CIVIL PROCEDURE

SIBERGRAMME 4/2008

ISSN 1814-0564

28 May 2008

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Siber Ink

Published by Siber Ink CC, B2A Westlake Square, Westlake Drive, Westlake 7945.

Subscriptions: subs@siberink.co.za or fax (+27) – 088 – 021 – 701 2010

IN THIS ISSUE:

Cases

Legislation

None

Literature

None

1. INTRODUCTION

In this Sibergramme cases on civil procedure published in the **January 2008** issue of ***The South African Law Reports*** are considered. Other cases and materials on civil procedure published during January 2008 were dealt with in **Civil Procedure Sibergramme 3 of 2008**.

2. PARTIES

Joinder

The well-known rule that a party must be joined if he or she has a direct and substantial interest in any order which the court might make in the proceedings, or if such order could not be sustained or carried into effect without prejudicing that party, was invoked in ***Mpupa v MEC, Department of Social Development, Eastern Cape*** **2008 (1) SA 287 (Ck)** para 15 at 292B—C, with reference to *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A).

The judgment in *Mpupa* is considered in detail under '**JUDGMENTS AND ORDERS: *Contempt of court***' below.

Trustee

In ***Stander & others v Schwulst & others*** **2008 (1) SA 81 (C)** the court was concerned, inter alia, with the manner in which trustees should be cited in an application for their removal from office, and with the question of who should pay the costs of the proceedings if the application for removal is successful. (The costs issue is considered under '**COSTS: *Removal of trustee***' below.) An application for the removal of a trustee, said N C Erasmus J, is a claim against the trustee in his personal capacity, in much the same way as is a beneficiary's claim against a trustee for damages for breach of trust (para 32 at 92C). **A claim should be brought against a trustee in his representative capacity (only) where he is alleged to be liable in that capacity, for example on a contract concluded on behalf of the trust or a delict committed by the trust, or where a claim is brought for payment under the trust deed to a beneficiary** (para 34.1 at 92E—F). In such cases, where there is more than one trustee, the trustees in their representative capacities must act together, and any claim must cite all the trustees in their representative capacities. One of several trustees cannot in such cases be cited alone as a representative of the trust. It is the hallmark of a claim brought against trustees in their representative capacities that they must all be sued (para 34.2 at 92F—G). **Where, on the other hand, a trustee is sued for breach of trust** (whether the claim be for removal from office or for damages)**, the claim is obviously against the trustee personally**. The claim arises because the trustee assumed office as such, but the complaint is that he has violated the trust or the office. The whole point in such proceedings is that the trust (as represented by its trustees in their representative capacities) is not liable. If it were otherwise, beneficiaries would always be the ultimate losers where trustees act in breach of trust (para 34.3 at 92H—93B; see also para 37 at 94A). In the case of removal, the claim is personal. A trustee as a representative of the trust (as distinct from his personal capacity) cannot be removed. The office of trustee is unaffected by the removal. It is the individual who is removed from the office (para 34.4 at 93B—C). That claims for removal are personal is clear from the fact that a removal application can properly be brought against only one of several trustees. The claim arises

from conduct personal to the particular trustee and not from conduct which binds the trust (para 34.5 at 93C—D).

3. APPLICATIONS

Dispute of fact

In ***Meepo v Kotze & others*** **2008 (1) SA 104 (NC)** para 56 at 131C the court applied the rule in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 635C that where an allegation made by a respondent is far-fetched or clearly untenable, it may be rejected by the court on the papers in the course of determining a dispute of fact in motion proceedings in which final relief is sought.

Extension of time

In ***Stander & others v Schwulst & others*** **2008 (1) SA 81 (C)** an application ('the main application') was brought for the removal from office of the first to third respondents as trustees of a trust. The trustees neglected to file answering affidavits timeously, and asked for a stay of the filing of such affidavits until 60 days after the final determination of an application ('the costs application') brought by them for authority to withdraw funds from the trust in order to fund their defence of the main application. Declining to grant the relief sought by the trustees, N C Erasmus J held that there was no justification for the trustees not to have at least filed answering papers pending the determination of the costs application. In terms of uniform rule 27(1) **the court could grant an extension of time only 'on good cause shown'**. The trustees had deliberately not complied with the rules regarding the filing of their answering papers, and did not have acceptable grounds for adopting that position. They had also failed to bring their application for an extension of time at the earliest opportunity when they foresaw the need for it, but relied instead on the outcome of their rule 27(1) application (para 61 at 103D—F).

Despite this finding, however, N C Erasmus J granted an extension of time which enabled the trustees to file answering papers within 15 days of his order, on account of the prejudice that the trustees might suffer in consequence of the potential court orders in the main application (para 62 at 103F, read with item 4 of the order at 104A—B).

4. TRIAL ACTIONS

Amendment of pleadings

The decision in ***Mntambo v Road Accident Fund*** **2008 (1) SA 313 (W)** was previously reported sub nom *Duduzile v Road Accident Fund* in [2007] 4 All SA 1241, and was surveyed in **Civil Procedure Sibergramme 2 of 2008** (8 April 2008) 5.

Exception

The decision in ***Trustees, Bus Industry Restructuring Fund v Break Through Investments CC & others*** **2008 (1) SA 67 (SCA)** was surveyed in **Civil Procedure Sibergramme 3 of 2008** (6 May 2008) 9—10.

5. JUDGMENTS AND ORDERS

Anton Piller

The decision in ***Van Niekerk & another v Van Niekerk & another*** **2008 (1) SA 76 (SCA)** was surveyed in **Civil Procedure Sibergramme 3 of 2008** (6 May 2008) 11—13.

Contempt of court

The applicant in ***Mpupa v MEC, Department of Social Development, Eastern Cape*** **2008 (1) SA 287 (Ck)** had, in earlier proceedings against the MEC and the Permanent Secretary of the Department of Social Development, Eastern Cape Province, obtained an order directing the secretary to pay certain moneys to the applicant in the form of social grants. An order had also been made directing both the MEC and the secretary to pay the costs of the application. When the order was not honoured, the applicant launched a further application (the 'contempt-of-court application') for an order *(a)* directing the MEC to appear personally or by affidavit to show cause (i) why the MEC or her duly authorized functionaries had not complied with the previous order and (ii) when the MEC intended to comply with that order, and *(b)* directing that the applicant be entitled to approach the court in due course on the same papers, duly supplemented where necessary, in the event of the MEC failing to appear personally or by affidavit, for a further order directing the MEC to show cause why she should not be (i) held to be in contempt of the order to appear or to deliver an affidavit and (ii) committed to imprisonment for such contempt. The secretary against whom the earlier order (apart from the question of costs) was directed was not joined as a party to the so-called contempt-of-court application. It was therefore apparent that **relief in the contempt-of-court application was being sought against the wrong party. The question accordingly arose whether that defect could be cured by simply applying for joinder of the proper person when the applicant should have been aware of the correct position**. Another question was whether, if the application for joinder was nevertheless granted, it would be fair to order the respondent to pay the costs of the application (para 10 at 290F—H).

Referring to dicta in *MEC, Department of Welfare, Eastern Cape v Kate* 2006 (4) SA 478 (SCA), [2006] 2 All SA 455 para 30 at 492G—H (SA), 467*b* (All SA), Sangoni J pointed out that a public official who was ordered by a court to do or to refrain from doing a particular act and who had failed to comply with the order was liable to be committed for contempt of court in accordance with ordinary principles (para 12 at 291D—F). The non-citation of the secretary was occasioned by an erroneous

interpretation, on the part of the applicant, of the judgment in *Jayiya v Member of the Executive Council for Welfare, Eastern Cape, & another* 2004 (2) SA 611 (SCA), [2003] 2 All SA 223. Accordingly, even if the application for joinder succeeded, the applicant would have to bear the costs (para 13 at 291F—G).

Sangoni J went on to point out that the applicant had, before the joinder application was determined, filed a 'notice to amend', purporting to amend the notice of motion in the contempt-of-court application so as to cite the secretary as second respondent in that application. It would, however, be irregular to join the secretary in that way (para 14 at 292A—B).

In the light of the above circumstances, held Sangoni J, a proper case had not been made out justifying the joinder of the secretary in the contempt-of-court proceedings. This was so for the following reasons**:**

- The relief sought against the MEC in the contempt proceedings was also sought against the functionaries of the MEC. Without doubt, the secretary was one of those functionaries.
- The applicant opted to exclude, or neglected to cite, the secretary as one of the respondents. That was analogous to a situation where a party had waived his or her right to be joined as a party. In the case of waiver, the court could not grant joinder. In addition, the applicant had chosen to cite the MEC against whom no order had issued except for costs. That defect was fatal to the entire case and could not be cured by joining a party when an informed decision not to cite that party had already been taken.
- On the available information, there was no indication *(a)* in what way the secretary could be said to have a direct and substantial interest in the contempt-of-court proceedings, or *(b)* that such interest would be prejudicially affected by the order against the MEC.
- The notice of motion had been prematurely amended. As matters stood, since it had not been set aside, it rendered joinder of the secretary unnecessary

(para 16 at 292C—G). The application for joinder was accordingly refused (para 16 at 292G—H).

Although (it is submitted) the decision to dismiss the application for joinder was correct, much of the reasoning in support of it is, to the present author, quite incomprehensible. In the first place, no relief was sought against anyone other than the MEC in the contempt proceedings, since it was only the MEC who was called upon to show cause why she should not have to explain to the court why its original order had not been complied with and when the MEC intended to comply with that order. The secretary was not called upon to furnish such an explanation. The relief sought in the contempt proceedings was therefore not against any of the functionaries of the MEC. Secondly, the deliberate decision by the applicant not to cite the secretary as a party to the contempt application was not at all analogous to a waiver on the part of the secretary of a right to be joined. Only the secretary could waive her right to be joined, and her waiver (if such

there were) could have had effect only if she had been aware of her right to be joined and had deliberately decided to forgo that right. The applicant could not in any sense waive that right for or on behalf of the secretary**: one person cannot (in the absence of any relationship of agency) waive a right accruing to another**. Thirdly, it is obvious that the secretary, being the one who was originally ordered to make certain payments to the applicant, had a direct and substantial interest in the ensuing contempt-of-court proceedings, for she was the only one who could potentially be committed for contempt of court as a result of failure to comply with the order. Finally, it is clear that someone who is not a party to existing proceedings cannot be joined as a party to those proceedings except by means of a joinder application duly served on him or her, affording him or her an opportunity to object to the joinder and to put up a case as to why he or she should not be joined. A purported amendment of a notice of motion cannot have the effect of joining, as a party to the application in question, someone who is not already a party to it, and the mere failure by anyone to object to such a procedure as irregular cannot have the effect that a fresh party is joined in the proceedings.

The abortive joinder application in *Mpupa* was nothing more nor less than a case of the institution of contempt proceedings against X when the initial order of court was made, not against X, but against Y. The contempt proceedings, as well as the joinder application, were therefore clearly misconceived, for **what the applicant should have done was to withdraw the contempt application, tender the MEC's costs and proceed afresh against the secretary**, being the only party who could be held to account for failure to comply with the order of court granted in favour of the applicant in the original application.

6. APPEALS

Appealability

The decision in ***Van Niekerk & another v Van Niekerk & another*** **2008 (1) SA 76 (SCA)** was surveyed in **Civil Procedure Sibergramme 3 of 2008** (6 May 2008) 11—13.

7. REVIEWS

Exhaustion of internal remedies

The respondents in ***Meepo v Kotze & others*** **2008 (1) SA 104 (NC)** had lodged an internal appeal, apparently in terms of s 96 of the Mineral and Petroleum Resources Development Act 28 of 2002 ('the MPRD Act'), against the grant of a prospecting right to the applicant. Before the appeal was finalized, the applicant instituted proceedings to enforce his prospecting right, and the respondents launched a counter-application aimed at having the grant of the prospecting right declared null and void. The appeal proceedings were eventually concluded before the counter-application was argued and determined by the court. On behalf of the applicant, it was argued, however, that the

counter-application had been instituted prior to the finalization of the internal appeal process, and therefore that the counter-application was premature. The applicant relied upon s 96(3) of the MPRD Act, which provides that no person may apply to the court for the review of an administrative decision contemplated in s 96(1) of the Act until that person has exhausted his or her remedies in terms of the latter subsection. (Section 96(1) provides for an appeal against any administrative decision in terms of the MPRD Act to the Director-General of the Department of Minerals and Energy or, in certain cases, to the Minister of Minerals and Energy.)

Lacock and Olivier JJ began by pointing out that **the deferment of review applications until domestic remedies have been exhausted has been recognized in our courts on numerous occasions, both in common law and on the basis of applicable legislation, even in cases where it was not explicitly agreed upon or provided for** (para 23 at 118E—G). This principle was now statutorily provided for in s 7(2)*(a)* of the Promotion of Administrative Justice Act 3 of 2000 ('PAJA'), on which all applications for the review of administrative action are now based (para 24 at 118G, with reference to *Transnet Ltd & others v Chirwa* 2007 (2) SA 198 (SCA), [2007] 1 All SA 184, discussed in **Civil Procedure Sibergramme 9 of 2007** (30 November 2007)). The respondents' internal appeal had been finalized (and dismissed) well before the date on which the hearing of the matter (including the counter-application) commenced. The question was therefore whether, even if the counter-application had been lodged prematurely (in other words, prior to the exhaustion of the respondents' internal remedies), it would have been a nullity that could not be entertained and adjudicated upon by the court. That could never be the case in the circumstances in *Meepo* (para 31 at 119G—H). Even if it were to be assumed that the mere lodging of a counter-application amounted to an application as contemplated in s 96(3) of the MPRD Act, the fact remained that by the time when the relief applied for in the counter-application was actually argued and considered, the appeal had been finalized and the internal remedies had in essence been exhausted (para 32 at 119H—J).

Meepo was not a case in which proceedings were instituted before the accrual of a cause of action. The provisions of s 96(3) of the MPRD Act had nothing to do with a party's cause of action. The subsection merely provided for 'a procedural deference of the remedy of review', and not a complete ouster of that remedy (para 34 at 120C—D; see also para 39 at 121D, where the court remarked that the provisions of s 96(3) were 'clearly distinguishable' from provisions pertaining to the very cause of a party's action). It would certainly not be in the interests of justice to dismiss the counter-application on the basis relied on by the applicant. At the date of the hearing, it was clear that the appeal had in fact in the mean time been turned down, and since all parties were thoroughly prepared to argue the counter-application, the point in limine taken by the applicant in regard to it should not have been persisted with (para 35 at 120D—E). In this regard, remarks made in *Le Grand (t/a Jeannes) v Carmelu (Pvt) Ltd (t/a Lynwood Fashions)* 1980 (1) SA 240 (ZRA) at 242D—G were apposite. There Macdonald CJ had said that **the civil courts, in common with the criminal courts, exist to do justice and not to provide some practitioners with a forum in which, relying upon technical and wholly academic points, to attempt to prevent a court from adjudicating upon the**

real issues. A civil trial was not to be allowed by the presiding judicial officer to degenerate into a contest on technical and wholly academic points which obscured and even frustrated a trial on the real issues (para 36 at 120E—I).

Lacock and Olivier JJ added that, although it was probably not necessary to decide the issue in view of the conclusion already arrived at, they were of the view that although the provisions of s 96(3) of the MPRD Act were on the face of it peremptory in nature, the fact that the internal remedies were in fact exhausted by the time when the matter was heard constituted substantial and sufficient compliance with those provisions (para 38 at 121A—B). The question was simply whether the intention of the legislature in relation to s 96(3) had in the end been achieved. The question was whether there had been, not 'exact' or 'adequate' or 'substantial' compliance with the statute, but 'compliance therewith'. A court might well hold that, even though the position as it was was not identical with what it ought to be, the injunction had nevertheless been complied with. **In deciding whether there had been compliance with the statute, the object sought to be achieved by the statute was of importance**. It was not every deviation from the literal prescription that was fatal. The question remained whether, in spite of the defects, the object of the provision was achieved (para 40 at 121E—I, with reference to *Maharaj & others v Rampersad* 1964 (4) SA 638 (A) at 646C—E and *Unlawful Occupiers, School Site v City of Johannesburg* 2005 (4) SA 199 (SCA), [2005] 2 All SA 108 para 22 at 209G—H (SA), 116*c—d* (All SA), surveyed on this point in *Civil Procedure Sibergramme Yearbook 2005* (2006) 44). The legislature's intention with s 96 was obviously to ensure that internal remedies were exhausted before decisions contemplated in s 96(1) were subjected to scrutiny by the courts and before the costs of such a course were incurred. That object had effectively been achieved. To put it another way, the court could not for a moment conceive that it could be argued that the consideration of the counter-application would frustrate the legislature's object in passing s 96(3) (para 41 at 121I—122A).

The court in *Meepo* also gave consideration to the argument on behalf of the applicant that s 7(2)*(c)* of PAJA (which provides that a court or tribunal may, in exceptional circumstances, exempt a person from the obligation to exhaust any internal remedy if the court or tribunal deems it in the interest of justice) does not apply to matters falling under the MPRD Act. It was not necessary to come to a final conclusion in that regard on the facts before the court in *Meepo* (para 30 at 119F). It is apparent, however, that the court felt that, had the internal appeal process not been exhausted by the time when the counter-application was heard, there was something to be said for the applicant's argument. That argument was based on the maxim inclusio unius est exclusio alterius ('specific inclusion of one is (= implies) the exclusion of the other' (V G Hiemstra & H L Gonin *Trilingual Legal Dictionary* 3 ed (1992) 208)), also sometimes rendered as 'expressio unius est exclusio alterius', combined with the fact that the legislature in enacting the provisions of s 96 of the MPRD Act omitted any reference to s 7(2)*(c)* when it provided in s 96(4) of the MPRD Act that ss 6, 7(1) and 8 of PAJA apply to any court proceedings contemplated in s 96. Against the background of the clear prohibition in s 96(3), so the argument proceeded, **the only reasonable inference was that the**

legislature intended to exclude the application of s 7(2)*(a)* of PAJA in matters resorting under the MPRD Act (para 27 at 118I—119B).

Another argument which could possibly have led to the same result would be that the legislature, when promulgating the MPRD Act after PAJA had already come into operation (and clearly well aware of PAJA), had intended to regulate the whole subject of access to courts in relation to decisions under the MPRD Act and that the relevant provisions of the latter Act necessarily superseded and repealed all former Acts so far as it differed from the prescriptions of former Acts (para 28 at 119B—D, with reference to *New Modderfontein Gold Mining Co v Transvaal Provincial Administration* 1919 AD 367 at 397 and *Mthembu v Letsela & another* 2000 (3) SA 867 (SCA) para 28 at 881B—C). Indications in the MPRD Act of such an intention could arguably be the heading to s 96 ('Internal appeal process and access to courts'), the fact that the legislature deemed it necessary specifically to exclude access to courts before internal remedies were exhausted (which was in any event already provided for in s 7(2)*(a)* of PAJA), and the fact that the legislature specifically provided that ss 6, 7(1) and 8 of PAJA would be applicable to review proceedings in respect of such matters (when those sections would in any event have been applicable) (para 29 at 119D—E). The result of such an interpretation would then be that those provisions of the MPRD Act which regulated access to courts would apply, to the exclusion of those provisions of PAJA that were not specifically referred to and made applicable (para 30 at 119E—F).

Although the view that s 96 of PAJA impliedly excludes those provisions of PAJA which have not been specifically rendered applicable is an attractive one, readers are cautioned against treating it as being beyond dispute that s 96 of the MPRD Act excludes the operation of the provisions of PAJA other than ss 6, 7(1) and 8. For it has been said that the maxim inclusio unius est exclusio alterius must be applied with caution, and that there are instances in which the maxim is applied when it should not be (see Etienne Mureinik 'Expressio Unius: Exclusio Alterius?' (1987) 104 *SALJ* 264 at 264, 265). It has also been pointed out that the maxim must be held to be, not a final, but only a prima facie indicator of meaning and therefore not a hard-and-fast rule (Lourens du Plessis *Re-Interpretation of Statutes* (2002) 238). And PAJA is an important statute, which 'has become the legislative foundation of the general administrative law of South Africa' (Iain Currie & Jonathan Klaaren *The Promotion of Administrative Justice Act Benchbook* (2001) 2). It is the instrument chosen by Parliament to give effect to the right to just administrative action enshrined in s 33 of the Constitution of the Republic of South Africa, 1996 and was intended as a codification of our administrative law (Cora Hoexter *Administrative Law in South Africa* (2007) 114). In addition, the cause of action for the judicial review of administrative action now ordinarily arises from PAJA (*Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & others* 2004 (4) SA 490 (CC), 2004 (7) BCLR 687 para 22 at 504G (SA), 702I—703A (BCLR) and para 25 at 506I—J (SA), 705C (BCLR)). The exclusion by implication of provisions of PAJA is therefore not to be lightly assumed merely because there are some legislative indicia which point in that direction.

8. COSTS

Removal of trustee

The court in ***Stander & others v Schwulst & others*** **2008 (1) SA 81 (C)** was called upon to determine an application ('the costs application') by the first to third respondents, who were the trustees of a trust, for an order authorizing them to withdraw funds from the trust in order to fund the defence of an application ('the main application') for their removal from office as trustees. At the time when the costs application was brought, the main application had not yet been determined; indeed, the trustees attempted to delay delivering answering affidavits in opposition to the main application until after the costs application had been determined. (See, in this regard, under '**APPLICATIONS: *Extension of time***' above.)

On first principles, said N C Erasmus J, one would expect costs in a removal application to follow the result. **If a trustee was removed for improper conduct or breach of trust, he should pay the costs of the other side personally**. Conversely, if the complaining beneficiary's claim was found to be unfounded, the trustee's costs should be paid by the unsuccessful applicant personally. This was borne out by case law**:** where a trustee was removed, he was invariably ordered to pay the applicant's costs personally, though it was often stated (for the successful applicant's protection) that if the trustee failed to pay such costs, they could be recovered from the trust estate. This was not confined to cases where the trustee had been guilty of misconduct but extended to proceedings made necessary by his negligence or unreasonable behaviour (para 36 at 93E—H). An order allowing the successful applicant for removal to recover costs from the trust estate if those costs were not paid by the trustee in no way indicated that the claim was not against the trustee in his personal capacity (para 44 at 95G—H).

Turning to consider the issue of the trustee's own costs in such cases, N C Erasmus J added that **if the trustee was removed for improper conduct or breach of trust, it would obviously be unjust for the trust estate to have to bear the expense of his unsuccessful defence**. Since the claim was against the trustee in his personal capacity (see under '**PARTIES: *Trustee***' above), his defence was not in his (representative) capacity as a trustee and one would not in principle expect him to be entitled to have recourse to the trust estate, particularly where he was removed for misconduct (para 37 at 93H—94B).

A trustee was entitled to an indemnity in respect of expenses properly incurred, and this applied in respect of legal expenses incurred by the trustee when sued in his representative capacity. Accordingly, if a trustee sued or was sued in his representative capacity, and the bringing or defending of the proceedings was proper, he would be entitled to a full indemnity regardless of the outcome. That would apply both to the trustee's own costs and to the costs he became liable (if unsuccessful) to pay to the other side (para 38 at 94B—D). If, however, the trustee acted mala fide or unreasonably or improperly in bringing or defending legal proceedings, he would be held personally liable for the costs even where he was properly a party to the proceedings in his representative

capacity (para 39 at 94D—E). **If the trustee was removed from office for misconduct or other improper or unreasonable behaviour, his opposition to the application for his removal would inevitably be found to have been unreasonable, and he would not only be ordered to pay the other side's costs personally but also have no entitlement to an indemnity from the trust in respect of his own costs** (para 43 at 95D—E; see also para 46.3 at 96F and para 47.1 at 97B—C).

Applying these principles, N C Erasmus J held that the trustees in *Stander* were not assisted by a clause in the trust deed to the effect that the trustees were entitled to be indemnified out of the trust fund against all claims and demands of whatsoever nature that might be made upon them arising out of the exercise of any of the powers conferred upon them by the trust deed. That clause referred to a claim or demand made against the trustees in their capacity as such (sc in their representative capacity). An application for removal was not a claim or demand made upon trustees arising out of the exercise of their powers under the trust deed. In any event, a clause of the kind under consideration would always be construed as covering only expenses properly incurred. **Since the trust deed did not empower the trustees to act improperly, the misconduct which would form the basis of their removal would not constitute the exercise by them of powers conferred by the trust deed**. Similarly, unreasonable or improper opposition to their removal would not involve an exercise by them of powers conferred by the trust deed (para 45 at 95H—96B).

Turning, finally, to the question whether the costs application could succeed, N C Erasmus J held that if the applicants succeeded in the main application, the trustees would not enjoy an indemnity out of the estate. One could not say (in the light of numerous and serious charges of misconduct) that an indemnity order was the only one which the court could reasonably make in the main application (para 56.2 at 102A—B). The general principle was that a pre-emptive costs order of the kind being sought by the trustees in a removal case was inappropriate, save perhaps in exceptional circumstances. As regards possible exceptional circumstances, *Stander* was plainly not a case in which the breaches of trust complained of, if established, would be found to be insignificant, nor was *Stander* a case of impecuniosity on the part of the applicants. In any event, a danger of inability on the part of the applicants to pay the costs of the trustees (if the latter were ultimately successful) could be adequately met by an order at the end of the main case. At that stage, the court could order that, to the extent that the applicants were unable to pay the trustees' costs, such costs could be recouped by the trustees from the trust estate. After all, that was the order with which the applicants would have to be satisfied if they were successful in the main case and the trustees in their personal capacities should prove to be unable to pay the applicants' costs. That was usually the way in which costs orders in such matters were framed by our courts (para 57 at 102D—H).

A costs application of the kind made by the trustees was fundamentally misconceived. They asked in advance for an order that their defence of the main application for their removal be funded by the trust estate. Since they would be entitled to such an indemnity only if their opposition were justified, the court could not make such an order without deciding the main case. **In effect, the trustees asked the court to rule that regardless of whether or not they were acting reasonably in opposing the main application,**

they were entitled to an indemnity. The making of such an order was contrary to all authority, which was to the effect that trustees enjoyed an indemnity only if they opposed proceedings properly and reasonably. The trustees' demand also offended against 'basic notions of justice and common sense' (para 58 at 102H—103B).

The costs application was accordingly dismissed, and the trustees were held not entitled to recover the costs of that application from the trust (paras 1 and 3 of the court's order at 103H—I and 104A).

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