magistrate. Did the magistrate misdirect himself in any material respect? Or is the sentence so severe as to cause a sense of shock? The magistrate, in his comments preparatory to passing sentence, mentioned most if not all the relevant factors and substantially correctly described the proper approach to the question of sentence. But I am satisfied upon consideration of his reasons for sentence in their entirety that, when applying the principles which he correctly enunciated, he gave excessive weight to the factors of deterrence, public expectations regarding punishment of one convicted of a serious offence and prevalence of this type of offence, but wholly insufficient weight to other factors, more especially to the factor that appellant did not possess the firearm for evil or unlawful purposes. Important as the factors of deterrence, public expectations and prevalence of a particular offence undoubtedly are, they must not be permitted to weigh so heavily as to negate other factors which lessen the gravity of the offence in the particular circumstances of the case before the court. (See *per* JANSEN JA in *S* v *Matoma* 1981 (3) SA 838(A) at 842H-843A.) The magistrate clearly regarded this case as one in which an exemplary sentence should be imposed "wat as voorbeeld sal dien en wat afskrikkingswaarde sal hê" and in that context concluded that the case fell within the category of cases which required that the offender necessarily undergo a period of imprisonment. He also made pointed reference in that context to the many crimes committed by the use of firearms possessed by persons not licensed to possess them—a factor hardly to be taken into account against the appellant personally, in the light of the magistrate's finding that he possessed the firearm not for unlawful or nefarious purposes. What has to be guarded against when exemplary sentences are imposed (concerning which see *S* v *Khulu* 1975 (2) SA 518 (N) at 521-2) is the danger that excessive devotion by a judicial officer to furtherance of the cause of deterrence may so obscure other relevant considerations as to result in very severe punishment of a particular offender which is grossly disproportionate to his deserts. (See also *S* v *Christodoulou; S* v *Savides; S* v *Temple; S* v *Zwyssig* 1979 (3) SA 523 (A) at 536E-F.)

This appears to me to be a case in which the failure properly to balance against the gravity of the offence in general the several factors serving to lessen such gravity in regard to the appellant on the facts of this particular case, led to the imposition of an excessively severe sentence. The Legislature has provided in the Act for a sentence of imprisonment for a period not exceeding two years, or a fine not exceeding R1 000, or both, in respect of the offences of which the appellant has been convicted. Both the public interest and the need to do justice to the appellant would be served by the imposition of a fine, severe enough to represent real punishment but not so severe as to render the option of a fine illusory so far as the appellant is concerned; and, in addition, a wholly suspended sentence of imprisonment. I cannot find any warrant, in the particular circumstances of the case, for a sentence requiring the appellant to serve a term of imprisonment without the option of a fine.

The appeal is allowed. The sentences imposed by the magistrate are set aside and there is substituted therefor the following sentence in respect of both offences, treated as one for purposes of sentence:

"A fine of R350, or six months' imprisonment; and, in addition, six months' imprisonment suspended for three years on condition that the accused is not convicted of any offence of contravening s 2 or s 36 of Act 75 of 1969, committed during the period of suspension".

WESSELS JA and TROLLIP AJA concurred.

Appellant's Attorneys: *H R McLaren,* Johannesburg; *Webber & Newdigate,* Bloemfontein.

JOINT LIQUIDATORS OF GLEN ANIL DEVELOPMENT CORPORATION LTD (IN LIQUIDATION) v HILL SAMUEL (SA) LTD

(APPELLATE DIVISION)

1981 *September* 17, 25 WESSELS JA, CORBETT JA, TRENGOVE JA, HOLMES AJA and GALGUT AJA

Insolvency—The creditors—Secured creditor—Act 24 of 1936 s 88—"Debt"—Ordinary meaning is a firm obligation to pay whether now or later—A conditional liability not a debt—"Debt" is used in the ordinary sense—Respondent entering into a deed of suretyship in respect of liability of GS Company—GA company indemnifying respondent in 1972 against loss which it might suffer under such suretyship—Mortgage bonds securing indemnity lodged for registration in September 1976—Respondent called upon to pay liability of GS company during February-May 1977—GA company provisionally liquidated in February 1977—Respondent claiming under indemnity and relying on security of mortgage bonds—Debt under the indemnity incurred only when respondent required to pay under its suretyship—Accordingly such debt not incurred more than two months prior to lodging of bonds for registration—Preference afforded by bonds not hit by s 88 of Act.

The ordinary meaning of debt is a firm obligation to pay, whether now or later. A conditional liability is not a debt—it might become a debt, but it also might not. In regard to the interpretation of this word in the context of s 88 of the Insolvency Act 24 of 1936 the Legislature apparently uses the word "debt" in the ordinary sense. If a more expansive connotation were intended in s 88, one would have expected the addition of an adjective such as "conditional".

Respondent had in 1972 entered into a deed of suretyship in respect of a loan by the GS company from S. The GA company had, on the day before, undertaken in writing to indemnify respondent against all loss which it might suffer in terms of or arising out of the suretyship. In September 1976 the GA company lodged two surety mortgage bonds for registration and the bonds were registered later that month. These bonds

were passed as security for the GA company's contingent liability to respondent in terms of the indemnity. When called upon to repay the loan to S, the GS company failed to do so and respondent was, in terms of the suretyship, called upon to make the repayments due under the loan, which it did between 1 February and 25 May 1977. The GA company was placed in provisional liquidation on 2 February 1977, the order being subsequently made final. Respondent lodged claims against the GA company in liquidation and relied on its security under the two surety mortgage bonds. The applicants, the joint liquidators of the GA company, averred that the debt secured by the bonds was incurred in 1972 when the indemnity was given, that such debt was incurred more than two months before the bonds were lodged for registration and that, accordingly, the bonds did not, in terms of s 88 of the Insolvency Act 24 of 1936, confer any preference in favour of the respondent. In a stated case in terms of Rule of Court 33 the Court *a quo* gave judgment in favour of respondent, in an appeal,

Held, that the ordinary meaning of debt was a firm obligation to pay, whether now or later and that a conditional liability was not a debt—it might become a debt, but it also might not.

Held, further, that, the Legislature apparently used the word "debt" in the ordinary sense in s 88 and, if a more expansive connotation had been intended in this section, one would have expected the addition of an adjective such as "conditional".

Held, further, as the debt secured by the bonds was not incurred more than two months prior to the lodging of the bonds, that the bonds in favour of respondent did confer preferent status.

The decision in the Witwatersrand Local Division in *Joint Liquidators of Glen Anil Development Corporation Ltd (In Liquidation)* v *Hill Samuel (SA) Ltd* 1980 (1) SA 432 confirmed.

Appeal from a decision in the Witwatersrand Local Division (MELAMET J). The facts appear from the judgment of HOLMES AJA.

C Z Cohen SC (with him *P A Solomon*) for the appellants: The question is whether a debt is incurred in terms of s 88 of Act 24 of 1936 when an indemnity is furnished or only when the contingent debtor is called upon to pay. If the former is the case, then the debt was incurred more than two months prior to the lodgment of the bonds, but if the latter is the case then the debt was incurred after lodgment of the said bonds which will accordingly confer a preference. The word "debt" and the phrase "a debt . . . which was incurred" are not defined in the Insolvency Act. The question should be resolved according to the recognised principles of interpretation of statutes. The Court should look at the intention of the Legislature and not confine itself to a purely literal interpretation of the words in question. See Steyn *Die Uitleg van Wette* 4th ed at 2-4; *Farrer's Estate* v *Commissioner for Inland Revenue* 1926 TPD 501; *R* v *Westenrand* 1941 OPD at 105; *S* v *Cocklin en 'n Ander* 1971 (3) SA at 781A. Cf *Jaga* v *Dönges NO and Another* 1950 (4) SA at 662G-664. See also Catherine Smith *Law of Insolvency* at 217; Nathan *South African Insolvency Law* 4th ed at 307. While the authors might have gone too far in alluding to the intention of the creditor, when the bond is lodged, the obvious purpose of the said section was to prevent a creditor from obtaining an advantage over other creditors, by having a mortgage bond over the debtor's

property registered in his favour, in respect of a hitherto unsecured debt. The intention with which the act is done is not important, because, unlike ss 26, 29 and 30 of the Insolvency Act, the act is not nullified; the only effect is that the bond confers no preference. The provisions of s 88 must be considered independently from the impeachable transaction sections, not only for the reason set out above, but also because s 88 does not have the same historical origin as the impeachable transaction sections. Section 88 had no equivalent in the previous Insolvency Act 32 of 1916, while the impeachable transaction sections did exist in previous insolvency legislation. There is no reason why the word "debt" or the phrase "debt . . . which was incurred" should be narrowly construed to include indebtedness which is presently due while excluding contingent indebtedness. Why should a creditor in respect of a debt actually due be thwarted by s 88 while a "contingent creditor" is protected? If this were the intention of the Legislature the absurd situation would arise whereby a person with a contingent claim would be better off than a person with an actual claim, for the former would, in anticipation of the contingent debtor's sequestration, be able to gain an advantage over other creditors by having a mortgage bond registered over the property of his contingent debtor and, in the event of the condition being fulfilled, have a secured claim, while the latter could not do this. Furthermore, if the meaning contended on behalf of respondent is correct, a person with a claim, secured by a bond falling within the ambit of s 88 and whose claim is subject to a condition which would be fulfilled, if at all, more than a year after sequestration, and whose claim is admitted in terms of s 48 *(b)* of the Insolvency Act, would be better off than a person with an unconditional claim secured by a similar bond. This could not have been the intention of the Legislature. If s 88 was not introduced for the aforesaid purpose, it is difficult to envisage what its purpose was. The Judge *a quo* applied the following method of interpretation, without having sufficient regard for the primary rule of interpretation, referred to above: *(a)* the ordinary meaning of the words; *(b)* the use of the same or similar words elsewhere in the Insolvency Act; *(c)* the use of the same or similar words in other contexts. The Judge *a quo* was too formalistic in his application of the ordinary meaning of the words and the approach in our law has been a less formalistic one. See *Steyn (ibid* at 22 *et seq)*; *Union Government (Minister of Finance)* v *Mack* 1917 AD at 739; *Dadoo Ltd* v *Krugersdorp Municipal Council* 1920 AD at 554; *Gravenor* v *Dunswart Iron Works* 1929 AD at 303; *Hatch* v *Koopoomal* 1936 AD at 212; *S* v *Thole* 1962 (2) SA at 92; *Goldberg NO* v *P F Joubert Ltd* 1960 (1) SA at 523; *Principal Immigration Officer* v *Hawabu and Another* 1936 AD at 34; *Hleka* v *Johannesburg City Council* 1949 (1) SA at 852; *Du Plessis* v *Joubert* 1968 (1) SA at 594H; cf *Stock* v *Frank Jones (Tipton) Ltd* (1978) 1 All ER at 952*f*; 953*e*; 955*b*. The word "debt" can mean an unconditional liability, or a conditional liability. The debt is therefore incurred when the unconditional liability, or the conditional liability, as the case may be, was incurred. "Debt" is anything which one person is under an obligation to pay or render to another. "Incur" is to render oneself

liable to . . . to bring upon oneself. See *Shorter Oxford English Dictionary* 3rd (revised) edition.

While a presumption of consistency by the Legislature in the use of words in a statute is an appropriate aid to interpretation (*Steyn* (*ibid* at 132)) such presumption has less force when the origins of the various sections in which the same word is used are different and the purpose of the sections is different. It is conceded that, in certain contexts in the Insolvency Act, the word "debt" is used only to mean a debt presently due and owing (s 8) but in other sections it bears different meanings (cf. ss 50 (2) and 87). If the Legislature had intended that the debt should be actually due and immediately payable it would have used words clearly indicating this intention, eg "debt due" or "payable" or "owing" (cf *Van Rensburg and Another* v *Superior Trading Co* 1933 TPD 423). There is no presumption, similar to that relating to the same statute, that the Legislature is consistent in its use of the same word in different statutes. There are grave dangers inherent in applying the meanings given to a word as used in one statute to the same word when used in another statute. That no consistent meaning has been applied to the word "debt" is apparent from an examination of the following authorities: *(a)* Caney *Law of Suretyship* 2nd ed at 35 146-147; *Rossouw and Rossouw* v *Hodgson and Others* 1925 AD 97; *Langeberg Koöperasie Bpk* v *Inverdoorn Farming and Trading Co Ltd* 1965 (2) SA 597. Therefore the debt was incurred, for the purposes of s 88, when the original indemnity was furnished.

D J Shaw QC (with him *M Tselentis*) for the respondent: The approach to interpretation is to seek the intention of the Legislature in an analysis of the language used, in the context in which it has been used. A resort to legislative intention to justify a departure from the ordinary meaning of words must be based on a legislative intention which appears clearly and is not merely a matter of probability or surmise. See *Dadoo Ltd and Others* v *Krugersdorp Municipal Council* 1920 AD at 554-5; *Shenker* v *The Master and Another* 1936 AD at 143; *Jaga* v *Dönges NO and Another: Bhana* v *Dönges NO and Another* 1950 (4) SA at 664G-H; *S* v *Thole* 1962 (2) SA at 92D-G; *S* v *Cocklin en 'n Ander* 1971 (3) SA at 781A-B. The normal meaning of the word "debt" is at the very least an amount due. See *Morley* v *Pederson* 1933 TPD at 307. In many contexts it means a debt not only due but payable. *White* v *Municipal Council of Potchefstroom* 1906 TS at 48. Normally therefore the situation with regard to the obligation must be not only that *dies cedit* but also that *dies venit*. Voet *Commentarius Ad Pandectas* 36.2.1 (*Gane's* trans vol 5 at 448). This meaning accords with the dictionary definition of the Afrikaans word "skuld". There is nothing in the context of s 88 to suggest a different conclusion. Section 87 shows that the position of amounts falling due in the future was present in the mind of the Legislature and the concept of "future debt" (and the concept of "future advances" used in s 87 (2) of the Insolvency Act 32 of 1916) indicates an acceptance of the distinction drawn in earlier authorities between a debt, whether payable in the present or the future, and a hypothetical, potential or conditional

liability. See *Heydenryck* v *Mackie, Young and Co's Trustee and the Standard Bank* 2 Buch AC at 289-293; *Standard Bank* v *Heydenryck* 3 Buch AC at 147. The word "debt" is also used in the above sense in s 8 *(a), (e), (g), (h)* and s 77 of the Insolvency Act. The phrase "debt incurred" means a debt actually due and payable. See *Law* v *Coburn (Inspector of Taxes)* (1972) 3 All ER at 1119*b*-1120*j*. This phrase is used in this sense in s 50 (2) of the Insolvency Act. The phrase "debt incurred" clearly means a debt incurred by the insolvent, in this case Glen Anil. On the wording of annexure "C" which is clearly crucial *(Jonnes* v *Anglo-African Shipping Co (1936) Ltd* 1972 (2) SA 827; *Taurog and Others NNO* v *General Accident Insurance Co of SA Ltd* 1978 (3) SA 609), there could clearly be no action by the respondent against Glen Anil until the respondent had been required to pay and had made demand on Glen Anil. Until that stage the respondent had suffered no loss because there was no inescapable liability to pay on its part, and no obligation had therefore been incurred by Glen Anil. See *R* v *Kallel (Pty) Ltd* 1939 AD at 441; *Jonnes* v *Anglo-African Shipping Co (1936) Ltd* (*supra* at 837D-838A). No debt arises in the case of a normal indemnity arising under the *actio mandati* until payment has been made by the agent. See *Proksch* v *Die Meester en Andere* 1969 (4) SA at 589 *in fine*-590H explaining *Rossouw and Rossouw* v *Hodgson and Others* 1925 AD 97; Pothier *Mandat* para 84 chap III; Pothier *Obligations* paras 442, 443. Therefore no debt was incurred by Glen Anil when the agreement to indemnify was entered into in 1972 and a debt was only incurred in 1977 when the respondent was called upon to pay and made payment in terms of its suretyship undertaking.

Cohen SC in reply.

Cur adv vult.

Postea (September 25).

HOLMES AJA: A lends money to B. C guarantees the debt. D indemnifies C against possible loss thereunder. Later, D passes surety bonds over certain of its property in favour of C. B defaults. D is placed under liquidation, within six months after the lodging of the bonds. C pays A. C claims against D (in liquidation) under the indemnity, relying on the bonds for a preference. The liquidators of D dispute any preference. The question is: when did D "incur a debt" to C (within the meaning of s 88 of the Insolvency Act)? Was the debt incurred in 1972 when D indemnified C against possible loss, as the liquidators unsuccessfully contended; or was it incurred in 1977 when B defaulted and C had to pay A, as C successfully contended? The answer decides whether C has a preferent claim against D in liquidation. It is a pretty problem—and the stake is R2 000 000.

With that prelude I turn more fully to the facts.

(a) On 15 May 1972 South African National Bond Co Ltd, ("Sanbond") entered into an agreement with Glen Stewart Investments (Pty) Ltd ("Glen Stewart") in terms of which Sanbond agreed to advance the sum of R2 600 000 to Glen

Stewart. It was duly advanced. It was to be repaid in seven instalments, the first being due on 31 January 1977 and the last on 31 July 1977.

A *(b)* On 17 May 1972 Hill Samuel (SA) Ltd ("Hill Samuel") signed a deed of suretyship binding itself "jointly and severally as surety for and co-principal debtor *in solidum* with" Glen Stewart for due repayment of R2 600 000, plus interest, to Sanbond.

(c) On 16 May 1972 Glen Anil Development Corporation Ltd ("Glen Anil") undertook in writing to indemnify Hill Samuel
B against all loss of whatsoever nature which it might suffer arising out of the aforementioned suretyship. Since approximately 1975 Glen Stewart has been a wholly owned subsidiary company of Glen Anil, and before that time 50 per cent of its issued capital was held by Glen Anil.

C *(d)* A few years later (in September 1976) Glen Anil lodged for registration two surety mortgage bonds, (a first bond and a second bond) for amounts totalling R2 000 000 over certain of its property, in favour of Hill Samuel. Both of these bonds were passed by Glen Anil as security for its "contingent liability" to
D Hill Samuel under the indemnity referred to in *(c) (supra)*. These two mortgage bonds were not only lodged but also registered in September 1976. I shall refer to them as "the September bonds".

(e) When called upon at the agreed time in 1977 to make the stipulated repayments of the sum of R2 600 000 lent to it by
E Sanbond, Glen Stewart failed to do so. Hill Samuel was therefore called upon to make all of those repayments to Sanbond, and it accordingly paid to Sanbond in the aggregate the sum of R2 762 219,20 during the period 1 February 1977 to 25 May 1977. This amount obviously included interest.

F *(f)* A provisional winding-up order was granted against Glen Anil on 2 February 1977, and it was subsequently made final. It is common cause that Glen Anil was liquidated within a period of six months after the dates upon which each of the September bonds was lodged for registration.

G *(g)* In July 1977 (that is the date of the covering affidavit) Hill Samuel lodged certain claims against the insolvent estate of Glen Anil (in liquidation), including one for R2 363 589,03 in terms of the indemnity referred to in *(c) (supra)*. (The difference between this figure and that in para *(e) (supra)* is not explained in the papers, but it has no bearing on the point in
H issue.) The two September bonds were relied on as security for the claim.

It was common cause that Glen Anil was a company unable to pay its debts and that ss 339 and 342 of the Companies Act 61 of 1973 make s 88 of the Insolvency Act 24 of 1936 applicable *mutatis mutandis*. The latter section reads (omitting words not here relevant):

"A mortgage bond . . . passed for the purpose of securing the payment of *a debt* not previously secured, which *was incurred* more than two months prior to the lodging of the bond . . . shall not confer any preference if the estate of

the mortgage debtor is sequestrated within a period of six months after such lodging . . ."
(My italics.)

The Afrikaans version was signed. It uses the words "skuld wat aangegaan is" for "debt . . . which was incurred". There is no A difference of meaning.

The case came before a single Judge of the Witwatersrand Local Division by way of an application by the liquidators of Glen Anil for a declaration that the two September bonds do *not* confer any preference in the estate of Glen Anil. There was an agreed statement B of facts under Rule of Court 33. The application was dismissed with costs. The appeal direct to this Court is by consent of the parties under s 20 (3) of the Supreme Court Act 59 of 1959 as amended. The judgment of the Court *a quo* is reported in 1980 (1) SA 432 (W).

In the agreed statement of facts it was recorded that it was common C cause between the parties that—
"in view of the provisions of s 88, the September bonds will confer preferent status only if—
the debt which they secure, being the debt arising from the indemnity, was not incurred more than two months before the date on which the respective September bond was lodged for registration;
or D
such debt was incurred more than two months prior to the date on which the respective September bond was lodged for registration, and that debt was previously secured within the meaning of s 88."

The September bonds were, I repeat, lodged for registration in September 1976, less than six months before the liquidation of Glen E Anil. I trust that it is by now apparent why it is crucial to determine whether Glen Anil incurred a debt to Hill Hill Samuel:

(i) on 16 May 1972 when Glen Anil indemnified Hill Samuel, ie more than two months before the bonds were registered in September 1976 (as contended for by the liquidators); or

(ii) in 1977, as Hill Samuel contend, when Glen Stewart defaulted F in its obligation to repay Sanbond and Glen Anil's indemnity to Hill Samuel was put into operation. (The first instalment repayable by Glen Stewart was due on 31 January 1977; see para *(a)* and *(e)* of the recital of facts *supra*).

At this stage I set out the indemnity which Glen Anil gave to Hill G Samuel:

"With reference to the guarantee which you have given in respect of the obligation of Glen Stewart Investments (Pty) Ltd, a copy of which is attached marked 'A', we hereby indemnify you against all loss of whatsoever nature which you may suffer in terms of or arising out of the said guarantee.

Should you be required to pay any amount in terms of or arising out of the said guarantee, then we shall pay you on demand such amount." H

It was dated 16 May 1972.

Did Glen Anil thereby "incur a debt" to Hill Samuel *at that date*?

It will be seen from the indemnity that any liability thereunder is conditional:
"should you be required to pay any amount in terms of or arising out of the said guarantee"
(ie the guarantee given by Hill Samuel to Sanbond—see para *(b)* of the recital of facts *supra*). Furthermore, the amount indemnified is

uncertain—it could depend, *inter alia*, on the degree of Glen Stewart's default in repayment.

In interpreting the words, "debt . . . which was incurred . . ." in s 88, one considers their ordinary meaning and the context in which they appear and the general intention of the Legislature.

The ordinary meaning of debt is

"that which is owed or due; anything (as money, goods or services) which one person is under obligation to pay or render to another".

See *Shorter Oxford English Dictionary*. See also *Leviton and Son* v *De Klerk's Trustee* 1914 CPD 685 at 691 *in fin*:

"Whatever is due—*debitum*—from any obligation".

The foregoing were cited by this Court in *Electricity Supply Commission* v *Stewarts & Lloyds of SA (Pty) Ltd* 1981 (3) SA 340 (A) at 344F. One notices the word "is" in the definitions, in regard to the obligation, and the absence of any connotation of "might be". It seems to me that it can be said that, in ordinary parlance, a debt is a firm obligation to pay, whether now or later. The notion of a possible or conditional obligation to pay is at variance with this; and the words "was incurred" in s 88 reinforce that view. Grammatically, notionally and monetarily, one cannot reconcile, "I am already in debt", with "I might be in debt in the future", or "I will be in debt if something happens". The same conclusion is reached in considering the ordinary meaning of "skuld wat aangegaan is" in the Afrikaans version. As the Court *a quo* pointed out:

"'Skuld' in its primary meaning is ''n geldsom wat 'n mens moet betaal vir diens of goedere' and 'aangaan' bears the meaning of '5. Reël, ooreenkom: 'n Koop, huwelik, lening aangaan. 9. Maak: onkoste, uitgawes aangaan'.

HAT sv 'skuld' and 'aangaan'. In the *Verklarende Afrikaanse Woordeboek* Kritzinger, Labuschagne and Pienaar 'skuld' is defined as 'wat aan ander betaal moet word, geldelike verpligting' and 'skuld aangaan' is equated to 'skuld maak'".

The view expressed above, about the ordinary meaning of "debt", finds support in the English case of *Law* v *Coburn (Inspector of Taxes)* (1972) 3 All ER 1115 (Ch D). The case turned on s 60 (1) of the Income and Corporation Taxes Act 1970. It reads in part:

"Relief shall be given in respect of any payment of interest falling due before 6 April 1975 on *a debt incurred* on or before 15 April 1969 . . ."

(My italics.)

FOSTER J indicated at 1119C that the argument by counsel for the Crown was as follows:

"*(a)* Using the words 'a debt was incurred' in their normal and ordinary meaning, a person incurs a debt at the moment when the debt comes into existence.

(b) A debt comes into existence, so far as the debtor is concerned, when it can be said that he owes a sum of money, or when he is liable to pay a sum, albeit that he is liable to pay it in the future.

(c) A debt is not incurred if there is only a contingent liability or if the debt may or may not arise in the future as the result of existing contractual obligations."

Consistent therewith, the learned Judge referred with approval to the case of *Webb* v *Stenton* (1883) 11 QBD 518 in which LINDLEY LJ said at 527:

"A debt is a sum of money which is now payable or will become payable in future by reason of a present obligation *debitum in presenti, solvendum in futuro*."

And at 529 of the same case FRY LJ said:

"I have further no doubt that the word 'indebted' describes the condition of a person when there is a present debt, whether it be payable *in presenti* or *in futuro* . . . The material question which has been argued before us is this: does the meaning go further, and does it include debts which may hereafter arise? *If they may hereafter arise, it is possible also that they may not hereafter arise, and it would require explicit words to include such future possible debts*."

(My italics.)

Continuing with judicial decisions as to the ordinary meaning of debt, in the case of *Heydenryck* v *Mackie, Young and Co's Trustee and the Standard Bank* 2 Buch AC 279 there was a general notarial bond covering, *inter alia*, future advances. At issue was the question of preference on insolvency. The relevance of that judgment to the present case is that it is implicit, throughout the reasoning of the judgment of DE VILLIERS CJ, MAASDORP and HOPLEY JJ, that a conditional liability becomes an actual debt only when the condition is fulfilled.

The decision was confirmed on appeal to the Privy Council (*Standard Bank* v *Heydenryck* 3 Buch AC 115). The judgment includes the following statement:

"In certain events which might or might not happen a debt might arise which might be described as *solvendum in futuro*, but until those conditions were fulfilled nothing became *debitum* at all either in the present or the future."

To sum up so far, the ordinary meaning of debt is a firm obligation to pay, whether now or later. A conditional liability is not a debt—it might become a debt, but it also might not.

So far I have discussed the ordinary meaning of "debt" or "debt . . . which was incurred". That meaning seems to be clear and settled. I turn now to the Insolvency Act, to see whether it throws a different light on that meaning. As to that, in *Morley* v *Pedersen* 1933 TPD 304 DE WET J (later CJ) said this:

"It seems to me that when the Insolvency Act uses the word 'debts' it does so *in the ordinary sense*, namely amounts which are due, and that the Legislature did not intend to include a problematical indebtness which might arise from an action brought afterwards."

(My italics.)

The learned Judge was there dealing with the use of the term in s 8 *(a)*—leaving the Republic with the intention of evading or delaying the payment of debts.

As to the general intention of the Insolvency Act, it was passed for the benefit of creditors, so that they might share in the distribution of assets — subject to certain securities and preferences. To this end provision is made, *inter alia*, for the setting aside of disposition in regard to voidable preferences, undue preferences and collusive dealings. See ss 29, 30 and 31. Then s 88 provides that in certain specified circumstances a mortgage bond to secure a debt shall not confer a preference. (The bond itself is not set aside.) The specified circumstances relate, *inter alia*, to "a debt . . . which was incurred" etc. The section does not say, after the word debt, "whether existing or conditional". Yet the Legislature was familiar with the concept of a

conditional claim (the converse of a conditional debt), for it specifically allows proof thereof in s 48. Furthermore, the Legislature apparently uses the word "debt", in the ordinary sense mentioned earlier, in s 8 *(a), (e), (g), (h)* and ss 50 (2) and 77 of the Insolvency Act. If a more expansive connotation were intended in s 88, one would have expected the addition of an adjective such as "conditional".

"It would require explicit words to include such future possible debts"

—as FRY LJ said in another context in *Webb* v *Stenton (supra)*.

To sum up, in the Court *a quo* MELAMET J, in a careful and convincing judgment, came to the following conclusion:

"I am of the opinion that a debt was not incurred when the indemnity was given on 16 May 1972 and was incurred only when the respondent was required to pay under its guarantee during February 1977-May 1977.

I have come to the conclusion, therefore, that on the facts of the present case a debt was not incurred more than two months prior to the lodging of the 'September bonds'. The debt was in fact incurred after the lodging of such bonds."

I find no reason for differing from that conclusion. It follows that the appeal cannot succeed. This means that the September bonds in favour of Hill Samuel *do* confer preferent status.

It was common cause that, if such were the finding of the Court, it would not be necessary to deal with the alternative question posed, namely whether the "debt" was previously secured within the meaning of s 88. See the quotation from the agreed statement of facts *supra* as to the circumstances in which the September bonds will confer preferent status. It is therefore not necessary to recite or deal with a number of other facts in the agreed statement, on the question of previous securities and cessions, including a Cape Town bond.

It may be that anomalous situations could arise out of s 88 as here interpreted. For example, a bond to secure a conditional debt might, on fulfilment of the condition, confer a preference on insolvency, whereas a bond to secure an existing debt might not. This may well be an instance of *casus omissus* on the part of the Legislature. But that does not entitle the Court to supply the omission; see Steyn *Die Uitleg van Wette* 5th ed 1981 at 16. That applies particularly here where the meaning of "debt" does not include a conditional debt which may or may not become actual; and it would require explicit words to include such future possible debts.

In the result, the appeal is dismissed with costs, including those consequent upon the employment of two counsel.

WESSELS JA, CORBETT JA, TRENGOVE JA and GALGUT AJA concurred.

Appellants' Attorneys: *Werksmans*, Johannesburg; *Rosendorff, Venter & Brink*, Bloemfontein. Respondent's Attorneys: *Deneys Reitz*, Johannesburg; *Webber & Newdigate*, Bloemfontein.

SECRETARY FOR INLAND REVENUE v SAFRANMARK (PTY) LTD

(APPELLATE DIVISION)

1981 *August* 17; *September* 28 JANSEN JA, CORBETT JA, MILLER JA, HOLMES AJA and GALGUT AJA

Revenue—Income tax—Deductions—"Machinery initial allowance" in s 12 (1) of Act 58 of 1962 and "machinery investment allowance" in s 12 (2)—When claimable—Requirement that machinery or plant be used directly in "a process of manufacture"—Machinery and plant used to produce fried chicken with special taste from raw chicken and certain other ingredients—Process resulting in a new and distinctive product recognisable as such—Accordingly it amounted to a "process of manufacture" as required by s 12 (1) and (2) of the Act.

The respondent held a franchise from a company, K, to prepare and sell fried chicken in a manner specified by K. The respondent was obliged by K to follow and adhere to a certain procedure from the time the raw product, ie the chicken, was received until the fried chicken was sold to the customer. This procedure, according to the evidence led before the Special Income Tax Court in an appeal against the respondent's disallowance of the "machinery initial allowance" in terms of s 12 (1) of the Income Tax Act 58 of 1962 and the "machinery investment allowance" in terms of s 12 (2) of the Act, claimed by respondent as a deduction in its return of income, involved the use of certain ingredients and plant and machinery and was intended to result in fried chickens all having the same taste, tenderness and brownish colour. Respondent had five outlets in 1975 and 11 in 1976 and the volume of respondent's production of fried chicken was large. The Special Income Tax Court had allowed respondent's appeal and held that it was entitled to deduct the "machinery initial allowance" and the "machinery investment allowance". In an appeal by the Secretary against the decision of the Special Income Tax Court, the sole issue before the Court for decision was whether the operations conducted by respondent could be said to have been a "process of manufacture" as required by s 12 (1) and (2) of the Act. The appellant contended that the process did not result in any substantial or essential change in the main ingredient—the fried chicken was still a chicken and that the procedures and operations insisted upon by K were for quality control and not to produce a manufactured article.

Held (CORBETT JA dissenting), that the conclusion to be drawn from an examination of the procedures and operations carried out by respondent was that not only had each of the ingredients ceased to retain its individual qualities but, upon completion of the process, a different compound substance having a special quality as such, viz edibility and special taste, had been produced and, moreover, produced in quantity for purposes of trade.

Held, further, that the operations of the respondent constituted a process of manufacture: the detailed process evolved, prescribed and insisted upon by the respondent was calculated to result in a new and distinctive product recognizable as such and the evidence showed that that had been achieved.