91/84

Case No. 386/82

MARIA JOHANNA KILROE-DALEY

and

BARCLAYS NATIONAL BANK LTD.

385/82

mp

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

MARIA JOHANNA KILROE-DALEY — Appellant (2nd Defendant in Court *a quo*)

and

BARCLAYS NATIONAL BANK LTD — Respondent (Plaintiff in Court *a quo*)

CORAM: RABIE, CJ, JANSEN *et* NICHOLAS, JJA
GALGUT *et* HOWARD, AJJA

HEARD: 22 May 1984

DELIVERED: 4 September 1984

J U D G M E N T

GALGUT, AJA,

The respondent, a registered banking

institution ....

institution, was the plaintiff in the Court a quo. I shall refer to it as "the Bank". Dodo Shipping Company (Proprietary) Limited was one of its customers. It had been granted extensive overdraft facilities. I shall refer to it as "Dodo".

Appellant (second defendant in the Court below) had on 30 April 1973 (I quote from paragraphs 8 and 9 of the Bank's declaration) -

8.

"
.... signed a document in terms whereof she bound herself as surety in solidum and co-principal debtor for all debts or other obligations of whatever nature, both present and in future, from whatever cause arising, which may be or become due, owing or payable by the company (Dodo) to the plaintiff. A copy of the aforesaid document is annexed hereto, marked 'C' ...."

9.

"
To secure her indebtedness to the plaintiff, arising out of annexure 'C' hereto but limited to a sum not exceeding R70 000,00 together with interest thereon, the second defendant hypothecated the immovable property registered in her name in terms of deed of transfer

No T.30010/1963

No T.30010/1963 to the plaintiff under first mortgage bond No B.39348/1973".

The date of the above bond is 18 October 1973. A company, Paardekraal Ondernemings (Eiendoms) Beperk (Paardekraal) had also bound itself to the Bank as surety in solidum and co-principal debtor in respect of Dodo's liability. Paardekraal's liability was limited to R40 000.

As at 31 July 1974 Dodo's indebtedness to the Bank was R228 273,37. The Bank on that date demanded payment of that sum from Dodo, the appellant and Paardekraal.

Dodo was unable to pay its debts and it was wound up by the Court in terms of section 344(f) of the Companies Act 61 of 1973. The date of the final winding up order is 15 October 1974. On 1 April 1976 the Bank filed a claim against Dodo (in liquidation). The claim was accepted by the liquidator in an amount of R210 299,37.

The final liquidation and distribution account of Dodo (in liquidation) was confirmed by the Master

of ....

of the Supreme Court on 9 August 1978. Plaintiff duly received its dividends on its proved claim. No further dividends are payable.

Thereafter the Bank caused summons to be issued against Paardekraal as first defendant and appellant as second defendant. The amount claimed from appellant was R51 646,67 plus interest thereon. How this amount was arrived at is not material to the issue before us. There was also a claim for an order declaring the property, mortgaged by the appellant, executable. The summons was served on appellant on 31 March 1980. The importance of the respective dates will appear later.

Appellant and Paardekraal separately entered appearance to defend the action. The Bank then applied for summary judgment against each of them. Summary judgment was not granted. The Bank then filed its declaration. The relevant allegations against appellant are in paras. 8 and 9 thereof - as to which, see above.

Appellant in a special plea alleged that the due date of Dodo's liability to the Bank was 31 July 1974; that in the normal course of events the Bank's claim against Dodo would have become prescribed by 31 July 1977; that inasmuch as her liability as surety and co-principal debtor was accessory to Dodo's liability, the claim against her would also normally have become prescribed by that date; that by reason of the provisions of sub-secs. 13(1)(g) and (i) of the Prescription Act 68 of 1969 (the Act) the completion of the period of prescription had been delayed till a date not later than one year after 9 August 1978; that, as the summons was served on appellant after that date, viz, on 31 March 1980, the Bank's claim against her had become prescribed.

It is convenient to set out at this stage certain relevant statutory provisions. The relevant sections of the Act read:

> 11. Periods of prescription of debts.
> "The periods of prescription of debts shall be the following:
>
> (a) ....

(a) thirty years in respect of -

(i) any debt secured by mortgage bond;

(ii) any judgment debt;

(iii) ....

(iv) ....

(b) ....

(c) ....

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

12. When prescription begins to run

"(1) Subject to the provisions of sub-sections (2) and (3) prescription shall commence to run as soon as the debt is due." (Sub-sections (2) and (3) are not relevant.)

13. (1) Completion of prescription delayed in certain circumstances - "If ....

(a) ....

(b) ....

(c) ....

(d) ....

(e) ....

(f) ....

(g) the debt is the object of a claim filed against the estate of a debtor who is deceased or against the insolvent estate of the debtor or against a company in liquidation or against an applicant under the Agricultural Credit Act, 1966 (Act No 28 of 1966), or the Farmers' Assistance Ordinance, 1962 (Ordinance No 11 of 1962, of the territory of South-West Africa); or

(h) ....

(h) ....; and

(i) the relevant period of prescription would, but for the provisions of this sub-section, be completed before or on, or within one year after, the day on which the relevant impediment referred to in paragraphs (a), (b), (c), (d), (e), (f), (g) or (h) has ceased to exist,

the period of prescription shall not be completed before a year has elapsed after the day referred to in paragraph (i)."

Section 408 of the Companies Act reads:

408. Confirmation of account -

"When an account has lain open for inspection as prescribed in s.406 and -

(a) no objection has been lodged;

(b) ....) [These sub-sections deal with the procedure when objections are lodged]

(c) ....)

the Master shall confirm the account and his confirmation shall have the effect of a final judgment, save as against such persons as may be permitted by the Court to re-open the account after such confirmation but before the liquidator commences with the distribution."

The Bank in its replication denied "that sec.13(1)(i) has any application to the instant matter" and went on to aver that "its claim against Dodo will, in terms of section 11(a) of Act 68 of 1969, only become prescribed

on ....

on the 9th day of August 2008."

At the commencement of the trial in the Court a quo the minutes of the pre-trial conference were handed in. These reflect that the above facts and dates were common cause. The further relevant paragraphs read:

> "3. The trial will proceed against second defendant only on the question whether plaintiff's claim has prescribed or not.
> 4. It is recorded that plaintiff has settled its claim against first defendant in the sum of R30 000,00 (Thirty Thousand Rand).
> 5. In the event of the Honourable Court holding that plaintiff's claim has not prescribed plaintiff shall be entitled to judgment against second defendant; this judgment shall be for the amount of plaintiff's claim as set out in its declaration less the sum of R30 000,00 received by plaintiff from first defendant on 10 June 1982."

It is not disputed that the due date of the liability to the Bank was 31 July 1974 and that, in terms of sec. 12(1) of the Act, prescription commenced to run from that date.

The learned trial Judge having considered the provisions of sec. 408 of the Companies Act and of

sec.11(a)(ii) of the Act went on to say in his reasons for judgment:

> "It follows in my view that when the final liquidation account was confirmed in this matter by the Master on 9 August 1978 the Master's confirmation had the effect, in regard to the account as a whole, of a final judgment.
>
> The further question which was also raised was whether a final judgment was necessarily a judgment of a court.
>
> In my view it is clear that the legislature intended, by the use of the words 'final judgment' to mean that it should be equated to a judgment of a court of law, and that it should have precisely the same effect."

He accordingly held that the applicable period of prescription was that set out in sec.11(a)(ii), viz, 30 years and hence the Bank's claim had not become prescribed. He then gave judgment in favour of the Bank as prayed less R30 000 paid by Paardekraal. The appeal is against the whole of the judgment and order.

From now on, unless otherwise stated, all references to sections, will be to sections of the Prescription

Act. ....

Act.

The facts are not in dispute. The issues before this Court are whether appellant's contention that, by reason of sub-secs. 13(1)(g) and (i), the Bank's claim had become prescribed within one year after 9 August 1978, is correct or whether the relevant period of prescription is 30 years either in terms of sec. 11(a)(i) or in terms of sec. 408 of the Companies Act read with sec.11(a)(ii).

Sec. 13(1) was considered in this Court in Murray and Roberts Construction (Cape) (Pty) Ltd. v Upington Municipality 1984(1) SA 571 (A). At page 578 *et seq* GROSSKOPF, AJA, who delivered the judgment of the Court, discussed certain philosophical explanations justifying extinctive prescription. There is no need to repeat what is there said. See also the remarks of MARAIS, AJA, in Cape Town Municipality v Allie N O 1981(2) SA 1(C) at p 5. At p579 B of the Murray and Roberts report it is said:

> "It is accepted in the Act that there are circumstances in which it would be unfair to require of the creditor that he institute

proceedings....

> proceedings within the time normally allowed. This unfairness arises in the main where it is impossible or difficult for a creditor to enforce his rights within the time limit. (See De Wet (op cit at 122-126).)"
> (The work here referred to is De Wet Opuscula Miscellanea).

The learned Judge went on to say that there may be times when it is impossible or difficult for a creditor to recover his debt and that in such cases the Act comes to his aid. He then refers to sec.13(1)(g) and says (see p579 G) -

> "There may be greater or lesser difficulty in suing debtors of the type mentioned in this subsection. It seems clear, however, that a part of its underlying ratio is also that, in the circumstances mentioned, the creditor is already taking appropriate steps to recover his debt and should not be required to institute legal proceedings merely to interrupt the running of prescription."
> (The underlining is my own.)

Secs. 353 and 358 read with 359(1) of the Companies Act, to a greater or lesser degree contain provisions which could result in the creditor being prevented from instituting

or ....

or continuing with civil proceedings against a company. Furthermore from a practical point of view (I have not overlooked the provisions of secs.359(2) of the Companies Act) it would in the ordinary course of events serve a creditor no good purpose to institute action against a company against which the Court has made or is about to make a winding-up order on the ground that it is unable to pay its debts. I do not think that the difficulties created by the above sections or the futility of instituting action constitute the "impediment" mentioned in sec.13(1)(i). I say this because the words in sec.13(1)(g) "the debt is the object of a claim filed" must refer to a claim already filed against an estate or a company in liquidation. This would appear to be how this Court interpreted sec.13(1)(g). See the words underlined by me in the above quotation from the Murray and Roberts case, supra. Hence, although this section is far from clear, it would seem that the impediment commences when the creditor files his claim.

The ....

The next question for decision is (see sec.13(1)(i)) when does the "relevant impediment" cease to exist? No difficulty arises in this regard in those cases mentioned in 13(1)(a) to (f). For example, it ceases in sub-sec (a), when the creditor becomes of age, in (b) when the debtor returns to the Republic, in (c) when the marriage ends. Counsel were agreed that in respect of a claim filed against a company in liquidation the impediment ceases to exist if and when it is rejected. They were also agreed that when such a claim has been accepted the impediment ceases to exist and that the confirmation of the account is the acceptance thereof. I proceed to deal with this aspect of the appeal on that basis.

The debt owing by Dodo was due on 31 July 1974. In the ordinary course of events that debt would have become prescribed by 31 July 1977 (see secs. 12(1) and 11(d)). The Bank's claim was filed on 1 April 1976. As appears from what has been said above the "impediment" brought about by such

filing ....

filing delayed the running of prescription. In terms of sec.13(1)(i) that delay continued for one year after the impediment ceased to exist which was one year after 9 August 1978, the date on which the account was confirmed. It follows that unless the Bank's claim against Dodo is governed by sec.11(a)(i) or 11(a)(ii) it became prescribed by 9 August 1979.

For reasons which will appear later, it is convenient to deal with the argument of counsel for respondent first. In seeking to support the judgment *a quo* he submitted:

A. That appellant as a co-principal debtor, had executed the mortgage bond to secure her liability to the Bank and that by reason of the provisions of sec.11(a)(i) the prescriptive period applicable is thirty years; and

B. That the Bank had filed its claim against Dodo (in liquidation) on 1 April 1976, i.e. before 31 July 1977;

that ....

that by reason of sub-secs. 13(1)(g) and (i) the ordinary period of prescription had been extended; that the liquidator's account had been confirmed by the Master on 9 August 1978; that in terms of sec.408 of the Companies Act "the confirmation had the effect of a final judgment"; that it followed that the prescriptive period was thirty years as provided in sec.11(a)(ii).

Counsel at the commencement of his argument stated that he preferred to address the Court on submission B first and proceeded to do so. I find it more convenient to discuss submission A first.

<u>Ad A above. Is sec.11(a)(i) applicable?</u>

Counsel urged that the words "any debt secured by mortgage bond" are cast in the widest terms; that appellant had bound herself as a surety and co-principal debtor; that that was a contract separate from Dodo's contract and that there was thus no reason to exclude the

debt ....

debt of a surety and co-principal debtor secured by a mortgage bond from the provisions of the wide terms of sec.11(a)(i).

It becomes necessary to decide what the debt was which appellant secured. The liability which she under= took is set out in paragraph 8 of the declaration (see above). She bound herself as surety and co-principal debtor. It is correct that a contract of suretyship is a separate contract from that of the principal debtor and his creditor. It is, however, accessory to the main contract - see Corrans and Another v Transvaal Government and Coull's Trustee 1909 TS 605 at p612. See also Union Government v van der Merwe 1921 TPD 318 at p321 where WESSELS, JP said:

> "The legal scope of the surety's contract is identical with that of the principal debtor - accessorium sui principalis naturam sequitur. The surety undertakes the same obligation as the debtor, and undertakes to perform this same obligation so soon as the debtor, when called upon, fails to perform it. Troplong, Caut: 46. It is true there are two contracts, the one between the creditor and the debtor and the other between the creditor and the surety. But the

contract ....

> contract between the creditor and the surety is not an independent contract with an obligation of its own but an accessory contract with the very same obligation that exists between the principal debtor and the creditor. Although it is true that the suretyship contract may be entered into by an agreement different to that of the principal contract, yet immediately the surety agrees to become such, whether by a written or a verbal agreement, then his contract with the creditor is of the same nature as that of the principal debtor, because it becomes accessory to it, or is, as it were, absorbed by it."

At page 322 the learned Judge says:

> "The present case is, however, stronger for the surety has signed as surety and co-principal debtor. We must give some meaning to the words 'co-principal debtor'. That the addition of these words operate as a renunciation of the benefits of the surety is clear, but they have a still greater force. The addition of these words shows that the surety intends that his obligation shall be co-equal in extent with that of the principal debtor: or otherwise expressed, that his obligation shall be of the same scope and nature as that of the principal debtor."

The above statement of the Law was accepted in

Mahomed v Lockhat Bros and Co Ltd 1944 AD 230 at p238

where TINDALL, JA said:

"Now ....

"Now the defendant is a surety but he bound himself under the compromise as co-principal debtor, and therefore his obligation under the compromise in respect of the due payment of the 24 monthly instalments is 'of the same scope and nature as that of the principal debtor' (see Union Government v van der Merwe 1921, TPD 318, per WESSELS, JP, at p322). Accordingly the liability of the defendant in the present proceedings depends on the obligation of the debtor under the compromise agreement."

It follows from what has been said above that a surety and co-principal debtor does not undertake a separate independent liability as a principal debtor; the addition of the words "co-principal debtor" does not transform his contract into any contract other than one of suretyship - see also Ideal Finance Corporation v Coetzer 1969(4) SA 43 (O) at p44C and the cases there cited.

The appellant executed a mortgage bond. In so doing she did not enter into a contract separate from her contract of suretyship; she merely furnished security for her indebtedness. This appears quite clearly from what is said in paragraph 9 of the declaration. I pause to say

that ....

that I have studied the deed of suretyship and the bond. Paragraphs 8 and 9 of the declaration correctly reflect what appears in those documents. As we have seen, appellant's indebtedness is accessory to that of the principal debtor, Dodo. It is not a separate independent liability as a principal debtor. It was that accessory and dependent debt which was secured by the bond. It follows that if the principal debt, i.e. Dodo's debt, became prescribed or for any other reason ceased to exist, the appellant's debt also became prescribed and ceased to exist. In the result the Bank cannot invoke sec.11(a)(i).

Ad B above. Do the words "shall have the effect of a final judgment" in sec.408 of the Companies Act mean that the confirmation of the liquidation account is tantamount to a "judgment debt" as stated in sec.11(a)(ii)?

Sec. 3(2) of the Prescription Act No 18 of 1943 provided that:

"(2) The periods of extinctive prescription shall .... be the following:-

(e) ....

(e) thirty years in respect of

(i) ....

(ii) judgments of a court of law for payment of money, or for specific performance, or other such judgments which require further action by the person in whose favour they have been given, in order to secure compliance therewith."

Sec.11(a)(ii) merely provides that the "period of prescription of debts" shall be "thirty years in respect of "any judgment debt."

Having regard to the 1943 provisions it must be accepted that the words "judgment debt" do not mean only a money debt. They would include judgments e.g. for the delivery of property or for specific performance. This also is the view of the learned authors (DE WET AND YEATS) of Kontraktereg en Handelsreg 4th Edition at p261 where in a footnote they say:

> "Art.11(a)(ii). Ook hierdie bepaling bring niks nuuts nie. 'n Vonnisskuld hoef natuurlik nie 'n geldskuld te wees nie."

That ....

That means that judgment debt in sec.11(a)(ii) refers, in the case of money, to the amount in respect of which execution can be levied by the judgment creditor; that in the case of any other debt steps can be taken by the judgment creditor to exact performance of the debt i.e. delivery of the property or performance of the obligation. A further feature of a judgment debt is that the judgment is appealable.

This brings me to the question of what is meant in sec.408 of the Companies Act (to which I shall hereafter refer as sec.408) where it is said the confirmation of the account by the Master "shall have the effect of a final judgment."

Counsel for the respondent urged that the account (the relevant page thereof appears at p195 of the record before us) reflected that the amount of the Bank's claim was R210 299,37; that the liquidator had accepted the claim in that amount; that the Master had confirmed the

account which meant that he had confirmed that the amount due to the Bank was the said figure; that that confirmation had the effect of a final judgment and accordingly that was a judgment debt as envisaged by sec.11(a)(ii). He went on to say that the dividend payable to the Bank in terms of the account was merely the result of a mathematical calculation arrived at by dividing the amount available for distribution amongst the creditors of Dodo (in liquidation).

In support of the above submissions counsel referred to Executors Dative of R Masterman vs Morris, Strachan & Co and Solomon Niekerk 8 N L R (1887) 59. At p61 CONNORS, CJ who delivered the majority judgment of the Court is reported as saying:

> "With reference to the question of prescription, his Lordship observed that our Law (14 of 1861), s.2), which was referred to, excepted from prescription, a claim in respect of which there was a judgment or order of a Court in the Colony or elsewhere. In this case, there was clearly an Order, when the Court in East Griqualand confirmed the account which involved the sums that were the subject of the action."

(The ....

(The Court was there dealing with the confirmation of an account in an insolvent estate). No reasons are given by CONNORS, CJ, for his conclusion.

In Central African Building Society v Pierce, N O 1969(1) SA 445 (R A D), the liquidator (Pierce) of a company in liquidation accepted a creditor's claim based on a mortgage bond, for compound interest, up to the date of liquidation but refused such interest thereafter. Interim distribution accounts had been confirmed. Thereafter the creditor sought to challenge the liquidator's decision. BEADLE, CJ, who delivered the Court's judgment, having discussed the legal principles relating to a claim for compound interest after the date of liquidation went on to say at p455:

> "I turn now to deal with the third question posed by the learned Judge, that is, the effect of the confirmation of the interim distribution accounts. There is no doubt that under the provisions of sec.250 of the Companies Act, Chap.223, the confirmation of a distribution account has the effect of final sentence; it has precisely the

same ....

> same effect as a judgment of a court, and, before another court can go behind such a judgment, application must be made to have it set aside."

In MARS - The Law of Insolvency (7th edition by Waters and Jooste) at p406 it is said:

> "Confirmation of an account, being in the nature of a judgment, may be regarded as an order for the purposes of the law of prescription."

The authors merely quote the Masterman case and the Central African Building Society case as authority for their statement.

I am of the view that to the extent that the statement by CONNORS, CJ, purports to say that the confirmation of a trustee's account by the Court (as the law was at that time) was, in respect of each item in the account, tantamount to a judgment of a court, and so affects the running of prescription it is not a correct statement of the law. My reasons will appear later.

As to the above statement from the

Central African Building Society case, it does not say, as does the Masterman case, that prescription runs anew from the date of the confirmation of the account. BEADLE, CJ, was there concerned with whether the creditor could, in regard to the already confirmed accounts, go behind the accounts. It was held that he could not do so. The learned Judge, when dealing with the "third question", was not concerned with the question whether confirmation of the account invests each claim with all the attributes of a judgment of a Court. Moreover he was not concerned with the question of prescription. All he was concerned with was whether the confirmation of the interim accounts rendered those accounts final. As will be seen shortly there are decisions in our Courts which hold that confirmation of an account renders it final in the sense that, like a judgment of a court, it will only be set aside in cases where restitutio in integrum would be granted. It follows that the authors of Mars are not justified in citing the Central African Building Society case as authority

for ....

for the statement that "confirmation of an account, being in the nature of a judgment, may be regarded as an order for the purposes of the law of prescription."

Counsel referred us to cases in which our Courts were asked to order the re-opening of a liquidator's account or a trustee's account. In each of those cases the wording of the relevant section was similar to the wording of sec.408. In those cases the learned Judges say the confirmation of the account has the effect of a judgment of a court. See for e.g. S A Clay Industries (Pty) Ltd v Katzenellenbogen N O 1957 (1) SA 220 (W) at 223H to 224F and the cases there cited , and also Rulten NO vs Herald Industries (Pty) Ltd 1982(3) SA 600(D) at p604F. These statements take the matter no further. They do not purport to say that the confirmation of the account elevates each item in the account to a judgment of a court.

The above submissions by counsel cannot be sustained for the reasons set out hereunder.

A ....

A judgment debt is the amount or subject matter of the award in the judgment. Execution can be levied to recover the judgment debt. As will be seen later it cannot be suggested that the words in sec.408, (the Master's) "confirmation shall have the effect of a final judgment", enable a creditor whose claim has been proved and accepted to levy execution for the amount of his proved claim or even for the dividend awarded to him in the confirmed account. In the present case the Bank could not have proceeded to execution for payment of the sum of R210 299 (less of course the dividend) nor could it so proceed in the future. I have not overlooked the fact that if in terms of an account a creditor is liable to contribute and fails to pay the amount of his liability the liquidator is empowered to issue a writ of execution. This is only so because sec.118(1) of the Insolvency Act 24 of 1936 specially provides that this can be done. (It will be remembered that sec.339 of the Companies Act provides that, in a winding up of a company unable to

pay ....

pay its debts, the provisions of the Insolvency Act shall apply *mutatis mutandis.)* The very fact that there is such a provision indicates that without it execution could not have been levied.

In the case of a judgment debt the judgment is as I have stated appealable. Sec.408 provides that once the account has been confirmed it may only be re-opened by such persons as may be permitted by the Court so to do. We were referred to decisions in our Courts in which application was made to have the account of a liquidator (or trustee in insolvency) re-opened. The principle which runs through all these cases is that an applicant must show grounds for *restitutio in integrum* such as *justus error* or *dolus* before a Court will order the re-opening of a confirmed account. See *S A Clay Industries Ltd v Katzenellenbogen N O and Another* 1957(1) SA 220 (W) at pages 223-224 and the cases there cited. See also HENOCHSBERG, *On the Companies Act* (Third edition) at p709. I am of the view that the fact that execution cannot

be ....

be levied in respect of the amount allowed in a confirmed account; that execution against a contributory can only be levied becuase of an authorising provision; that an appeal does not lie in respect of an account as a whole (which means there is no appeal in respect of an individual item therein) indicates that the items in an account are not elevated to the status of judgments.

I am also of the view that if one has regard to other relevant sections of the Companies Act, sec.408 cannot be interpreted to mean that individual items in a confirmed account have the effect of a final judgment.

A liquidator has to lodge accounts within prescribed periods; he has to advertise that an account (be it the first or a later account) is lying for inspection; he has to give each proved creditor notice that an account is lying for inspection; periods for lodging objections are fixed and if an objection is overruled the objector can approach the Court for relief. See secs.403, 406, 407 and

408 (b) and (c) of the Companies Act. It may well happen, after the first account has been confirmed, that additional facts come to the liquidators' notice. If, as is my view, the whole account is, after confirmation, final, the liquidator cannot re-open it. This would not preclude him from, in his later account, reducing or increasing a creditor's claim or increasing or reducing a creditor's contribution. He will probably have to make the necessary mathematical adjustments in the amounts to be paid or collected. It could hardly be said that the items in the first account were equivalent to judgments.

Sec.403 of the Companies Act details the matters which must appear in an account. At pages 1026-1027 of HENOCHSBERG, sup.cit., there appear details of the essential contents of an account. The account must reflect a record of all receipts from monies collected, of proceeds of assets realised, details of assets hypothecated or subject to other security and many other matters. It is inconceivable that

the ....

the confirmation of the account means that each item therein has the effect of a final judgment.

It follows from what has been said above that I am of the opinion that the words (the Master's) "confirmation shall have the effect of a final judgment" do not give each item in the account the quality of a judgment of a court. They mean that, once the Master has confirmed an account, after objections if any have been dealt with, his confirmation of that account is final and it cannot be re-opened save where a Court authorises the re-opening. Such a provision is necessary. See in this regard what was said by KUPER, J in the S A Clay Industries case sup.cit at p224.

> "It must be remembered that the whole machinery of the Act is directed towards a speedy liquidation and distribution of the assets of an insolvent estate. It is for that reason that the section precludes the re-opening of an account when a dividend has been paid under the account. After confirmation and before the payment of a dividend the aggrieved person must show something more than ignorance and prejudice: he must show that this failure to object has been induced by justus error or by fraud."

It follows from what is said above that the Bank's claim against Dodo became prescribed within one year from 9 August 1978. Hence the claim against appellant also became prescribed on that date.

Heads of argument were filed in terms of Rule 8 of the Rules of this Court. In those heads the matters dealt with above were canvassed and the appeal was conducted, in the main, on that basis. However, at the hearing of the appeal, Counsel for the appellant (he did not draw the original heads) handed in additional heads. In support of these heads he relied on Rand Bank Ltd vs de Jager 1982(3) SA 418(C). In that case each of two sureties bound himself as surety and co-principal debtor for the principal debtor's indebtedness to the creditor - Rand Bank Ltd. One of these was de Jager. The creditor sued the principal debtor and the other surety and obtained judgment against both of them. This of course meant that as against them the period of prescription was thirty years. Thereafter, after a lapse

of more than three years from the due date of the principal debtor's liability, the creditor sued de Jager. He pleaded that his contract was a separate contract and his liability had become prescribed. The creditor maintained that inasmuch as de Jager's contract was accessory to and of the same scope and nature as that of the principal debtor the relevant period of prescription applicable was, by virtue of the judgment, thirty years. The Court, however, held that the fact that a judgment had been taken against the principal debtor, did not mean that the prescription period of thirty years applied to de Jager's liability. Hence, so submitted appellant's counsel before us, even if the Bank's claim in the present case became a judgment by virtue of the Master's confirmation of the account, appellant's debt nevertheless had become prescribed in three years, i.e. by 31 July 1977 or within one year from 9 August 1978.

As stated above, by reason of the way in which the appeal was argued before us, the matters discussed

earlier ....

earlier in this judgment had to be decided. Because of the conclusions arrived at above it is unnecessary to decide whether the last submission by appellant's counsel is correct. I hasten to say that nothing in this judgment must be read to mean that this Court agrees or disagrees with what is said in Rand Bank Ltd v de Jager cited above.

In the result the appeal must succeed. It is, however, necessary to say something about the costs. As stated earlier, two abortive applications for summary judgment were launched, viz., one against each of the defendants in the trial. All the papers, including the affidavits, relating to these applications were included in the record before us. Counsel for the appellant correctly conceded that these documents should not have been included in the record. Counsel also conceded that save for p195, all the documents in volume three of the record should not have been included. The appellant is not entitled to any costs relating to the unnecessary

documents. In order to assist the taxing master I will, in the order, detail the relevant pages.

1. The appeal is allowed with costs save that such costs are not to include any costs occasioned by the inclusion in the record of pages 9 - 12; 31 - 34; 52 - 64; 143 - 194; 196 - 201.
2. The costs occasioned by the employment of two counsel are allowed.
3. The order of the Court a quo is set aside and there is substituted therefor an order reading:

> "Plaintiff's claim against second defendant is dismissed with costs."

O GALGUT AJA

RABIE, CJ)
JANSEN, JA)
NICHOLAS, JA) Concur
HOWARD, AJA)