of the *lex causae* (South Africa). For these reasons I am fortified in so finding that the *lex fori* limitation law must apply.

Section 16 of 1540 Placaat – Is it sustainable in the case postulated?

[41] Having demonstrated above that section 16 of 1540 placaat is applicable in Swaziland and it governs the parties' contract on the issue at hand; and that it governs articles purchased and delivered for consumption and not for wholesale, irrespective of its quantities, I now analyse the present matter with a view to ascertaining whether this principle would sustain under the circumstances of the present matter.

[42] It is common cause that summons serving before us were served upon the defendant as per paragraph 2.19 of the parties' statement on 22nd November 2012. It is undisputed, as reflected under paragraph 2.20, that there were various dates upon which each debt was due. It is further undisputed as per paragraph 2.8 of the statement that the merchandise involved was for consumption (coal for use in the defendant's boilers). A cursory glance of the dates viewed against the date of service of summons (22nd November 2012) shows that each debt has prescribed as per the placaat discussed herein.

[43] That as it may, it is however common cause that this matter is convoluted with a chequered history as clearly evident from the statement. Before I say anything further it is apposite to regurgitate the reason behind the

principle of prescription. **Chidyausiku J** in **Coutts and Co. v Ford and Another 1977 (1) ZLR 440** at 445 authored:

> "*The policy underlining the law of prescription is that there should be finality to litigation and* ***that the law should not assist the tardy litigant****. In my view, this same policy does not demand the non-suiting of a foreign litigant approaching our court on a cause which his law regards as good and sustainable* ***and who according to his own law is acting expeditiously and within the prescribed period for acting."*** (my emphasis)

[44] Following the above *orbiter dictum*, the question for determination is whether the plaintiff was "*tardy*" or failed to act "*expeditiously and within the prescribed period for acting*" as per **Chidyausiku J** *supra*. The parties' statement reads:

> "*2.14 The plaintiff instituted action against the defendant from the KwaZulu Natal High Court, Durban ("the Durban Court") under case number 10292/2011 (The ("the Durban action"), in which it claimed payment of the sum of E12 286 900.00 together with interest thereon at the South African legal rate (then 15.5% per annum). This Honourable Court is referred to the summons and particulars of claim commencing at page 118 of the bundle."*

[45] Turning to the summons at page 118 of the bundle, 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.

[46] It is therefore against this date (14th October 2011) that this court is to ascertain whether the debt was, according to **Wessels J** in **Mostert's** case as quoted at paragraph 18 of this judgment, kept "*green*". Put differently, could it be said that under this circumstance the debt had been reasonably forgotten by the defendant? For this answer, I resort to the dictates of

section 16 of 1540 placaat by Emperor Charles V which provides that a claim for consumption or consumables must be taken up by means of legal processes within a period of two years except where there is evidence of the debt, that is, where there is acknowledgement of debt or the creditors are legatees or heirs. I guess it would be an exception as well where the debtor was absent from the *lex fori* even though the placaat is silent on this.

[47] Turning to the period within which the debt fell due, the parties pointed out as per their statement:[23]

> *"2.20 With regard to the amounts claimed by the plaintiff from defendant –*
>
> *2.20.1. the sum of E7 822384.60 (annexure POC1 to the particulars of claim) fell due for payment by no later than 31st August 2009;*
>
> *2.20.2. of the amount of E2408 846.15 (annexure POC2 to the particulars of claim –*
>
> *2.20.2.1. an amount E2 079 399.80 fell due for payment by no later than 31 October 2009;*
>
> *2.20.2.2. the balance, in the amount of E1,329.446.20 fell due for payment by no earlier than 30 November 2009;*
>
> *2.20.3. the amount of E2 055 670.50 (annexure POC3 to the particulars of claim) fell due for payment by no earlier than 28th February 2010."*

[48] Obviously from the above, it is clear that the plaintiff instituted legal actions 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. However, as the action to be taken by the creditor refers to legal actions, it is trite that public holidays and weekends must be discounted on the basis that no legal process could be served during this period. It is my considered view therefore, that the claim by the plaintiff could not be said

[23] see para 2.20 of the Statement of Agreed Facts

to have prescribed as plaintiff instituted legal processes within the stipulated period, thereby keeping the debt alive or *green* as it were, not to be forgotten, even though the debt was pursued in the wrong forum.

[49] The defendant has urged this court to find that the contract is regulated by both 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[24]. 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 were first served upon the defendant on 14th October, 2011.

[50] In the final analysis the following orders are entered:

1. The defendant's special pleas are dismissed.

2. Defendant is ordered to pay costs, including cost of senior counsel.

[24] Forsyth, n[22] page 84

M. DLAMINI J

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I agree **S. B. MAPHALALA PJ**

For Plaintiff: **A. Lamprecht instructed by Henwood & Company**

For Defendant: **SC Vivian instructed by R.J.S. Perry**

This is the majority judgment by M. Dlaminin J and my brother S.B. Maphalala PJ. My brother M. Mamba J is dissenting.