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Legislation
None

Literature
None

1. INTRODUCTION

This Sibergramme deals with judgments on civil procedure reported in **July 2007** which have not already been considered in previous issues.

2. JURISDICTION

Arrest or attachment to found jurisdiction

See ***Manna v Lotter & another*** **[2007] 3 All SA 50 (C)**, which is surveyed under '***Immovable property***' immediately below.

Immovable property

The first respondent in ***Manna v Lotter & another*** **[2007] 3 All SA 50 (C)** was the seller of immovable property situated within the area of jurisdiction of the court. The applicant (the buyer of the property) sought an order compelling transfer of the property against payment by the applicant of the agreed purchase price of the property and all transfer costs. The first respondent (the seller), however, was permanently resident in Wales and was a peregrinus of the Republic. She argued in limine that, in the absence of an

attachment of the property ad confirmandam jurisdictionem, the court did not have jurisdiction to hear the matter in view of her status as a peregrinus.

Rejecting this argument, Griesel J pointed out that the procedure of an attachment to confirm jurisdiction has its origin in the doctrine of effectiveness, described in *Sonia (Pty) Ltd v Wheeler* 1958 (1) SA 555 (A) at 563C as 'the basic principle of jurisdiction'. It is necessary in appropriate cases to attach property to confirm jurisdiction in order to render effective any judgment or order that the court might eventually make. Accordingly, if the court can give an effective judgment without an attachment having taken place, such an attachment would be unnecessary (para 6 at 52*e—g*).

The decisions in *Thermo Radiant Oven Sales (Pty) Ltd v Nelspruit Bakeries (Pty) Ltd* 1969 (2) SA 295 (A) and *Ewing McDonald & Co Ltd v M & M Products Co* 1991 (1) SA 252 (A), upon which the first respondent had relied in support of the proposition that attachment to confirm jurisdiction was a necessary prerequisite in proceedings against a peregrinus, were not in point because they dealt with claims sounding in money, whereas *Manna v Lotter* concerned a claim for the transfer of immovable property situated within the area of jurisdiction of the court. With regard to the latter type of claim, different considerations applied. **Generally speaking, in any claim relating to immovable property, whether in rem or in personam, the court within whose territorial jurisdiction the property was situated (the forum rei sitae) would always have jurisdiction to entertain such a claim. It was then irrelevant whether the defendant was an incola or a peregrinus**. That principle had been accepted as long ago as 1848 in *Palm v Simpson* (1848) 3 Menz 565, where it was held that a claim to rescind a contract for the sale of immovable property could be effectively dealt with by the courts of the state in which the property was situated. Such a state had complete control over the property and could therefore effectively release a person from his obligation to transfer or to take transfer of the property. It followed that in an action in which a judgment rescinding a contract to transfer immovable property was claimed, it was a sufficient basis for jurisdiction that the property was situated within the state in whose court the action was brought (para 7 at 52*g*—53*c*, citing *Sonia (Pty) Ltd v Wheeler* at 561G—in fine, a passage reproduced also in *Pollak on Jurisdiction* 2 ed (1993) by David Pistorius 95). A similar conclusion had been reached in *Jackaman & others v Arkell* 1953 (3) SA 31 (T) at 34G—H, where Roper J had stated that when immovable property is situated within the court's territory, the court has jurisdiction wherever the defendant may be, and therefore it is not necessary to attach the property in addition to obtaining leave to sue by edictal citation (para 8 at 53*c—d*). Furthermore, in *Sonia (Pty) Ltd v Wheeler* at 562pr—A the court had commented that the decision in *Palm v Simpson* had apparently never been queried or criticized, and had stood as a correct exposition of the law for over a hundred years. It was now too late to query the law as laid down in that case, and besides, the decision could be supported on grounds of principle, convenience and common sense (para 9 at 53*f—g*).

Applying the law as articulated in the earlier cases, Griesel J held that **it was not necessary for the applicant in *Manna v Lotter* to have applied for attachment of the first respondent's property in order to confirm the jurisdiction of the court. The property in question was situated within the court's area of jurisdiction, with the result that it was immaterial where the first respondent might find herself** (para 10 at

53*g*—*h*). There was, in addition, a further reason, in the light of the court's jurisdiction over property being largely a question of effectiveness, why the first respondent's objection to the jurisdiction of the court could not be upheld**:** as part of the order granting the applicant leave to sue by way of edictal citation, an interim interdict had been granted restraining the first respondent from transferring the property to any person other than the applicant. (A rule nisi issued to that effect had been confirmed on the return day.) An attachment of the immovable property would therefore not have made any eventual judgment of the court in favour of the applicant any more effective. To non-suit the applicant merely because he might have attached the wrong 'label' to his application by calling it an interim interdict instead of an attachment ad confirmandam jurisdictionem would be to sacrifice substance on the altar of form. The objection to jurisdiction could therefore not succeed (para 11 at 53*h*—54*d*).

3. PARTIES

Intervention

The decision in ***Gory v Kolver NO & others (Starke & others intervening)*** **2007 (4) SA 97 (CC)** was previously reported in 2007 (3) BCLR 249, and was discussed in **Civil Procedure Sibergramme 7 of 2007** (31 October 2007) 13—14.

Public school

The first and second plaintiffs in ***St Helena Primary School & another v MEC, Department of Education, Free State Province & another*** **2007 (4) SA 16 (O)** were, respectively, a public school and its governing body. Although governing legislation (in this instance, the Free State Education Act 2 of 2000) did not confer on the governing body the status of a juristic person, s 41(1)*(b)* of the Act empowered a governing body to adopt a constitution. This, said Musi J, meant that **a governing body could clothe itself with the status of a juristic person by its own constitution**. The answer to the question whether the governing body had the legal capacity to sue or be sued in its own name would accordingly have to be answered with reference to its constitution. There could be no doubt that the Act contemplated that a governing body might clothe itself with such capacity, in order to be able properly to fulfil its statutory functions. It was therefore assumed in the hearing that the second plaintiff was a juristic person, apart from the public school it governed (para 1 at 18D—F).

4. SECURITY FOR COSTS

In ***United Enterprises Corporation & another v STX Pan Ocean Co Ltd*** **[2007] 3 All SA 87 (C)** Cleaver J referred to the view adopted in the Cape Provincial Division and the Eastern Cape Division that **an applicant seeking the arrest of a ship as counter-security in terms of s 5(3)*(a)* of the Admiralty Jurisdiction Regulation Act 105 of 1983 bears the onus of establishing, on a balance of probabilities, that it has a**

genuine and reasonable need for security (para 35 at 103*g*, para 36 at 103*j*—104*a*; see also para 17 at 95*b*—*c*). In the Durban and Coast Local Division, on the other hand, the different approach had been adopted that while security would not be ordered if there was no case or need for it, it was inconsistent with the unfettered discretion of the court to require that the need for security be genuine and reasonable (para 37 at 104*b*—*c*). Both in the Cape Provincial Division and in the Durban and Coast Local Division a need for security had to be shown, and all that was in issue was the difference in describing the level of that need. The difference in approach might well be nothing more than one of semantics, for it might well be difficult to identify any difference in practice. According to Gys Hofmeyr *Admiralty Jurisdiction Law and Practice in South Africa* (2006) 123 there was unlikely to be any difference in practice, having regard to the conventional view that despite the requirement (if such it be) that the need for security must be genuine and reasonable, the court retains an overriding discretion to refuse to order security to be furnished. These considerations led Cleaver J to associate himself with the view of Comrie J in *MV Heavy Metal***:** *Belfry Marine Ltd v Palm Base Maritime SDN BHD* 2000 (1) SA 286 (C) at 298F—I, from which it was apparent that in all probability the result would be the same, whichever test was applied (para 41 at 106*a*—*b* read with para 39 at 105*c*—*e*; see also para 44 at 107*b*—*c*).

There appears to be much to be said for the view of Cleaver J that the difference between the Cape Provincial Division approach and that of the Durban and Coast Local Division is merely one of semantics, since genuineness is obviously implied when one postulates need for security as a requirement, and it can hardly be contended that a need for security exists if it is unreasonable. In short, need connotes both genuineness and reasonableness.

On a different point, Cleaver J held that an arrestor, in establishing a prima facie case, is not confined to allegations made in the founding papers but can also rely on what is alleged in its answering affidavit filed in opposition to an application to set aside the arrest (para 23 at 98*b*).

See also ***Shoreline Universal Ltd BVI v America's Bulk Transport Ltd & others*** **[2007] 3 All SA 183 (D)**, where Levinsohn DJP referred to the requirement that a party seeking an order for the security arrest of a ship bears the onus of justifying the granting of the order of arrest (at 187*e*—*f*, with reference to *Cargo Laden & Lately Laden on Board the MV Thalassini Avgi v MV Dimitris* 1989 (3) SA 820 (A) at 832I—833A and 834G—H). **Given the potentially serious economic consequences that can flow from an illegal arrest of a ship, it is incumbent on an applicant who seeks such an arrest to ensure that it has a proper case to do so**. Once the arrest is effected and it is then pointed out to the applicant that its case is suspect, the applicant ought to step back and simply release the vessel. It is wrong for an arrestor to adopt an attitude of 'I am suspicious about your claims. Please furnish me with all your documents so that I can pursue an investigation and *possibly* find evidence to justify the arrest' (at 189*c*—*d*). Levinsohn DJP accordingly endorsed the dictum of Van Winsen J in *Priday v Thos Cook & Son (SA) Ltd* 1952 (4) SA 761 (C) at 764B—C that it is not the policy of our courts to encourage a person to search amongst the books and documents of another in order to find out whether or not he has an action against that other (at 189*a*—*c*).

5. APPLICATIONS

Dispute of fact

The test in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E—635C was applied in ***Propfokus 49 (Pty) Ltd & others v Wenhandel 4 (Pty) Ltd*** **[2007] 3 All SA 18 (SCA)**, where it was held that a factual dispute between the parties had to be decided on the version advanced by the respondent in the High Court since the latter's allegations or denials of relevant facts were not so far-fetched or clearly untenable that the court would be justified in rejecting them merely on the papers (at 23*b*—*c*, *d*—*e*).

Ex parte

In ***United Enterprises Corporation & another v STX Pan Ocean Co Ltd*** **[2007] 3 All SA 87 (C)** Cleaver J restated the 'trite' rule that **in ex parte proceedings, an applicant is obliged to observe the utmost good faith in placing all material facts before the court, and the failure to do so may result in the order being set aside on the grounds of non-disclosure alone**. Furthermore, said the judge,

- in ex parte applications, all material facts must be placed before the court which might influence a court in coming to a decision;
- the non-disclosure or suppression of facts need not have been wilful or mala fide to incur the penalty of rescission; and
- the court, apprised of the true facts, has a discretion to set aside the former order or to preserve it

(para 27 at 100*f*—*g*, with reference to *Schlesinger v Schlesinger* 1979 (4) SA 342 (W) at 349A—B and *National Director of Public Prosecutions v Braun & another* 2007 (1) SA 189 (C), [2007] 1 All SA 211 para 22 at 197A—C (SA), 216*g*—*h* (All SA)). In the exercise of its discretion whether to grant or deny relief to a litigant who has breached the uberrima fides rule, the court should take into account the extent to which the rule has been breached, the reasons for non-disclosure, the extent to which a court might have been influenced by proper disclosure, the consequences (from the point of view of doing justice between the parties) of denying relief to the applicant, and the interests of innocent third parties (para 33 at 102*i*—103*b*, with reference to *Cometal-Mometal S A R L v Corlana Enterprises (Pty) Ltd* 1981 (2) SA 412 (W) at 414G—in fine).

Applying these principles, Cleaver J held that even if there had been a breach of the uberrima fides rule in the *United Enterprises* matter, the breach would have been so slight that he would not have exercised his discretion in favour of the respondent. It had not been suggested that if additional information had been placed before the court, the ex parte order in question would not have been made. Furthermore, discharge of the order (for the arrest of a ship) would have 'created a risk' for the applicant (the arresting party) in the ex parte proceedings (para 33 at 103*b*—*d*).

Striking-out

Certain paragraphs were struck out from a founding affidavit in ***Jeebhai v Minister of Home Affairs & another*** **2007 (4) SA 294 (T)** on the ground that they traversed or commented upon certain documents which had been obtained by the applicant's attorney from a file of documents belonging to the first respondent. In earlier proceedings, Poswa J had ordered that there should be no publication of the contents of the file. The documents were placed before the court in breach of the order of Poswa J. Ngoepe JP, Pretorius J and Snijmann AJ remarked as follows**:**

> 'It is not for this Court to question the validity of the order of Poswa J as we are not aware of all the facts that had led to it. What admits of no argument is that a court order must be obeyed. This is of fundamental importance in a democratic society and in the administration of justice. This Court must demonstrate its disapproval of this conduct by, *inter alia*, granting the application for striking-out. The Court must resist the temptation to come to the applicant's assistance, no matter how inviting the case may be; a litigant may not reach the required remedy by violating so sacrosanct a principle . . . as compliance with a court order. How do we reward the violation of one court order in the name of fundamental human rights, with another court order against the respondent and expect the latter . . . to obey our order? Nothing would undermine the authority of the Court more than such an inconsistency'

(para 33 at 307F—I; see also para 51 at 312E, citing *Culverwell v Beira* 1992 (4) SA 490 (W) at 494B).

Further on *Jeebhai*, see under '**JUDGMENTS AND ORDERS: *Contempt of court***' below.

6. RES JUDICATA

In ***United Enterprises Corporation & another v STX Pan Ocean Co Ltd*** **[2007] 3 All SA 87 (C)** Cleaver J remarked that the requirements for a successful defence of res judicata are well known, sc that the judgment pleaded must be a final and definitive decision which puts an end to the dispute between the parties (para 10 at 90*g*, with reference to *Custom Credit Corporation (Pty) Ltd v Shembe* 1972 (3) SA 462 (A) at 472A—B and *African Farms and Townships Ltd v Cape Town Municipality* 1963 (2) SA 555 (A) at 562C—D). A judgment is final if it has determined the substantive rights of the parties (para 18 at 95*e*, with reference to *African Wanderers Football Club (Pty) Ltd v Wanderers Football Club* 1977 (2) SA 38 (A) at 45—6). Where the decision of a particular question, although dealt with in the reasons for judgment, is not incorporated in the actual judgment (sc the order made by the court) and the question is not necessarily determined by the judgment, the matter is not res judicata (para 15 at 93*f—g*, with reference to *Commissioner of Customs v Airton Timber Co Ltd* 1926 CPD 351 at 359). **The exceptio rei judicatae will also not apply where an arrest (of a ship) has been set aside on grounds that the applicant failed to make out a prima facie case, and a**

further application for arrest may in that event be made provided that the legal requisites are present on the later occasion. The logic of this view is 'compelling' (para 16 at 94*b*—*f*, with reference to *Great River Shipping Inc v Sunnyface Marine Ltd* 1992 (2) SA 87 (C) at 89G—H). On an application of these principles, Cleaver J held that an earlier judgment of an Italian court revoking an order of seizure of a vessel 'was akin to an order for absolution from the instance' and therefore that the exception of rei judicatae could not be sustained on the basis of the Italian judgment (para 18 at 96*b*).

7. INTERDICTS

Interlocutory interdicts

Balance of convenience

The balancing of interests involved in the determination of an application for an interim interdict, said Mayat AJ in ***Tirhani Auctioneers (Gauteng) (Pty) Ltd v Transnet Ltd & another*** **[2007] 3 All SA 70 (W)**, had been described in *Olympic Passenger Service (Pty) Ltd v Ramlagan* 1957 (2) SA 382 (D) (at 383E—G) as meaning the prejudice to the applicant if the interdict was refused, weighed against the prejudice to the respondent if it was granted. **The stronger the prospects of success, the less need for such balance to favour the applicant, whereas the weaker the prospects of success, the greater the need for the balance of convenience to favour him** (para 43 at 82*i*—83*b*; see also para 46 at 83*j*—84*a*).

Irreparable injury

Irreparable injury was held in ***Tirhani Auctioneers (Gauteng) (Pty) Ltd v Transnet Ltd & another*** **[2007] 3 All SA 70 (W)** to have been established if an interim interdict was not granted to prevent auction sales from taking place pursuant to a tender awarded by the first respondent to the second respondent, which was a rival auctioneer of the applicant. The applicant had established a strong prima facie case for the review and setting aside of the award of the tender to the second respondent, and would have a hollow victory if the auctions continued and the applicant was ultimately successful with respect to the final relief sought by it (para 42 at 82*g*—*h*).

No other satisfactory remedy

An interim interdict to restrain the conduct of auction sales pursuant to a tender awarded by the first respondent to the second respondent was granted in ***Tirhani Auctioneers (Gauteng) (Pty) Ltd v Transnet Ltd & another*** **[2007] 3 All SA 70 (W)** at the instance of the applicant, a rival auctioneer. Damages, held Mayat AJ, would not constitute adequate alternative redress to the applicant since there was authority from the Supreme Court of Appeal to the effect that a claim in delict by an unsuccessful tenderer against a government department for losses suffered during the course of a tender process was limited, in the absence of fraud or dishonesty, to cases where a court was convinced that

negligent conduct causing pure economic loss was wrongful. And without fraud or dishonesty, the courts would not make a finding of wrongfulness against a government department which negligently but in good faith 'bungled' a tender process, with the result that, despite the existence of blameworthy conduct on the part of the government department concerned, the department effectively received immunity against liability for damages resulting from its blameworthy conduct. The applicant's case for judicial review of a 'bungled' tender process was not premised on dishonesty or fraud, and the applicant would in the circumstances have difficulty in establishing wrongfulness for the purpose of a delictual claim. The applicant accordingly did not have an adequate alternative remedy in damages (para 49 at 85*d*—86*b*). In the course of a discussion of these principles, Mayat AJ mentioned that, as a general rule, **where the harm flowing from the infringement of a right was capable of being assessed in monetary terms, and where damages would provide adequate compensation for the infringement, the applicant was barred from seeking an interdict. That general rule, however, was subject to certain exceptions, for example where there was a continuing violation of the applicant's rights and/or where damages were difficult to quantify** (para 49 at 85*c*—*d*).

Prima facie right

In an application for a temporary interdict, the applicant's right need not be shown by a balance of probabilities, and it is sufficient if such right is prima facie established, though open to some doubt. The proper manner of approach is to take the facts as set out by the applicant together with any facts set out by the respondent which the applicant cannot dispute and to consider whether, having regard to the inherent probabilities, the applicant could on those facts obtain final relief at a trial. The facts set up in contradiction by the respondent should then be considered, and if serious doubt is thrown upon the case of the applicant, he or she should not succeed in obtaining temporary relief**:** *Webster v Mitchell* 1948 (1) SA 1186 (W) at 1189. These principles were reiterated in ***Tirhani Auctioneers (Gauteng) (Pty) Ltd v Transnet Ltd & another*** **[2007] 3 All SA 70 (W)** para 31 at 77*h*—78*a*.

Requirements

The requirements for the grant of an interim (interlocutory) interdict were restated by Mayat AJ in ***Tirhani Auctioneers (Gauteng) (Pty) Ltd v Transnet Ltd & another*** **[2007] 3 All SA 70 (W)** with reference to *Setlogelo v Setlogelo* 1914 AD 221 as being a prima facie right, though open to some doubt; a well-grounded apprehension of irreparable injury if the interim relief is not granted and the ultimate relief is eventually granted; that the balance of convenience favours the granting of interim relief; and that the applicant has no other satisfactory remedy (para 29 at 77*e*—*g*). Mayat AJ added that in every case in which an applicant seeks an interim interdict pendente lite, the court has an inherent jurisdiction to grant relief in order to avoid injustice and hardship (para 30 at 77*g*).

8. JUDGMENTS AND ORDERS

Arbitration award

An award made by an arbitrator is not automatically an award of either a magistrate's court or a High Court. Accordingly, it cannot be enforced through the processes of either court. **It is only where an arbitrator's award is made an order of court that the award is capable of being enforced by writ of execution** issued out of and by such court in accordance with the rules of the court**:** ***Phillips & others v Van den Heever NO & another*** **[2007] 3 All SA 159 (W)** para 65 at 174*g—h*.

On the need for taxation of costs awarded by an arbitrator before a writ of execution may be issued in order to recover such costs, see under '**COSTS: *Taxation***' below.

Contempt of court

The applicant in ***Jeebhai v Minister of Home Affairs & another*** **2007 (4) SA 294 (T)**, his attorney and the attorney's professional assistant were convicted of contempt of court after they had traversed in a founding affidavit, and appended to the affidavit copies of, certain documents obtained from a file belonging to the first respondent. In prior proceedings, Poswa J had ordered that there be no publication of the contents of the file. The documents in question were used in support of the application in breach of the order of Poswa J.

After granting an interlocutory application for the striking-out of the relevant portions of the founding affidavit (as to which, see under '**APPLICATIONS: *Striking-out***' above), Ngoepe JP, Pretorius J and Snijmann AJ turned to the question whether contempt of court had been committed. With reference to the definition of contempt of court now found in I Ellis & M Dendy 'Civil Procedure**:** High Court' in W A Joubert (ed) *The Law of South Africa* Volume 3 Part 1 2 ed (2007) para 353 at 209 and to dicta of Cameron JA in *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) (wrongly cited in the report of the judgment in *Jeebhai* as '2006 (1) SA 326 (SCA)') paras 22—4 at 338E—F, 338G—339B, the court held that **the respondents had to show that an order had been granted against the applicant, that the order had been served on the applicant or that the applicant had known of the contents of the order, and that there had been non-compliance with the order**. If, on proof of those requirements, the applicant failed to furnish evidence raising a reasonable doubt whether the non-compliance was wilful and mala fide, the offence would be established beyond a reasonable doubt. The criminal standard of proof, sc proof beyond a reasonable doubt, applied in matters of the kind before the court in *Jeebhai* as well (paras 46—8 at 311C—J). The requirements of contempt of court had been met, and the conduct of the applicant, his attorney and the attorney's personal assistant were wilful and mala fide. There was no reasonable doubt on the issue (para 50 at 312B—D, para 52 at 312G). It was 'a serious matter for an Officer of the Court to undermine the authority of the Court' (para 53 at 312H—I). Bearing in mind that all three were first offenders, and that the applicant must have relied heavily on advice received from his attorney and the latter's professional assistant, who 'should have

known better' notwithstanding their desire to help their client, the court cautioned and discharged the applicant, and imposed on the attorney and his professional assistant a fine of R2 000 or six months' imprisonment each, suspended for a period of three years on condition that they were not convicted of contempt of court committed during the period of suspension.

Interpretation of court order

The basic principles applicable to construing documents also apply to the construction of a court's judgment or order. The court's intention is to be ascertained primarily from the language of the judgment or order as construed according to the usual, well-known rules. As in the case of a document, the judgment or order and the court's reasons for giving it must be read as a whole in order to ascertain its intentions. If, on such a reading, the meaning of the judgment or order is clear and unambiguous, no extrinsic fact or evidence is admissible to contradict, vary, qualify or supplement it. In such a case, not even the court that gave the judgment or order can be asked to state what its subjective intention was in giving it. These well-established principles, derived (inter alia) from the decision in *Firestone South Africa (Pty) Ltd v Gentiruco AG* 1977 (4) SA 298 (A) at 304D—G, were restated and applied in ***Phillips & others v Van den Heever NO & another*** **[2007] 3 All SA 159 (W)** para 29 at 166*h* read with n30 at 166*i*—167*j*.

9. APPEALS

Condonation of late prosecution of appeal

An application for condonation of the late filing of an appeal record in the Supreme Court of Appeal, and reinstatement of a lapsed appeal, was refused in ***Commissioner: South African Revenue Services, Gauteng West v Levue Investments (Pty) Ltd*** **[2007] 3 All SA 109 (SCA)**, where there had been a flagrant disregard of the rules for which no convincing or adequate explanation had been advanced, giving credence to the accusation by the respondent that the members of the appellant's staff had deliberately delayed the appeal proceedings in the hope that the financial embarrassment caused to the respondent in consequence would cripple the respondent financially. The attitude adopted by the appellant's officials towards the appeal was 'inexcusable' (para 12 at 114*a*—*c* read with para 9 at 113*f*). Although the appellant had had good prospects of success on appeal, the court had repeatedly warned that **a party seeking condonation could not rely solely on prospects of success to entitle it to be excused for not complying with the rules of court** (para 11 at 113*h*—114*a*, with reference to *P E Bosman Transport Works Committee & others v Piet Bosman Transport (Pty) Ltd* 1980 (4) SA 794 (A) at 799D—E and *Ferreira v Ntshingila* 1990 (4) SA 271 (A) at 281I—282B).

Exercise of discretion by court a quo

The decision in ***Gory v Kolver NO & others (Starke & others intervening)*** **2007 (4) SA 97 (CC)** was previously reported in 2007 (3) BCLR 249, and was surveyed in **Civil Procedure Sibergramme 7 of 2007** (31 October 2007) 9.

10. COSTS

Agreement to litigate in High Court

In ***Price v Mutual & Federal Insurance Co Ltd*** **2007 (4) SA 51 (SE)** Sangoni J awarded costs on the High Court scale regardless of what the quantum of the claim might eventually turn out to be (the amount of the claim was unquantified, and a declaratory order was sought) because the parties had agreed at the pre-trial stage that the matter could not be resolved 'in another jurisdiction', resulting in the matter being tried in the High Court. The issues agreed upon by the parties at the pre-trial stage were held to be factors relevant in deciding whether costs should be awarded on the High Court scale (paras 85—6 at 71C—E).

De bonis propriis

In issue in ***Phillips & others v Van den Heever NO & another*** **[2007] 3 All SA 159 (W)** was whether certain costs orders that had been made in previous proceedings had to be interpreted as having been granted against the first respondent in his personal capacity or in his representative capacity as curator of certain properties of the first appellant which had been made subject to a restraint order in terms of the Prevention of Organised Crime Act 121 of 1998 ('POCA'). The wording of the orders, held Satchwell J and Mayat AJ (Salduker J concurring), was clear and unambiguous. The first respondent had been cited and described in the earlier litigation in his representative capacity. The party held responsible for the costs had been identified as 'the respondent', who was the curator cited in his representative capacity. In other proceedings, involving enforcement of an arbitration award, the order had been made that 'the respondent' (identified throughout as 'Theodor Wilhelm van den Heever NO') was (jointly) liable for the payment of arbitrator's fees and for the costs of an application to make the arbitrator's award an order of court. The words customarily used to indicate anything other than liability for costs in the capacity in which one was cited, in this case 'de bonis propriis', were not used (paras 32—4 at 167*d*—*g*). There was no basis on which it could be found that the only source of funds for the payment of costs, other than the assets under restraint, were the personal funds of the curator himself (para 40 at 168*g*). **Where a party was cited in his or her representative capacity in court proceedings and the court intended that party to pay costs out of his or her personal estate, invariably the party cited in his or her representative capacity was ordered to pay costs de bonis propriis** (para 41 at 168*g*—*h*).

Turning to the fiduciary position occupied by a curator of property appointed in terms of POCA (para 44 at 169*c*), the court remarked that appointment to such a fiduciary position, whether it be as a curator ad litem or a curator bonis, trustee, guardian, executor, administrator or even company director, usually affords prima facie protection against personal liability for costs of unsuccessful litigation. Such a person is indemnified against personal financial liability for any actions undertaken or not undertaken in that fiduciary capacity which were performed or not performed in accordance with the expected high standards of honesty and diligence. This approach is reiterated by s 78 of POCA, which provides that any person generally or specifically authorized to perform functions in terms of the Act will not, in his or her personal capacity, be liable for anything done in good faith under the Act (para 45 at 169*d—f*). Where, however, a fiduciary appointee acts in an improper or unreasonable manner or with lack of bona fides, costs may be awarded against such person in his or her personal capacity. The basic notion is material departure from the responsibility of office, and costs for the own account of the fiduciary have been awarded on findings of negligence, unreasonable conduct, abuse of trust, acting without care, fraud, want of honesty, wilfulness, vexatiousness, acting in one's own interest and not that of the estate concerned, want of bona fides, and mala fides. In the case of a curator appointed in terms of POCA, the exclusion from liability applies in all cases save where there is an absence of good faith (para 46 at 169*f*—170*a*).

It would appear to be a requirement, the court added, that **the fiduciary who is in jeopardy of such an order being made is informed of that possibility and afforded an opportunity to contest any argument advanced in support of the grant of such an order**. This is done at the time of initiation of the proceedings or in the course of the litigation. The fiduciary should at the very least be confronted with the possibility of personal liability and be made aware that the protection afforded by the representative capacity in question may in the discretion of the court be withdrawn. In addition, the court should be provided with all facts and argument thereon. Absent a proper hearing, the exercise of a discretion in this manner would be undesirable (para 47 at 170*a—d*). In the proceedings in question, the notice of motion did not seek costs against the first respondent de bonis propriis, and there was no indication in the judgment of the court that the first respondent was on the verge of losing the shield of representative or fiduciary status by reason of incompetence, laziness, obstructiveness, malevolence or lack of good faith. There was no indication that the court in making the earlier costs orders had formed an opinion that the first respondent had so conducted himself that a punitive and personal order was warranted (para 48 at 170*d—f*).

If good reason needed to be shown for such a punitive order to be made and reasons given for making such an order, the order had to be clearly and unambiguously expressed. Where a party had been cited in his or her representative capacity in court proceedings, and the court intended that party to pay costs out of his or her personal estate, then invariably the party cited in his or her representative capacity was ordered to pay costs de bonis propriis (para 50 at 171*a—b*, with reference to *Re Estate Potgieter* 1908 TS 982 at 1000). Cases in which the trustees of insolvent estates had been ordered to pay costs and had been prohibited from paying such costs out of the assets of the insolvent estates in question were distinguishable, for those were matters in which applications were held not to have been brought in the interests of the whole body of

creditors of the insolvent estates administered by the trustees. The orders in question in *Phillips* had not been based upon any view to the effect that the first respondent had acted in bad faith or in his own interest to the detriment of the assets under his control. And in the cases involving the administration of insolvent estates, there was no source of funding available to meet the costs of litigation other than the assets of the estate which were being administered for the benefit of creditors. In *Phillips*, on the other hand, there was another explicit source of funding, for the state was liable to meet disbursements if they could not be met from a confiscated estate. Indeed, POCA provided for the state as the ultimate source of funding (para 52 at 171*f*—172*b*, read with para 51 at 171*d*—*f*). To read personal liability of the curator into the earlier court orders could accordingly not be justified on the ground that there was no other available source of funds (para 64 at 174*e*—*f*).

Satchwell J and Mayat AJ added that if they had sat as a court of first instance in the earlier applications, it was possible that they would have awarded punitive costs against the first respondent in his personal capacity, in the light of his (mis)conduct of the curatorship in certain respects, and that if they had sat as a court of first instance in the present application (in which the first respondent was successful), they might have deprived the first respondent of his costs. However, they had in fact sat as a court of appeal in a matter in which the decision of the court a quo had not been disturbed. The appellants had unsuccessfully appealed the decision of the lower court and had to bear the financial burden of their own decision (para 98 at 181*d*—*f*). These remarks illustrate that **a court of appeal will not interfere with the manner in which a lower court has exercised its discretion in the matter of costs merely because the appeal court would have exercised that discretion differently**.

Discretion of court

See ***Phillips & others v Van den Heever NO & another*** **[2007] 3 All SA 159 (W)** para 98 at 181*d*—*f*, commented upon under '***De bonis propriis***' immediately above.

Failure to index, paginate and secure court file

The applicant in ***Manna v Lotter & another*** **[2007] 3 All SA 50 (C)** was ordered to pay the wasted costs of a postponement occasioned by the fact that the court file was not in order as required by uniform rule 62(4). It was incumbent on the applicant, said Griesel J, to ensure that the court file was in order in all respects not later than five days prior to the hearing. In the circumstances, it would be fair to order the applicant to pay the wasted costs occasioned by the postponement (para 38 at 59*a*—*c*, para 40 at 59*g*).

Retention of moneys to meet taxed costs

The buyer of an immovable property (the applicant) in ***Manna v Lotter & another*** **[2007] 3 All SA 50 (C)** was granted an order authorizing the transferring attorneys to retain an amount of R50 000 in trust from the proceeds of the sale of the property (payable by the

applicant) against which he could set off his taxed costs after bringing a successful application for an order compelling the seller (the first respondent) to effect transfer of the property against payment of the agreed purchase price and transfer costs. Griesel J made the order in the light of the fact that the first respondent was a peregrinus of the Republic and that it was unknown whether she had any other assets in the Republic from which the costs order made in favour of the applicant could be satisfied, bearing in mind the doctrine of effectiveness to which the court alluded earlier in its judgment (as to which, see under '**JURISDICTION: *Immovable property***' above) (para 39 at 59*c—e*, para 40 at 59*g*).

Taxation

Taxation affects, not liability for costs, but only the amount of costs payable**: *Phillips & others v Van den Heever NO & another* [2007] 3 All SA 159 (W)** para 93 at 180*c—d*, with reference to *Stent and Pretoria Printing Works Ltd v Roos* 1909 TS 1054 and *Dumah v Klerksdorp Town Council* 1951 (4) SA 519 (T). This is because it is not taxation which founds liability but the court order in question (para 72 at 175*g*).

Uniform rule 45(2) provides that no process of execution shall issue for the levying and raising of any costs ordered by the court to any party until they have been taxed by the taxing master or agreed to in writing by the party concerned in a fixed sum. Applying this rule in *Phillips*, the court held that **where there was no written agreement as to the amount of the costs awarded by an arbitrator, a writ of execution could not be issued to recover the costs paid to the arbitrator by the party in whose favour an arbitration award had been made, in the absence of taxation of such costs** (para 73 at 175*h*—176*b*, para 86 at 179*b—c*). Taxation was the means whereby reasonableness of the fees was determined prior to the issue of a warrant of attachment or execution, as the case might be, and rule 45(2) required taxation in the absence of written agreement on a fixed sum in respect of those fees (para 72 at 175*g—h*). Where the arbitration award had been made an order of court, the costs award of the arbitrator became a costs award of the court, and was liable to be dealt with in accordance with rule 45(2) (para 75 at 176*c—d*). The taxing master would presumably approach the taxation on the reasonableness or otherwise of the fees charged by an arbitrator of particular standing in an arbitration of a particular degree of complexity (para 86 at 179*c*). The fact that an arbitrator had a view as to his own fee did not preclude a professional and impartial determination, which might or might not be in accordance with the arbitrator's view (para 82 at 178*a—b*).

Two counsel

The plaintiff in ***Schmidt v Road Accident Fund*** **[2007] 2 All SA 338 (W)** was awarded the costs of two counsel, bearing in mind the fact that the matter was of considerable importance to her, having regard to the magnitude of the quantum of her bodily-injury claim. Difficult and complicated issues arose from the testimony of a battery of medical experts who gave competing and conflicting evidence in a trial that ran for seven days. The issues that arose involved complicated medical aspects and were by no means simple. In the circumstances, the plaintiff's employment of two counsel was 'a wise and

reasonable precaution' (para 47 at 354*c—f*, with reference to *Van Wyk v Rondalia* 1967 (1) SA 373 (T) at 376G).

11. CONSTITUTIONAL PRACTICE

Costs

The decision in ***Gory v Kolver NO & others (Starke & others intervening)*** **2007 (4) SA 97 (CC)** was previously reported in 2007 (3) BCLR 249, and was surveyed in **Civil Procedure Sibergramme 7 of 2007** (31 October 2007) 11—12.

Intervention

The decision in ***Gory v Kolver NO & others (Starke & others intervening)*** **2007 (4) SA 97 (CC)** was previously reported in 2007 (3) BCLR 249, and was discussed in **Civil Procedure Sibergramme 7 of 2007** (31 October 2007) 13—14.

Jurisdiction of Constitutional Court

The decision in ***Gory v Kolver NO & others (Starke & others intervening)*** **2007 (4) SA 97 (CC)** was previously reported in 2007 (3) BCLR 249, and was surveyed in **Civil Procedure Sibergramme 7 of 2007** (31 October 2007) 16.

Unconstitutional statutory provision

The decision in ***Gory v Kolver NO & others (Starke & others intervening)*** **2007 (4) SA 97 (CC)** was previously reported in 2007 (3) BCLR 249, and was surveyed in **Civil Procedure Sibergramme 7 of 2007** (31 October 2007) 19.

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