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Legislation

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None

1. INTRODUCTION

This Sibergramme deals with judgments reported in **May 2007** which have not already been considered in previous issues.

2. PARTIES

Trust

Although the summons issued out of a magistrate's court in ***Nel & others v Metequity Ltd & another*** **2007 (3) SA 34 (SCA)** described the plaintiff as 'Metequity Ltd', an annexure to the summons (which set out the cause of action) stated that the plaintiffs were Metequity Ltd and Metboard Properties Ltd, in their capacities as trustees of the Jan Nel Bond Trust. Default judgment was granted in favour of the plaintiffs 'as claimed in the summons'. Dismissing an argument that the judgment was void on account of the fact that (so it was argued) it was not granted in favour of the trustees (respondents on appeal), Streicher JA (Cameron and Mlambo JJA and Malan and Cachalia AJJA concurring) agreed with the court a quo that there could be no doubt that the plaintiffs were the two trustees of the Jan Nel Bond Trust, and that the reference to 'Metequity Ltd' on the face of the summons was merely a label or shorthand description and not a full and proper description such as was to be found in the annexure to the summons. **Only the properly described plaintiff(s) could apply for judgment and be entitled to it**. Accordingly when the magistrate had granted default judgment, he could only have granted judgment in favour of the plaintiff(s) as described in the annexure to the summons. Judgment had been claimed by the respondents, and not by Metequity Ltd (paras 13—14 at 39D—H).

3. APPLICATIONS

Dispute of fact

A claim for the repayment of moneys paid in terms of a contract induced by fraudulent misrepresentations was instituted by way of application in ***Northwest Provincial Government & another v Tswaing Consulting CC & others*** **[2007] 2 All SA 365 (SCA)**. Having established in its founding papers the fraud, its entitlement to rescind the contract and (one must add to the court's formulation) an election to rescind, the first applicant became entitled to repayment by the first respondent in the absence of evidence affording a basis for a finding that restitution to the first applicant would be unjust (para 21 at 371*h*—*i*). The first applicant had, however, anticipated a rebuttal of its accusations, stating that a resultant dispute might not be capable of resolution on the papers, and that in the event of the court being of the view that that was the position, the applicants would request that the matter be referred to evidence or to trial. In reply, the first respondent's deponent had asserted that '[t]he applicants have accepted that the contents hereof are subject to dispute, . . . and that it should be referred to evidence'. The first respondent, the deponent continued, was 'thus relieved of answering this paragraph at this stage'. **Evasion of this sort**, said Cameron JA (Zulman, Nugent and Maya JJA and Cachalia AJA concurring), **could not serve to raise a dispute of fact impeding the first applicant's claim to repayment**. The first respondent had failed to set out particulars of the work it had done for the first applicant, its expenditures, the value delivered and the

services rendered under the contract which entitled it to be paid by the first applicant. Instead, the first respondent had sought refuge in a bare denial of the first applicant's claim that the first respondent had added 'no or very little value' to the roads project which formed the subject matter of the contract between the parties, and an evasion of all the other relevant allegations (para 21 at 371*h*, *i*—*j*). It followed that no factual basis existed for denying the first applicant the equitable remedy of restitution (para 22 at 372*a*).

4. TRIAL ACTIONS

Summons

Service of

Service of a summons at a particular address as being a chosen domicilium citandi et executandi was held in ***Nel & others v Metequity Ltd & another*** **2007 (3) SA 34 (SCA)** to be valid notwithstanding the fact that the plaintiffs had earlier been advised of a change of address. The address at which the summons was served had been chosen as the domicilium of the plaintiffs' debtor (for whose indebtedness the defendants had stood surety) in terms of a mortgage bond, which made no provision for a change of address. In any event, the notification of change of address did not purport to be a notification of a change of domicilium citandi et executandi (para 15 at 39H—40A).

A further argument unsuccessfully relied upon by the defendants was that the summons issued against them was invalid because it had been served before it was issued. Issue had taken place on 27 January 1992, but the copy of the sheriff's return of service relied on by the defendants was of such poor quality that the date reflected as being that of service could have been 10, 20 or 30 January 1992. In the light of the fact that **the return of service bore the case number, which in the normal course would be affixed to the summons only when it was issued**, the last date was probably the correct one. It was accordingly not necessary to consider what the position would have been had the summons been served before it was issued (para 15 at 40A—C). The reasoning of the court in this regard was incontrovertible, since the sheriff could not possibly have known the case number unless the summons was issued prior to service. In practice, the possibility of service of a summons prior to issue is utterly unlikely ever to arise, since sheriffs uniformly identify and track court processes handled within their offices by means of case numbers, and a sheriff will not accept a summons for service unless it has been issued by the registrar or clerk of the court in question and bears a legible case number.

5. INTERDICTS

Interlocutory interdicts

Requirements

On the requirements for the grant of an interim interdict, see ***Treatment Action Campaign v Rath & others*** **[2007] 2 All SA 439 (C), 2007 (4) SA 563** (at 446*a—b* (All SA), 571E—F (SA)), where a prima facie right to the court's protection, a well-grounded apprehension of irreparable harm and the absence of a suitable alternative remedy (specifically, damages) were mentioned.

6. APPEALS

Appealability

One of the trite requirements for an appeal to be launched is the existence of a 'judgment or order' appealed against (see, for example, s 20(4) of the Supreme Court Act 59 of 1959 and *Zweni v Minister of Law and Order* 1993 (1) SA 523 (A) at 531B—C). In ***Minister of Environmental Affairs and Tourism & others v George & others*** **2007 (3) SA 62 (SCA)** the court held that a refusal by a High Court judge, sitting as a judge of an equality court, to refer a matter to the High Court (as requested by the Minister) 'entailed a discretionary decision entrusted to [him], [and] did not embody a judgment or order capable of being appealed' (at 66E). The appeal was for that reason incompetent, and was struck from the roll.

For a more detailed survey of this aspect of the decision in *George*, see under '**CONSTITUTIONAL PRACTICE: *Equality courts*: Functioning of equality courts**' below.

Application for leave to appeal

In ***Minister of Environmental Affairs and Tourism & others v George & others*** **2007 (3) SA 62 (SCA)** the Minister sought to appeal directly to the Supreme Court of Appeal against a refusal by N C Erasmus J, sitting as an equality court judge, to refer the dispute between the parties to the High Court. The Minister, however, did not seek or obtain leave to appeal, contending that s 23(1) of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 ('the Equality Act') granted him an untrammelled right of appeal. Section 23(1) provides that any person aggrieved by an order made by an equality court in terms of or under the Equality Act may appeal against such order to the High Court having jurisdiction or to the Supreme Court of Appeal, as the case may be. The Equality Act, however, retorted Cameron JA (Harms, Zulman, Lewis and Jafta JJA concurring), makes the provisions of the Supreme Court Act 59 of 1959, and the rules made under it, applicable 'with the necessary changes required by the context' to (inter alia) questions of jurisdiction (s 19(1)*(e)*). And the Supreme Court Act provides in

general terms that no appeal shall lie against a judgment or order of a High Court in any civil proceedings unless leave to appeal is granted (s 20(4)*(b)*). Accordingly, **no appeal lies against a judgment or order of a High Court sitting as an equality court in any civil proceedings unless leave to appeal is granted**. The lack of such leave rendered the Minister's appeal incompetent (para 16 at 70C—F), and the appeal was struck from the roll.

Heads of argument

When a party, through its attorneys, has full knowledge of an imminent appeal but fails to file heads of argument when required, and remains inert in the face of passing deadlines, postponement of the appeal hearing at the request of the passive party 'would wreak a clear injustice' on the opposing party and must be refused**:** ***Northwest Provincial Government & another v Tswaing Consulting CC & others*** **[2007] 2 All SA 365 (SCA)** para 9 at 369*b*—*c*, read with paras 6—9 at 368*a*—369*b*.

7. EXECUTION

Immovable property

Uniform rule 46(3) provides**:**

> 'The mode of attachment of immovable property shall be by notice in writing by the sheriff served upon the owner thereof, and upon the registrar of deeds or other officer charged with the registration of such immovable property, and if the property is in the occupation of some person other than the owner, also upon such occupier. Any such notice as aforesaid shall be served by means of a registered letter, duly prepaid and posted addressed to the person intended to be served.'

In ***Ex parte Firstrand Bank Ltd t/a FNB Home Loans v Sheriff, Brakpan, & others*** **2007 (3) SA 194 (W)** Goldblatt J (Boruchowitz and Tsoka JJ concurring) held that the second sentence of rule 46(3) is imperative and, upon compliance with it, the notice by the sheriff has been served. This will be so provided that the letter is addressed to an address chosen by the addressee or to an address that the sheriff either personally or through acceptable evidence knows to be the address of that party (at 200H—I).

Rule 46(7)*(a)* provides that the sheriff must appoint a day and place for the sale of immovable property, which day must (except by special leave of a magistrate) be not less than one month after service of the notice of attachment. In order to give effect to this rule, said Goldblatt J, the sheriff must know when service of the notice of attachment took place. If this depended on knowing when and if the addressee of the notice received such notice, considerable uncertainly and difficulty would be created in fixing a date for the sale. That could not have been the intention of the drafters of the rule, and they must accordingly have intended service in terms of rule 46(3) to mean that service occurred on the posting of the registered letter referred to in rule 46(3) (at 200I—201B). Referring with approval to H J Erasmus et al *Superior Court Practice* (1994) B1—336, Goldblatt J

therefore held that **there will have been proper service of the notice of attachment and substantial compliance with rule 46(3) where the sheriff sends a notice of attachment to the owner and occupier of the property attached and to be sold in execution by prepaid registered post, in formal compliance with the subrule, even though the owner or occupier might not have received the notice of attachment**. Posting of the letter constitutes service, and receipt thereof is unnecessary. If the notice is addressed to a domicilium citandi et executandi chosen by the debtor, this will be a sufficient compliance with the subrule. A party who has notice of the proceedings and fails to notify the creditor of a change of address cannot impugn an attachment if the registered letter is sent to him at the address which appears in the papers in which judgment has been given. Where no domicilium has been chosen and the debtor's whereabouts are unknown, application will have to be made to court for directions in regard to service (at 201C—F).

The court accordingly disapproved of the contrary view of Heher J in *Sowden v Absa Bank Ltd & others* 1996 (3) SA 814 (W) at 820I—821I, and approved of dicta critical of the decision in *Sowden* in *Standard Bank of SA Ltd & another v Bundu Te Litho* 1999 (3) SA 979 (C) at 983B—F (per Foxcroft J) and *Stand 734 Fairland CC v BOE Bank Ltd & others* 2001 (4) SA 255 (W), [2001] 4 All SA 667 paras 11—12 at 261E—262D (SA), 674*b—j* (All SA) (per Goldstein J).

In one respect, however, Heher J was held to have been correct**:** the notice of attachment referred to in rule 46(3) is not a 'process of the court' for purposes of uniform rule 4 (dealing with service of process). A notice to be given by the sheriff was not 'any process of the court directed to the sheriff' or 'any document initiating application proceedings', and rule 4 could therefore not apply to such notice (at 201G—H).

The court in *Firstrand Bank Ltd* accordingly granted a declaratory order reading as follows**:**

> '1. Service in terms of Rule of Court 46(3) takes place upon post by prepaid registered post of a letter containing the requisite notice to the address of the person intended to be served. Such address shall be either the address chosen or furnished by the addressee as such person's address or the actual postal address of such party.
> '2. A notice in terms of Rule of Court 46(3) cannot be served in the absence of an appropriate order of Court in terms of Rule of Court 4'

(at 201H—J). The second paragraph of the declaratory order is infelicitously worded, for it seems to indicate that the posting of a registered letter in terms of uniform rule 46(3) cannot take place unless an appropriate order of court has first been obtained authorizing service by means of such posting. That is not at all what rule 46(3) contemplates, and conflicts with the view expressed in the paragraph of the judgment of Goldblatt J immediately preceding the text of the declaratory order. It is submitted that what the court meant by the word 'served' was substituted service (sc service by some means other than the dispatch of the notice of attachment by registered post) referred to in rule 4(2). Even on that interpretation, however, the second paragraph of the declaratory order is open to criticism, for rule 4 (including the provision for substituted service set out in rule 4(2))

deals only with service of process of the court, and as such cannot be applicable to a notice issued by the sheriff.

8. CONSTITUTIONAL PRACTICE

Equality courts

Functioning of equality courts

Minister of Environmental Affairs and Tourism & others v George & others **2007 (3) SA 62 (SCA)** was an unsuccessful appeal against the refusal by N C Erasmus J, sitting as an equality court judge in *George & others v Minister of Environmental Affairs and Tourism* 2005 (6) SA 297 (EqC) (surveyed in *Civil Procedure Sibergramme Yearbook 2005* (2006) 181—3), to refer the dispute between the parties to the High Court. Commencing with an overview of the structure and functioning of equality courts, Cameron JA (Harms, Zulman, Lewis and Jafta JJA concurring) pointed out that the equality court 'is not a wholly novel structure', but is a High Court or a designated magistrate's court. The presiding judge or magistrate must have undergone 'social context training' (s 31(4)*(a)* of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 ('the Equality Act') read with s 16(2) of the Act). Subject to the availability of a presiding officer and one or more clerks, every High Court is an equality court for the area of its jurisdiction, and the Judge President may designate any judge who has completed a training course as a presiding officer of the equality court (s 16(1)*(a)* and *(b)*). The Minister for Justice and Constitutional Development may also designate magistrates' courts as equality courts (s 16(1)*(c)*) (para 4 at 67B—D).

When a complainant lodges an equality complaint, the equality court must first determine where the matter should best be heard. It must decide whether the matter is to be heard in the equality court or whether it should be referred to another appropriate institution, body, court, tribunal or other forum ('an alternative forum') which, in the opinion of the presiding officer, can deal more appropriately with the matter in terms of that alternative forum's powers and functions (s 20(3)*(a)*) (para 5 at 67E—F). If the presiding officer decides that the matter must be referred to an alternative forum, he or she must 'make an order' directing the clerk of the equality court to transfer the matter to the alternative forum (s 20(5)*(a)*). What emerges from this, said Cameron JA, is that **the court makes an order when redirecting a matter to an alternative forum, but it does not do so otherwise**. This is logical, for once a complaint of unfair discrimination is properly before an equality court, the statute vests the court with jurisdiction to hear the matter, and no further order is required to render the court competent. Nor is any order required for the equality court to retain its competence (para 6 at 68B—C). The possibility of referral to an alternative forum, far from being intended to deprive the equality court of its jurisdiction, is premised on its continuing jurisdiction, with the result that, in cases of non-referral, no express order need be given (para 7 at 68D—E). If the alternative forum does not resolve the matter to the satisfaction of one or more of the parties, and either party so requests, the alternative forum must refer the matter back to

the equality court in terms of s 20(8). The jurisdiction of the equality court therefore persists**:** the redirection entails 'only a conditional exploration of appropriate institutional alternatives'. Where there is no redirection, the presiding officer has declined to exercise the discretion to redirect, and the proceedings continue as before. In that event, no 'judgment' or 'order' is either necessary or appropriate, and **the decision not to redirect the matter to an alternative forum is not appealable** (para 8 at 68E—G). In any event, the decision of an equality court whether to redirect a matter entails a discretion with which a court on appeal will interfere only when the equality court fails to exercise it judicially. The test is then whether the equality court has exercised its discretion capriciously or upon a wrong principle, or has not brought its unbiased judgment to bear on the question or has not acted for substantial reasons (*Ex parte Neethling & others* 1951 (4) SA 331 (A) at 335D—E, L T C Harms *Civil Procedure in the Superior Courts* (1990) para C1.39). Counsel for the Minister had been unable to suggest any basis on which it could be said, with reference to that test, that a misdirection had taken place (para 9 at 68G—H, read with n6 at 68I—J).

A further problem with the Minister's argument was that a redirection from the equality court to the High Court would have been incapable, since the High Court did not fall within the category of alternative fora to which the equality court was empowered to refer the matter. A 'court' to which the matter could be referred in terms of s 20(3)*(a)* clearly could not include a High Court when the equality court was itself a High Court sitting as an equality court (para 10 at 68H—69B). This appeared most obviously from the 'relevant circumstances' which the presiding officer in the equality court was directed by s 20(4) to take into account. Those circumstances included 'the views of the appropriate functionary at any contemplated alternative forum' (s 20(4)*(e)*), but it was neither apparent who the 'appropriate functionary' in the case of a High Court would be, nor (if the functionary was a High Court judge) how his or her views would be obtained. The entire process of 'conditional exploratory referral' was alien to the functioning of a High Court. It had therefore to be concluded that **the legislation did not contemplate that a High Court sitting as an equality court could refer a matter to itself in another capacity** (para 11 at 69C—E).

Furthermore, the fact that much (though not all) of the relief sought against the Minister could also be granted by the High Court did not detract from the equality court's jurisdiction, nor was it a reason to deprive the respondents of the procedural benefits which they hoped would accrue from proceeding in the equality court (para 12 at 69F—G). Conversely, the fact that some of the relief sought by the respondents could be adjudicated only by the High Court (in which the respondents had simultaneously instituted parallel proceedings) did not entail that the equality court could not first (or concurrently) adjudicate upon the claims that were properly before it (para 13 at 69G—I).

The scheme of the Equality Act therefore did not envisage an appealable order when a presiding officer decided against referring a matter to another forum, and the referral to the High Court which the Minister sought was in any event incompetent because the High Court sitting as an equality court could not refer a matter to itself (para 14 at 69I—J).

Cameron JA concluded with a number of observations about the functioning of equality courts generally. As N C Erasmus J had pointed out, the question of double jurisdiction was not unique, and was likely to arise in every case brought under the

Equality Act. There was no reason why those who had interrelated remedies under the Equality Act and other legislation should not be entitled to pursue their remedies in parallel proceedings before the High Court in its capacity as an equality court and in its ordinary capacity (para 17 at 70F—H). Although the Minister had attacked the respondents' claims on various grounds, the respondents could not be denied their day in the equality court. They were entitled to claim the assistance and protection which the legislature afforded litigants who wished to press equality claims when it enacted the Equality Act (para 18 at 71C—D). Given that the problem of concurrency of jurisdiction would inevitably recur, the most productive and expeditious way of achieving efficiency would seem to lie in the matter being referred to the same High Court judge who, in his capacity as an equality court judge, was presiding in that court (para 19 at 71D—E).

Further on the appeal in *George*, see under '**APPEALS: *Application for leave to appeal***' above.

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