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1. INTRODUCTION

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

2. JURISDICTION

'Delay rule'

The High Courts have inherent jurisdiction to protect and control their own process, and the power to dismiss legal proceedings on account of delay or want of prosecution**:** ***Haroun v Garlick*** **[2007] 2 All SA 627 (C)** para 28 at 634*h—i*, with reference (inter alia) to s 173 of the Constitution of the Republic of South Africa, 1996 and *Herbstein and Van Winsen The Civil Practice of the Supreme Court of South Africa (Now the High Courts and the Supreme Court of Appeal)* 4 ed (1997) by the late Louis de Villiers van Winsen, Andries Charl Cilliers & Cheryl Loots 547. The general rule (sc in cases in which a claim is not precluded by the provisions of applicable legislation governing prescription) is that legal proceedings must be instituted within a reasonable period. What is reasonable depends on the facts and circumstances of each case. The question whether the delay has been reasonable or unreasonable is a factual enquiry. **If the court finds that the delay has been reasonable, it cannot bar the litigant from proceeding. If, however, the court finds that the delay has been unreasonable, the court exercises a discretion whether, in the light of all the relevant circumstances and factors, the delay should be condoned or not** (para 29 at 634*i*—635*b*, with reference to *Wolgroeiers Afslaers (Edms) Bpk v Munisipaliteit van Kaapstad* 1978 (1) SA 13 (A) at 42C—D, per Miller JA). There are no specific rules or practice (sc in the High Court) which provide that legal proceedings become superannuated by the effluxion of time for want of prosecution. Once an action has been instituted or an application has been launched, the rules of court stipulate a time period within which various steps have to be taken to bring the matter to finality (para 27 at 634*f—g*). (In the magistrates' courts, see rule 10, which provides that a summons will lapse if it is not served within twelve months of the date of its issue or if the plaintiff does not, after service, within that time take further steps in the prosecution of the action.)

Applying the above principles, Moosa J held that the applicant was not precluded by the 'delay rule' from enforcing the requirements of a zoning scheme affecting land adjacent to his own property. Multiple causes of action arose in favour of the applicant from moment to moment as a result of the respondent's breach of the conditions of the zoning scheme, and the respondent could not benefit from his own inaction in complying with those requirements. A defence predicated on the 'delay rule' was therefore misconceived and fell to be rejected (para 32 at 635*e—g*).

3. PARTIES

Intervention

The decision in ***Fraser v Absa Bank Ltd (National Director of Public Prosecutions as Amicus Curiae)*** **2007 (3) SA 484 (CC)** was previously reported sub nom *Fraser v Absa Bank Ltd* in 2007 (3) BCLR 219, and was surveyed in **Civil Procedure Sibergramme 7 of 2007** (31 October 2007) 15—16.

Joinder

In ***Haroun v Garlick*** **[2007] 2 All SA 627 (C)** Moosa J held, with reference to uniform rule 10, that the joinder of parties depends not only upon the nature of the subject matter but also upon the manner in which and the extent to which the court order sought may affect the interests of such parties. **For joinder to be essential, the parties to be joined must have a direct and substantial interest not only in the subject matter of the litigation but also in the outcome of it**. A court, in the absence of a direct and substantial interest, has a discretion to order a joinder on the basis of convenience (para 14 at 631*i*—632*a*). A defence of non-joinder was accordingly dismissed where the court was of the view that all of the parties whom the respondent claimed should have been joined had no direct and substantial interest in the subject matter of the interdict sought or in the outcome of the proceedings (para 15 at 632*b*—*c*, para 16 at 632*e*).

In the course of the court's judgment on the issue of joinder, Moosa J pointed out that s 97(1) of the Deeds Registries Act 47 of 1937 and s 46 of the Land Survey Act 8 of 1997 required notice of certain proceedings to be given to the Registrar of Deeds and the Surveyor-General, respectively, and not that those officials be joined as parties to the proceedings (para 13 at 631*g*—*h*).

Judge

In terms of s 25(1) of the Supreme Court Act 59 of 1959, notwithstanding anything to the contrary contained in any law, no summons or subpoena against the Chief Justice, a judge of appeal or any other judge of the Supreme Court shall in any civil action be issued out of any court except with the consent of that court. No such summons or subpoena shall be issued out of an inferior court unless the provincial division which has jurisdiction to hear and determine an appeal in a civil action from such inferior court has consented to the issuing thereof. The applicant in ***N v Lukoto*** **2007 (3) SA 569 (T)** sought leave in terms of these provisions to sue the respondent, a judge of the Venda High Court, for the maintenance of a fourteen-year-old boy. In the course of a judgment granting such leave, Ngoepe JP made the following points concerning the procedure which is followed in dealing with such an application, and the conduct of the judge whom the applicant wishes to sue**:**

- Normally, the judge president in question will receive a s 25(1) application and will consider it in chambers. This is done in order to dispose quietly of patently frivolous

claims which might unjustifiably damage the reputation of a judge. **Where there appears to be at least an arguable case, the judge president would approach the judge concerned**. In appropriate circumstances, the judge president might even urge the judge 'to oblige', for example where there is a clear debt against the judge. The judge president would impress on the judge concerned that those who are the ultimate enforcers of the law must themselves make every endeavour to observe it. Also of importance is to avoid the appearance of a judge as a litigant in court, particularly in the lower courts. **Where there seems to be an arguable case against the judge but the latter remains recalcitrant, the judge president would give the judge the opportunity to oppose the application for leave to sue him or her**. The matter may then be disposed of in chambers or in open court, depending on the intensity of the opposition. Once an applicant shows good cause, leave would be granted (para 4 at 572B—F, with reference to *Soller v President of the Republic of South Africa* 2005 (3) SA 567 (T) para 9 at 572A).

- The court which has jurisdiction (in relation to proceedings against a judge in a lower court) is the High Court which enjoys jurisdiction over the lower court before which the judge is to appear. Thus, in *Lukoto*, the applicable court was the Transvaal Provincial Division, since it exercised jurisdiction over the Polokwane magistrate's court, in which the intended maintenance proceedings were to take place, not the Venda High Court of which the judge was a member (para 12 at 574G—H; see also para 18 at 576C—D).

- Claims giving rise to requests for permission to sue should be expeditiously resolved through the efforts of the very judges involved, in a manner consistent with the nature and demands of their office as judges (para 24 at 577F—G).

- **A judge should not resort to tactics aimed at delaying the resolution of the matter, particularly in matters involving the maintenance of a child**. This is so because of the provisions and spirit of the Maintenance Act 99 of 1998, because a judge is by law the upper guardian of all minor children, and because s 28(2) of the Constitution of the Republic of South Africa, 1996 provides that a child's best interests are of paramount importance in every matter concerning the child. In this regard, Mokgoro J remarked in *Bannatyne v Bannatyne (Commission for Gender Equality, as Amicus Curiae)* 2003 (2) SA 363 (CC), 2003 (2) BCLR 111 para 24 at 375C—D (SA), 121E—F (BCLR) that children have a right to proper parental care, and it is universally recognized in the context of family law that the best interests of the child are of paramount importance (para 25 at 577G—I read with para 21 at 577A—C; see also s 9 of the Children's Act 38 of 2005). Courts need to be alive to recalcitrant maintenance defaulters who use legal processes to side-step their obligation towards their children. It appears to happen frequently in the maintenance courts that respondents utilize the system to stall their maintenance obligations through the machinery of the Maintenance Act. A judge may not be one of such people (para 28 at 578E—G, with reference to *Bannatyne* para 32 at 378F—H (SA), 124H—125A (BCLR); see also para 40 at 580C—D). Delaying a speedy resolution of an inquiry into the maintenance of a minor child is inconsistent with the nature and

demands of the office held by a judge, since he is an upper guardian of all minor children (para 42 at 580I—581B).

- The impression must be avoided, particularly in matters concerning the maintenance of a child, that the justice system becomes tardy when a judge is a litigant. Justice requires a speedy resolution of such matters, and the justice system ought to spare the child some anxiety (para 44 at 581E).

Further on *Lukoto*, see in particular under '**APPLICATIONS: *Notice of motion***' and '**APPLICATIONS: *Postponement***' below.

Neighbouring owner

The owner of an adjoining erf was held in ***Haroun v Garlick*** **[2007] 2 All SA 627 (C)** to have a direct and substantial interest in the compliance with and enforcement of a zoning scheme applicable to his property and that of the neighbouring owner. The applicant was entitled to protect that interest against unlawful use of and dealings with neighbouring land that would adversely affect his enjoyment, privacy, peace and tranquillity (para 10 at 631*a*—*c*). The applicant sought to prevent the development and alienation of an illegally created erf that would detract from the existing character and amenities of the neighbourhood, and that would absolve the neighbouring owner of his obligation to comply with a condition of subdivision or with the zoning scheme. The applicant accordingly had locus standi to bring an application to interdict the neighbouring owner from alienating or improving the land in question (para 11 at 631*c*—*d*; see also para 32 at 635*e*—*f*, para 36 at 636*d* and para 40 at 636*i*—637*a*).

4. RECUSAL OF JUDICIAL OFFICER

Bias

See ***N v Lukoto*** **2007 (3) SA 569 (T)** para 16 at 575F—J, where Ngoepe JP rejected an argument that grounds existed for his recusal on the basis of bias, holding that his prior conduct in relation to the matter indicated openness of mind on his part.

5. APPLICATIONS

Disclosure of documentation referred to in affidavit

Uniform rule 35(12) states that any party to any proceeding may at any time before the hearing deliver a notice to any other party in whose pleadings or affidavits reference is made to any document or tape recording to produce such document or tape recording for inspection, and to permit the requesting party to make a copy or transcription thereof. Any party failing to comply with the notice may not, save with the leave of the court, use the document or tape recording in such proceeding, although any other party may use it.

In issue in ***Penta Communication Services (Pty) Ltd v King & another*** **2007 (3) SA 471 (C)** were the limits of a litigant's obligation in terms of rule 35(12) to produce documents referred to in the founding affidavit in an application, in particular whether the production of such documents could be compelled when they were alleged not to be functional to the compelling party's case and whether indirect allusions to documents which might exist would trigger the provisions of the subrule. In the course of the court's judgment, Bozalek J held as follows**:**

- Even a reference to a document (or tape recording) which is not detailed or descriptive will suffice to trigger the provisions of rule 35(12) (para 15 at 476B, with reference to *Protea Assurance Co Ltd & another v Waverley Agencies CC & others* 1994 (3) SA 247 (C) at 248I, referring in turn to *Erasmus v Slomowitz (2)* 1938 TPD 242 at 244).
- **The judgment in the *Protea Assurance Co* case cannot be read as lending support to the proposition that where the existence of a document can be deduced by a process of reasoning and inference, it falls to be produced in terms of rule 35(12) notwithstanding the lack of any direct or even indirect reference to it** (para 16 at 476E—F). Thus, where an affidavit referred to a bank account, that did not entitle an opposing litigant to production of any and all documents relating to the bank account. The argument that where it can reasonably be inferred that documents exist relating to a fact or allegation made by a deponent to an affidavit, such documents must be disclosed under rule 35(12) extended the provisions of the subrule too far in that it gave the concept of 'reference' to a document so broad a meaning as to make it almost superfluous. The subrule provided a mechanism for a party to obtain production and inspection of documents prior to making out his case where those documents had been referred to by another litigant but not annexed. To give the rule the wide meaning contended for would be to sanction immediate and full discovery as provided for by rule 35(1). That was not the purpose of rule 35(12) (para 17 at 476F—I). Although, where a bank account was utilized, documents evidencing its existence and use had to exist somewhere, it did not follow that a reference to that bank account, without more, constituted a reference for the purposes of rule 35(12) to documentation relating to that bank account (para 18 at 476I—J; see also para 23 at 477I—J and para 25 at 478F—G).
- A reference in an affidavit to criminal charges in the process of being laid was not a reference, direct or indirect, to any document. Thus, even if a list of charges or a written complaint existed and was in the possession of the deponent, production of that list or complaint could not be demanded under rule 35(12) (para 20 at 477C—E).
- The provisions of rule 35(12) exist for a specific purpose, and **the subrule is not a mechanism whereby a litigant can go behind the words of an affidavit or a pleading and argue that, although there is no direct or even indirect reference to a document, such a document would in the ordinary course of events exist and must, if in the possession of the opposing party, be produced for inspection** (para 21 at 477E—F).

- Where a valid request for documents has been made under rule 35(12), it is no answer to state that the requesting party already has them in his or her possession or control (para 25 at 478E—F). The bulkiness of the documentation sought and the fact that the requesting party may once have been in possession of the documents likewise does not entitle the requested party to refuse to produce the documents (para 29 at 479E—F). A litigant may call for the production of a document under rule 35(12) notwithstanding that he already possesses a copy of it, if only to confirm that it is the document upon which the other party relies (para 29 at 479F—G).
- **Rule 35(12) should be interpreted as providing for a prima facie obligation on a party who refers to a document in a pleading or an affidavit to produce it for inspection, if called upon to do so**. That obligation is, however, subject to certain limitations, for example if the document is not in his possession and he cannot produce it, or if the document is privileged or irrelevant. In those circumstances, the court will not compel him to produce the document. Furthermore, since it will not necessarily be within the knowledge of the person serving the notice whether the document is one which falls within those limitations, **the onus would be on the recipient of the notice to set up the facts relieving him of the obligation to produce the document** (paras 30—1 at 479G—J, with reference to *Gorfinkel v Gross, Hendler & Frank* 1987 (3) SA 766 (C) at 774G—I and *Unilever plc & another v Polagric (Pty) Ltd* 2001 (2) SA 329 (C) at 338C—F).
- It is not proper for a litigant, whether represented by the same legal representatives or not, to purport to seek documentation or to invoke a rule (in this instance, rule 35(12)) on behalf of another litigant. Thus, for example, if an application to compel compliance with rule 35(12) were to fail, the litigant on whose behalf the applicant purported to act could not be compelled to pay a share of the costs of that application (para 32 at 481A—C).
- **A court would be embarking on a slippery slope were it to withhold from a litigant the right to invoke a rule of court because his or her motives in seeking the documentation might be mixed or less than pure** (para 38 at 482G), for example because it appeared that production of documentation in terms of rule 35(12) in an application for the sequestration of the first respondent was required by her husband, the second respondent, for the apparent purpose of obtaining advance discovery in a defamation action instituted by him against the applicant arising from averments made in the founding affidavit (paras 37—8 at 482C—G).

Applying these principles, Bozalek J ordered the production to the second respondent only of certain documents which were mentioned in the founding affidavit and which the second respondent required in order to refute accusations of dishonest collusion on his part with the first respondent, to whom he was married out of community of property. The second respondent was not merely cited in a nominal capacity or solely by virtue of his marriage to the first respondent, but was alleged to be a role-player in underlying commercial transactions that had led to litigation culminating in a judgment against the first respondent and the ensuing sequestration application (para 34 at 481G—H). Cape Practice Note 15 required that notice of intention to apply for a provisional order of

sequestration had to be given to the debtor's spouse, whether married in or out of community of property, and that the spouse had to be joined as a (co-)respondent (para 35 at 481I—J). The second respondent had been cited as a party to the application, serious allegations had been made against him, and as a party he was in principle entitled to invoke the provisions of rule 35(12) (para 39 at 482G—H). Furthermore, any sequestration order against the first respondent would have far-reaching effects for the second respondent because, in terms of s 21(1) of the Insolvency Act 24 of 1936, the effect of the sequestration of the estate of a spouse was to vest in the Master until a trustee was appointed, and in the trustee on his appointment, all the property of the spouse whose estate had not been sequestrated, as if it were the property of the sequestrated estate, and to empower the Master or the trustee to deal with such property accordingly. Until the (solvent) spouse secured the release of his assets, he had none of the ordinary powers of ownership over the assets and could not alienate or encumber them (paras 40—1 at 482I—483B). The applicant had accordingly not discharged the onus of proving on a balance of probabilities that the second respondent was not entitled to the documents mentioned in the founding affidavit, which he required the applicant to produce in terms of rule 35(12) (para 42 at 483B—C), despite the fact that no relief was sought against him (para 36 at 482A—B).

Dispute of fact

The decision in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) was applied in ***Haroun v Garlick*** **[2007] 2 All SA 627 (C)** in order to resolve disputes of fact on the basis of facts which were common cause or undisputed, together with facts which did not set up bona fide and genuine disputes of fact (para 4 at 630*b*—*c*).

Ex parte

In ***Absa Bank Ltd v Ntsane & another*** **2007 (3) SA 554 (T)** the court reiterated the principle that in an affidavit made ex parte the deponent is in duty bound to disclose all relevant facts which might influence the court's decision. The failure to comply with this fundamental principle, said Bertelsmann J, whether by design or by neglect, would entitle the court to dismiss the application on that ground alone (para 50 at 562I—563A, with reference to *Schlesinger v Schlesinger* 1979 (4) SA 342 (W) at 348F—349B).

Notice of motion

In ***N v Lukoto*** **2007 (3) SA 569 (T)**, an application in terms of s 25(1) of the Supreme Court Act 59 of 1959 to sue the respondent (a judge of the Venda High Court) for maintenance for a minor child, it was argued that the application was not an application at all on account of the absence of a formal notice of motion. It was true, said Ngoepe JP, that there was no formal notice of motion accompanying the affidavit, but this did not warrant the dismissal of the matter. **The court had an inherent power to condone non-compliance with its rules**, and such condonation was justified because the court was dealing with a claim for the maintenance of a fourteen-year-old child who was obviously

ignorant of how to enforce his claim. He could only be assisted by others, in the present instance his mother and the office of the public prosecutor, which was itself a public office rendering free service to the best of its ability and in good faith to helpless people. Furthermore, **there was no prejudice to the respondent**, and no attempt was made to point out any. The relief sought, which would have been the core of the notice of motion, was fully set out in the affidavit and in earlier correspondence from the office of the public prosecutor, and was very narrow and clearly identifiable in nature. There was nothing substantive which a notice of motion could have added. In any event, a formal notice of motion was subsequently delivered, apparently to meet the respondent's objection. No attempt was made to point out any prejudice that would ensue from this late step, and there could not have been any, given the narrowness of the relief and the fact that it was identifiable from the letter of the prosecutor (para 19 at 576D—I).

Postponement

An application for leave to sue the respondent, a judge, for unpaid maintenance in respect of a fourteen-year-old boy was instituted in ***N v Lukoto*** **2007 (3) SA 569 (T)**. When the matter was set down for hearing before Ngoepe JP, the respondent sought a postponement in order to prepare and launch a substantive application for the recusal of Ngoepe JP. In the exercise of his discretion, the latter refused the application for postponement, pointing out that there was no explanation why the substantive application for his recusal could not have been filed before the hearing. The matter, furthermore, had been dragging on for a long time (some six years) and was beginning to impact negatively on the image of the judiciary, bearing in mind that a judge was involved. In addition, the grounds on which the proposed recusal application was to be based had no merit at all (para 15 at 575E—F). **No postponement could be justified solely for the opportunity to launch a substantive application the grounds of which were patently without merit. A postponement, was, in any event, an indulgence which had to be earned; it could not be claimed as of right**. The matter concerned a maintenance inquiry in respect of a minor child, and the matter needed expeditious resolution (para 16 at 575I—576B, with reference to *National Police Service Union & others v Minister of Safety and Security & others* 2000 (4) SA 1110 (CC), 2001 (8) BCLR 775 para 4 at 1112C—D (SA), 776H—I (BCLR); see also *Lukoto* para 44 at 581D—E). In this regard, the principle of paramountcy of the best interests of the child had to be taken into account (para 21 at 577A—B; see also para 25 at 577G—I).

Ngoepe JP went on to express trenchant criticism of delays already occasioned by the respondent in seeking a postponement of the maintenance hearing before a magistrate in order to take on review the magistrate's dismissal of various points in limine raised by the respondent; in launching proceedings to review the decision of the magistrate dismissing the respondent's points in limine but then failing to set down the review proceedings for hearing for over a year; in attempting (unsuccessfully) to postpone the review proceedings after the applicant had set them down before another judge; in taking more than six months to apply for leave to appeal against a decision of the judge dismissing the respondent's review application; in taking two and a half years to lodge an application, styled a review, to challenge the validity of leave to sue granted three years earlier by

Ngoepe JP in chambers; and in attempting to have a subsequent hearing before Ngoepe JP postponed, without any proper papers being filed in support of a postponement application, for the purpose of launching an unfounded recusal application (see para 41 at 580D—I read with para 8 at 573F—G). Individually and cumulatively, said Ngoepe JP, the respondent's acts and omissions were inconsistent with an intention to bring to a speedy resolution a matter the nature of which demanded precisely that (para 42 at 580I—J). The submissions by the applicant on the delaying mechanisms employed by the respondent were material to the exercise of the court's discretion in the resolution of the issue of postponement (para 27 at 578C—D, E).

Urgent applications

The applicant in ***Scott v Hough*** **2007 (3) SA 425 (O)** had instituted an application in terms of uniform rule 6(12)*(a)* for provisional custody of his minor child pending an application for the variation of a divorce order which granted custody of the child to his ex-wife, the respondent. The application was instituted in the Orange Free State Provincial Division, within whose area of jurisdiction the applicant resided and the child (temporarily) was. The respondent, after the divorce, had moved to Stellenbosch in the Western Cape, where she still resided. A copy of the application was telefaxed to the respondent's attorneys in Stellenbosch on the morning of the hearing. The matter was heard 'in haste, *in camera* and in the absence of the respondent', and Rampai J granted a rule nisi operating as an interim interdict, the effect of which was to award custody to the applicant pending the finalization of the application. The next day, the respondent launched an application in terms of rule 6(12)*(c)*, which provides that a person against whom an order was granted in his (or her) absence in an urgent application may by notice set down the matter for reconsideration of the order. The essence of the respondent's application was that, since the respondent resided outside the area of jurisdiction of the Orange Free State Provincial Division, s 27 of the Supreme Court Act 59 of 1959, read with the definition of 'civil summons' in s 1(1) of the Act, required that 21 (calendar) days' notice be given if the notice of motion in the original application was to be served at a place more than 160km (in terms of s 27, 'one hundred miles') from the court out of which it was issued. Since that provision had not been complied with, argued the respondent, the entire application for interim custody was a nullity, and the rule nisi had to be discharged.

The respondent's argument was rejected by Rampai J. After distinguishing between rule 6(12)*(c)* and rule 6(8), which entitles any person against whom an order is granted ex parte to anticipate the return day upon delivery of not less than 24 hours' notice to the person in whose favour the order was given (para 9 at 429E—F), Rampai J expressed agreement with dicta in *ISDN Solutions (Pty) Ltd v CSDN Solutions CC & others* 1996 (4) SA 484 (W), [1996] 4 All SA 58 at 486H—487B (SA), 60*j*—61*d* (All SA). There it was remarked that rule 6(12)*(c)* has been widely formulated. It permits the reconsideration of an order granted in an urgent application provided only that it was granted in the absence of the person seeking reconsideration. The dominant purpose of the rule is to afford to an aggrieved party a mechanism designed to redress imbalances in, and injustices and oppression flowing from, an order granted as a matter of urgency in his

absence. In circumstances of urgency where an affected party is not present, factors which might conceivably impact on the content and form of an order may not be known to either the applicant for urgent relief or the judge required to determine it. The order may be interim or final in its operation, and **reconsideration may involve a deletion of the order, either in whole or in part, or the engraftment of additions to it. The framers of the rule have not sought to delineate the factors which might legitimately be taken into reckoning in determining whether any particular order falls to be reconsidered, and it is plain that a wide discretion is intended** (para 10 at 429F—J and para 11 at 430A—B; see also *Lourenco & others v Ferela (Pty) Ltd & others (No 1)* 1998 (3) SA 281 (T) at 290E—H and *Cape Killarney Property Investments (Pty) Ltd v Mahamba & others* 2000 (2) SA 67 (C) at 72B—F).

The service of court papers upon an interested party, continued Rampai J, is premised on the fundamental principle audi alteram partem, which requires a court approached by one party for relief to hear the other party as well before granting the relief sought. In general, a court would decline to grant relief unless the party against whom it was sought had been fully and timeously apprised that relief in a particular form would be sought and that he had had the maximum benefit of the dies induciae, in other words the fullest opportunity permissible in law of considering his defensive options and of dealing with the claim for the relief being pressed (para 12 at 430B—D). In the ordinary course, where the relief sought was not urgent, the respondent who resided within the area of jurisdiction of the court was 'entitled to a maximum of five Court days after the service of the Court papers before he can be called upon to appear in Court for the hearing' (with reference to rule 6(5)*(b)*). Where the respondent resided outside the jurisdictional boundaries of the High Court out of which the ordinary application was initiated, the respondent was entitled to at least 14 calendar days if he resided within a radius of 160km from the seat of the court or 21 calendar days if he resided outside that radius (with reference to s 27) (para 13 at 430D—F). (These dicta, in so far as they relate to rule 6(5)*(b)*, reflect a garbled misunderstanding of the rule. The period of five days (for delivery of a notice of intention to oppose) laid down in rule 6(5)*(b)* is not a maximum period but a minimum one, as is clear from the expression 'not less than five days' in the rule**:** an applicant may give a respondent a longer period than five court days in which to deliver a notice of intention to oppose, however unusual in practice such a indulgence may be. Furthermore, the respondent cannot be compelled to appear in court at all, whatever risk the respondent may run in the event of his or her non-appearance. And where notice of intention to oppose is delivered within the time allowed in the notice of motion (which must be at least five court days after service of the papers on the respondent), there will (in the absence of urgency) be no hearing five days after service of the notice of motion, for then the respondent is given a further fifteen court days in which to deliver an answering affidavit (rule 6(5)*(d)*(ii)).)

Where an application is urgent and the respondent resides within the area of jurisdiction of the High Court out of which the application is issued, said Rampai J, rule 6(12)*(a)* provides that the court may dispense with the formal periods of service as prescribed *in the rules*. But **where the respondent resides outside the jurisdiction, there is no similar provision which empowers the court to relax formal periods of service as prescribed *in the principal statute*. The mere absence of such a provision,**

however, does not mean that an applicant who resides within the jurisdiction cannot launch an urgent application out of the court against a respondent who resides outside the jurisdiction of such court. Rule 6(4) (which provides for ex parte applications) will then apply, together with rule 6(12)*(a)*, irrespective of the respondent's residence, provided that the matter is urgent and there is one or other jurisdictional factor which connects the respondent to the applicant's court of residence (para 14 at 430F—J). Since a High Court is empowered, in urgent matters, to relax the rules of service in respect of a respondent who resides within its area of jurisdiction, there is no reason in principle or in logic why, in urgent matters involving respondents who reside outside its area of jurisdiction, the court should be precluded from doing so. If the legislature had intended that the rules could not be relaxed where a respondent in an urgent matter resides outside the jurisdiction of the court, the legislature would simply have enacted a provision in the principal statute to the effect that in all urgent matters, the applicant must follow the respondent's court, in other words that the applicant must initiate an urgent application for a rule nisi out of the High Court where the respondent resides (para 15 at 431B—D).

After distinguishing the decision in *Claassens v Zeneca Suid-Afrika (Edms) Bpk* 1996 (1) SA 627 (O) on the basis that both parties there were residents within the jurisdiction of the same court and s 27 was not applicable (para 18 at 431I—432A), Rampai J expressed agreement with the decision in *Turquoise River Inc v McMenamin & others* 1992 (3) SA 653 (D) at 657D—E, where Levinsohn J upheld the approach of launching what was 'in the nature of an *ex parte* application', seeking a rule nisi, when circumstances of urgency existed (para 21 at 432I—433B). In the *Turquoise River* case, and in *Davy v Douglas & another* 1999 (1) SA 1043 (N), where there was a measure of urgency in a matter involving a respondent resident outside the jurisdiction of the courts concerned, it was significant that what was sought was interim (rather than final) relief on an ex parte basis. The type of relief, in addition to the urgency factor, was a fundamental consideration distinguishing the flexible external rules of service pertaining to (exceptional) urgent applications from the rigid external rules of service pertaining to (ordinary) non-urgent applications. By external rules of service the court meant the rules of dies induciae which apply to respondents residing outside the jurisdiction of the court concerned (para 22 at 433B—F).

The urgency of the application in *Scott v Hough*, continued Rampai J, did not simply evaporate into thin air the moment the application was telefaxed to the respondent's attorneys. The matter was in the nature of an ex parte application in terms of rule 6(4). **An ex parte application was used (inter alia) where immediate relief was essential because harm was imminent, a rule nisi then being sought** (para 24 at 433I—J, with reference to H J Erasmus et al *Superior Court Practice* (1994) B1—41). In the *Turquoise River* case the court had held that the provisions of s 27 and rule 6(5)*(b)* regarding dies induciae do not apply to an application for a rule nisi since such an application, even if brought on notice to the respondent, is in the nature of an ex parte application in terms of rule 6(4). The procedures contemplated in s 27 and rule 6(5)*(b)* were not underpinned by an element of urgency (para 24 at 434A—C). Rule 6(4) allows an applicant who seeks interim relief where the circumstances show that his interest or right is in imminent danger of being infringed to hasten to court alone in the absence of the respondent. An

applicant in terms of rule 6(4) was ordinarily exempted from giving the customary notice to the respondent provided that a proper case for this was made out. The exemption was, however, not there for the taking. The procedure in terms of rule 6(4) was 'somehow *sui generis*'. Its rigid foundation was a degree of urgency. Such a quick procedure was designed to provide immediate but interim relief in emergency situations, and the procedure did not lose its 'intrinsic and genuine character as a fast vehicle on a fast track to access justice' merely because the applicant gave unnecessary notice to the respondent (para 25 at 434C—F). Our civil-justice system would certainly be defective if 'such a fast train [could] easily be derailed or brought to a standstill or slowed down' because an applicant had informally notified or alerted the respondent beforehand of his intention to approach the court urgently for interim relief. Such informal notice as was given in the present case was undue and unnecessary, and had 'virtually no adverse impact' on the true character of an ex parte application. By alerting the respondent as he did, the applicant had not extinguished or erased the urgency of his ex parte application. L T C Harms *Civil Procedure in the Superior Courts* (1990) para B6.31 at B—50 (not B—150 as stated in the reported judgment in *Scott v Hough*) was correct in stating that **failure to allow for the days prescribed by the rules may be condoned but not if the period is prescribed by statute, as is the case for service outside the jurisdiction of the court, although that did not apply to applications for a rule nisi (even on notice) since such an application remains by its very nature an ex parte application** (para 26 at 434F—I).

Only the court hearing a rule 6(4) application could direct the applicant to give notice to the respondent first. The court was empowered to do so where it considered that an application brought in terms of rule 6(4) lacked a sufficient measure of urgency to justify the grant of even a rule nisi in the respondent's absence. Only the court could relax prescribed formal time limits, and no party had the power to direct the applicant to serve the urgent application on the respondent and to give the respondent a specified period of time to react to the application prior to the hearing of argument for or against the rule nisi. A litigant could not usurp such power from the court in advance (para 27 at 434J—435C).

Since there was, on the facts in *Scott v Hough*, a sufficient degree of urgency to entitle the applicant to proceed ex parte (para 28 at 435E—G), compliance with s 27 was not needed, for rule 6(4) did not require mandatory notice to be served on the respondent before a rule nisi could be issued. It was competent for the applicant to have launched an urgent application in terms of rule 6(4) for a rule nisi, and the court was not precluded from granting interim relief by the notice which the applicant had chosen to give to the respondent's attorneys prior to the grant of the provisional order. The urgency of the matter remained despite such informal and undue notice (para 29 at 435G—I). There was no merit in the submission that the rule nisi issued had to be set aside on the alleged ground that it was fatally abortive relief which had germinated from improper proceedings. The interim relief was correctly sought by way of a proper rule 6(4) procedure, the rule nisi was correctly granted and s 27 did not feature in the equation for speedy interim relief. The application by the respondent in terms of rule 6(12)*(c)* had therefore to be dismissed (paras 30—1 at 436A—E).

Although (with respect) one must agree that a litigant should not be precluded from bringing an urgent application against a respondent who resides outside the area of jurisdiction of the High Court out of which the application is issued (provided, of course, that the court has jurisdiction on some other basis), and although one must agree with Rampai J that an urgent application should not be frustrated by the provisions of s 27 of the Supreme Court Act in a case where the respondent resides outside the area of jurisdiction, **it is unfortunate that the only way of circumventing the difficulty created by s 27 in urgent matters to which it applies is to fall back upon the stratagem of utilizing the ex parte motion procedure in matters in which relief is claimed against another person, or where it is necessary or proper to give any person notice of the application**. In such situations, rule 6(2) requires that the notice of motion be 'addressed' to both the registrar and such person, and there can hardly be any point in addressing a notice of motion to a person without serving the papers on that person. It is also less than satisfactory for an application of which a respondent has in fact received notice (albeit notice of an informal nature) to be categorized as an ex parte application, which (as is apparent from rule 6(4)) is in essence an application of which notice has *not* been given by the applicant to any other person. The ideal solution to these difficulties would seem to be the repeal of s 27 of the Supreme Court and the enactment (if it be considered necessary to retain its provisions at all) of a uniform rule in similar terms. That would enable the court in an urgent matter, by virtue of its power (in terms of rule 6(12)*(a)*) to 'dispense with the forms and service provided for *in these rules*' (italics supplied), to condone a departure from the time provisions presently found in s 27, thereby obviating the need to fall back upon the bringing of an ex parte application in circumstances where relief is claimed against another person or it is necessary or proper to give any person notice of such application, and where there is no question of the giving of such notice defeating the purpose of the application.

Withdrawal

In terms of uniform rule 41(1) (which applies to trial actions as well as to applications), a person instituting any proceedings may withdraw them after set down only by consent of the parties or with leave of the court. In ***Absa Bank Ltd v Ntsane & another*** **2007 (3) SA 554 (T)** Bertelsmann J, in the absence of consent by the parties, refused to allow an application for default judgment to be withdrawn after the applicant (plaintiff) had sought an order declaring residential immovable property belonging to the respondents (defendants) to be executable pursuant to an application for default judgment to be granted in the capital sum of R18,46. This prompted the court to put a series of questions to counsel for argument, relating to the acceptability and constitutionality of declaring residential immovable property to be executable where such a picayune amount was claimed. The applicant failed to prepare answers to the questions raised by the court, and tried to evade the issue by attempting to withdraw the application (para 35 at 561B—C). Bertelsmann J, however, refused to allow the application to be withdrawn because an amicus curiae had by then already been appointed to address the court on the questions put by it and had prepared heads of argument. In addition, the motivation for the intended withdrawal itself appeared to be unsatisfactory and in need of further elucidation. Most

importantly, however, **the questions that arose concerned matters of significant constitutional and commercial import and of public interest** (para 34 at 561A—B).

6. INTERDICTS

Final interdict

In ***Haroun v Garlick*** **[2007] 2 All SA 627 (C)** the requirements for the grant of a final interdict (a clear right, an injury actually committed or reasonably apprehended, and the absence of any other satisfactory remedy available to the applicant) were restated and applied (para 33 at 635*g—i*, with reference to *Setlogelo v Setlogelo* 1914 AD 221 at 227 and *V & A Waterfront Properties (Pty) Ltd & another v Helicopter & Marine Services (Pty) Ltd & others* 2006 (1) SA 252 (SCA) paras 22—3 at 258A—E; see also paras 34—43 at 635*i*—637*g*).

In granting an interdict to prevent the respondent from alienating or developing an erf which had been illegally created in violation of the provisions of a zoning scheme, Moosa J took into consideration the possibility that the zoning scheme might be amended or that other legal measures might be introduced to enable the erf in question to exist lawfully as a separate entity. The interdict granted was accordingly ordered to endure until it became legally permissible to hold the erf as a separate entity, and the respondent was granted leave to approach the court, on due notice to the applicant and on good cause shown, for an order rescinding or amending the interdict in the event of circumstances changing materially (para 47 at 638*f—g*; see also para 45 at 637*i—j*).

7. APPEALS

Exercise of discretion by court a quo

The decision in ***Fraser v Absa Bank Ltd (National Director of Public Prosecutions as Amicus Curiae)*** **2007 (3) SA 484 (CC)** was previously reported sub nom *Fraser v Absa Bank Ltd* in 2007 (3) BCLR 219, and was surveyed in **Civil Procedure Sibergramme 7 of 2007** (31 October 2007) 9.

8. EXECUTION

Immovable property

In ***Absa Bank Ltd v Ntsane & another*** **2007 (3) SA 554 (T)** the applicant (plaintiff) applied for default judgment to be granted in a capital sum of R18,46, and sought in addition an order declaring the respondents' (defendants') residential immovable property (their home) to be declared executable so as to enable execution to take place against their home for the amount of R18,46. The amount was due and in arrears in respect of payments due under a mortgage bond passed over the respondents' home as security for a

home loan made to them and the repayments by the respondents had been erratic and frequently in arrears, but the respondents had made 'very real efforts' to bring any arrears up to date (para 20 at 558I). Describing the amount claimed as 'piffling, particularly when the status of the plaintiff as part of a multi-billion rand international financial conglomerate is taken into account' (para 18 at 558G—H), Bertelsmann J remarked that at first blush, the plaintiff's decision to enforce the bond appeared 'morally and ethically questionable, strongly reminiscent of Shylock insisting upon every single ounce of his pound of flesh' (para 22 at 559A; see William Shakespeare *The Merchant of Venice* Act 4 Scene 1, where Shylock says: 'The pound of flesh, which I demand of him/Is dearly bought, 'tis mine, and I will have it**:**/If you deny me, fie upon your law!'). The court had raised its 'very considerable disquiet about the apparently irreversible prejudice the defendants would suffer while the plaintiff relied upon the non-payment of a minute amount to enforce its claim' (para 22 at 559A—B). **The first impression that the application for default judgment created was certainly that it would be unfair and a striking injustice to deprive apparently poor persons of their only dwelling** (para 24 at 559D—E). The hard-heartedness of the applicant was 'difficult to accept' (para 25 at 559E—F). Although the amount claimed fell (manifestly) within the jurisdiction of a magistrate's court, the application had been referred to the High Court by the registrar in the light of the judgment in *Nedbank Ltd v Mortinson* 2005 (6) SA 462 (W), [2006] 2 All SA 506 para 33.2 at 473G—H (SA), 516*f—g* (All SA) (discussed in **Civil Procedure Sibergramme 2 of 2006** (3 May 2006) 19—26), which obliges the registrar to refer all cases in which a hypothecated property is sought to be declared executable to the court, to be heard in the open motion court (para 10 at 557H—I).

Before addressing the law governing execution against hypothecated immovable property, Bertelsmann J pointed out that the applicant did not deal at all with the fact that interest had been paid by the respondents as a first charge against every payment over the years. Nor had the sum of bank fees and other bank charges, such as penalty interest, been disclosed. In the light of those 'not unremarkable omissions', the court could only conclude that the applicant had not suffered any loss on the secured loan if all moneys received from the respondents were taken into consideration (paras 43—4 at 562C—E). It was thus obvious that the full picture of the history of the relationship between the applicant and the respondents had not been dealt with in any of the affidavits filed in court. The question arose whether that omission was significant and whether the applicant should have disclosed more facts that would have informed the court of the struggle the defendants had been through in their endeavour to retain their house. The information not included in the affidavit supporting the application for default judgment could only be regarded as relevant if such information, had it been at the court's disposal, was of a nature that might have led the court to a different decision from the one it would have reached without having those facts drawn to its knowledge. It was clear that much of what was left unsaid could have informed the court's eventual decision (paras 51—4 at 563A—E).

If the respondents' house was lost, continued Bertelsmann J, **they would not qualify for a state subsidy if they were to attempt to obtain another dwelling once they were evicted from their abode** (para 62 at 564A—B). In *Jaftha v Schoeman & others*; *Van Rooyen v Stoltz & others* 2005 (2) SA 140 (CC), 2005 (1) BCLR 78 para 34

at 156H—I (SA), 92E—F (BCLR) (surveyed in *Civil Procedure Sibergramme Yearbook 2005* (2006) 147—9) the Constitutional Court had held that any measure which permitted a person to be deprived of existing access to adequate housing limited the right protected in s 26(1) of the Constitution of the Republic of South Africa, 1996 (*Ntsane* para 63 at 564D—E). With reference to instances where execution against a family home would be unjustifiable, for instance the recovery of a debt of trifling importance to the creditor that would result in a disastrous dispossession of the family of the debtor of their only shelter, Mokgoro J (on behalf of the Constitutional Court) added that, bearing in mind the interests of creditors, there might be circumstances where, notwithstanding the relatively small amount of money owed, the creditor's advantage in execution outweighed the harm caused to the debtor. In such circumstances, it might be justifiable to execute. In this sense, a consideration of the legitimacy of a sale in execution had to be seen as a balancing process. However, there would also be circumstances in which it would be unjustifiable to allow execution, because the advantage that attached to a creditor who sought execution would be far outweighed by the immense prejudice and hardship caused to the debtor. Another factor of great importance would be the circumstances in which the debt arose. If the judgment debtor had willingly put his or her house up as security for the debt, a sale in execution should ordinarily be permitted where there had not been an abuse of court procedure. The need to ensure that homes might be used by people to raise capital was an important aspect of the value of a home, which courts had to be careful to acknowledge (para 64 at 564E—J, with reference to *Jaftha* paras 42—3 and 58 at 158H—159A and 162E—G (SA), 94D—G and 97I—98B (BCLR)). The respondents in *Ntsane* fell into the latter category, whereas the judgment debtors in *Jaftha* had not (para 65 at 564J).

Referring next to *Standard Bank of South Africa Ltd v Saunderson & others* 2006 (2) SA 264 (SCA), [2006] 2 All SA 382, 2006 (9) BCLR 1022 (discussed in **Civil Procedure Sibergramme 7 of 2006** (18 July 2006) 19—24), Bertelsmann J pointed out that the Supreme Court of Appeal had there held that once an owner of property bonded it to raise capital, whether for the purpose of acquiring the residence or otherwise, he or she voluntarily compromised the right of ownership until the debt was repaid. Continued ownership then depended upon repayment of the bond. While the court left the door open for a finding that the enforcement of a bond could conflict with the right to adequate housing, such cases were likely to be rare. It was particularly hard to conceive of instances where a mortgagee's right to reclaim the debt from the property would be denied altogether; it was more easily possible to contemplate a court delaying execution where there was a real prospect that the debt might yet be paid (*Ntsane* para 66 at 565A—D, with reference to *Saunderson* paras 19—20 at 274G—275C (SA), 389*a—e* (All SA), 1030F—1031A (BCLR)).

In neither *Jaftha* nor *Saunderson* did the question arise whether the bondholder's decision to accelerate the repayment of the full amount of the outstanding liability under the bond upon default in payment of one or more instalments (as the applicant in *Ntsane* also sought to do) could be set aside or reviewed by the court hearing an application for default judgment together with a prayer to declare the property specifically executable. Once the debtor had defaulted, the creditor was entitled to resolve to enforce the acceleration clause, or to invoke its provisions in those cases where acceleration of the

payment of the outstanding balance occurred automatically (para 67 at 565D—F). It would be difficult to imagine a ground upon which such a decision by the creditor could be held to be unlawful (para 68 at 565F).

At best for the debtor who had willingly bonded his or her property, a court could enquire whether, prima facie, enforcement of the bond might be held in abeyance while ways and means were explored by which payment of the debt might be arranged in spite of the debtor having defaulted. This enquiry would be complicated by the fact that most such matters would come before the court by way of an application for default judgment. The court in *Mortinson* had stated that if a small amount was in arrears, triggering the action against the debtor, the possibility of an infringement of the rights protected by s 26(1) of the Constitution was increased, and such claims therefore required careful scrutiny (para 69 at 565F—I). Adjudication between conflicting interests in a society governed by a democratic constitution involved the continuous weighing up of competing rights (para 70 at 565I). In this instance, the applicant's right to commercial activity and the right to enforce agreements lawfully entered into had to be balanced against the right to adequate housing which the respondents indubitably enjoyed (para 71 at 565I—J). In this weighing-up process, the harm that might befall defendants if judgment was granted had to be weighed against the harm the plaintiff might suffer if the agreement underlying the registration of the mortgage bond was rendered commercially ineffective. Not only would this deny the plaintiff the right to enforce a covenant properly and lawfully entered into, but it might also create uncertainty and distrust in commercial activities, and investment in the economy might be negatively affected if courts were to be seen to interfere willy-nilly with established practices (para 72 at 566A—C). In considering these rights, the court was called upon to take all relevant information into account, including the value of the bonded property, the past history of payments made by the debtor, the amount outstanding on the bond, any assets other than immovable property which the debtor might possess (particularly movable assets capable of easy attachment and sale in execution), any other debts of which the bondholder was aware (such as arrear rates and municipal taxes), and whether the debtor was employed (para 73 at 566C—D), although it might be difficult to obtain all the relevant facts (para 74 at 566D—E).

The court was enjoined by the Constitution to ensure that fundamental human rights were not infringed, and had if necessary to act mero motu in order to prevent the infringement of constitutionally safeguarded rights (para 77 at 566G—H, with reference to *Potgieter v Lid van die Uitvoerende Raad: Gesondheid, Provinsiale Regering, Gauteng, en andere* 2001 (11) BCLR 1175 (CC)). The court should accordingly enquire from a bondholder why a small sum that was in arrears on a bond over a modest property could not be collected by execution against movable assets. Even if the bond provided for acceleration of the bond upon non-payment, the court was entitled to refuse to grant execution against an immovable property where the result was so seemingly iniquitous or unfair to the house owner that the enforcement of the full rights to execution would amount to an abuse of the system (para 79 at 566I—567B).

Our courts have held claims in the High Court that would produce an unfair result, or that would create undue difficulty in conducting or settling the claim, or that bring about undue exposure to High Court costs, to be an abuse of process (para 80 at 567B—C, with

reference to *Standard Bank of South Africa Ltd v Shiba*; *Standard Bank of South Africa Ltd v Van den Berg* 1984 (1) SA 153 (W) at 158D—159B and *Whitfield v Van Aarde* 1993 (1) SA 332 (E)). **It would have been clearly in conflict with s 26 of the Constitution to enforce the right to execute against immovable property and thereby terminate the right of the respondents in *Ntsane* to adequate housing** (para 82 at 567D—E). To allow such a result in a country where housing was at a premium and poverty and the legacy of a previous dispensation denied millions the fundamental right to a roof over their heads infringed the fundamental right to adequate housing and might also be in conflict with the right to dignity (para 83 at 567E). In addition, a gross unfairness might be perpetrated upon the respondents if an enforced sale in execution were to obtain a price less than the market value, whereas a controlled sale might obtain a much higher price and leave the defendants with some money after paying the applicant's claim. If the sale in execution were to render a price less than the reasonable value of the immovable property, some speculator might score a handsome profit. This was not an uncommon practice in such matters, if persistent 'urban legends' were to be believed (para 84 at 567F—G).

Bertelsmann J accordingly concluded that the insistence by the applicant upon the right to enforce execution against the immovable property, the only home which the respondents had, under circumstances where there were easier ways to obtain payment of the arrears without any prejudice to the applicant's rights also constituted an abuse of the system and the processes of the court (para 85 at 567G—H). The principle laid down in *Ntsane* could be stated as follows**: where a bondholder calls up a bond, or seeks an order declaring the bonded property specially executable, while the amount in arrears at the date of the application for judgment is so small that it should readily be capable of settlement by execution against movable assets, taking all circumstances into account, the declaration of the immovable property as executable would constitute an infringement of the debtor's fundamental right to adequate housing** (para 86 at 567I—568A). The court faced with such an application should refuse to grant it unless and until the plaintiff persuaded the court by acceptable evidence that no other reasonable alternative existed to enforce its right (para 88 at 568B). Whether the arrears would be capable of being paid by execution against the debtor's movable assets would depend on the individual circumstances of each case (para 89 at 568B—C).

The claim in *Ntsane* constituted a prima facie abuse of the right to claim an outstanding amount which could be easily obtained by way of execution against movable assets (para 91 at 568E—F). The applicant had not dealt with issues raised by the court and in particular had not argued that it had not profited from the transaction with the respondents (para 92 at 568F). The application to declare the immovable property executable for default judgment for the full amount outstanding on the bond was therefore refused (para 93 at 568F—G), and judgment was granted in favour of the applicant only for payment of the sum of R18,46 together with interest on that amount and costs on the appropriate magistrate's court scale (para 94 at 568G—H).

De lege ferenda, Bertelsmann J ended his judgment by remarking that **plaintiffs approaching courts with an application of the kind in *Ntsane* should, in the affidavit setting out the arrears as at the date of application for default judgment, also set out sufficient facts to persuade the court to grant the prayer that the property be**

declared executable, along the lines indicated in the judgment in *Ntsane* (para 96 at 568I—J). Serious consideration should be given to the creation of a speedy and inexpensive remedy for such matters where the amount in arrears is prima facie too small to warrant the sale of a debtor's house (para 97 at 569A—B). The suggestion made by Bertelsmann J was that the banking and financial-services sector create a compulsory arbitration process which the court could invoke by referring the question whether execution against immovable property should be granted where small amounts are in arrears to an arbitration tribunal, to be resolved in an informal and speedy procedure. Such a tribunal should attempt in the first instance to resolve any problems between the finance house and the debtor, to find ways to pay up any arrears, to make alternative arrangements or to sell the immovable property on the open market, or to take other steps designed to ensure that poor homeowners are not deprived of the roofs over their heads if that can be avoided by creative co-operation between the debtor and the creditor (para 98 at 569B—D).

9. CONSTITUTIONAL PRACTICE

Application for leave to appeal to Constitutional Court

The decision in ***Fraser v Absa Bank Ltd (National Director of Public Prosecutions as Amicus Curiae)*** **2007 (3) SA 484 (CC)** was previously reported sub nom *Fraser v Absa Bank Ltd* in 2007 (3) BCLR 219, and was surveyed in **Civil Procedure Sibergramme 7 of 2007** (31 October 2007) 10—11.

Intervention

The decision in ***Fraser v Absa Bank Ltd (National Director of Public Prosecutions as Amicus Curiae)*** **2007 (3) SA 484 (CC)** was previously reported sub nom *Fraser v Absa Bank Ltd* in 2007 (3) BCLR 219, and was surveyed in **Civil Procedure Sibergramme 7 of 2007** (31 October 2007) 15—16.

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