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None

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None

1. INTRODUCTION

This Sibergramme deals with cases reported in ***The South African Law Reports*** and ***The All South African Law Reports*** during 2007, focusing in particular on the topics of jurisdiction, parties, summary judgment, interdicts, declaratory orders, the interpretation of court orders, the distinction between appeals and reviews, and aspects of costs.

2. JURISDICTION

Child abduction

The question for determination in ***S v H*** **2007 (3) SA 330 (C)** was whether a South African court had jurisdiction to grant certain declaratory relief as a precursor to the

institution of legal proceedings in Switzerland for the return to South Africa of the applicant's child, who had been abducted from Cape Town by the child's mother and taken to Switzerland. This turned on the proper interpretation of certain provisions of the Hague Convention on the Civil Aspects of International Child Abduction of 1980, which was incorporated into South African law by the Hague Convention on the Civil Aspects of International Child Abduction Act 72 of 1996, to which the Convention is attached in a schedule. It was settled law, said Griesel J, that for the purposes of an application in terms of the Convention for the return of a child wrongfully removed, it was for the court of the requested state (in this case, Switzerland), not the relevant authority of the requesting state (in this instance, South Africa), to decide whether the removal was wrongful within the meaning of art 3 of the Convention. However, the question of wrongfulness had to be determined with reference to the statutes and case law of the country in which the child was habitually resident (para 19 at 336E—G).

For her objection to the jurisdiction of the court, the mother relied on art 15 of the Convention, which reads as follows**:**

> 'The judicial or administrative authorities of a Contracting State may, prior to the making of an order for the return of the child, request that the applicant obtain from the authorities of the State of the habitual residence of the child a decision or other determination that the removal or retention was wrongful within the meaning of Article 3 of the Convention, where such a decision or determination may be obtained in that State. The Central Authorities of the Contracting States shall so far as practicable assist applicants to obtain such a decision or determination.'

In the absence of any request from the Swiss authorities or a Swiss court in terms of art 15, the mother argued, the application for the declaratory relief sought was premature. Rejecting the mother's objections to the court's jurisdiction as unfounded, Griesel J held that **a prospective applicant in a Hague Convention application where the country of habitual residence was South Africa did not have to await a request in terms of art 15 by the courts or other relevant authority of the requested state; he or she was at liberty to be proactive and to approach a South African court for a declarator**, as the father had done. This conclusion was dictated by the provisions of art 8 of the Convention, which sets out the requirements for an application for the return of a child. The article provides that the application 'may be accompanied or supplemented' by an authenticated copy of any relevant decision or agreement, a certificate or an affidavit emanating from a Central Authority or other competent authority of the state of the child's habitual residence, or from a qualified person, concerning the relevant law of that state, and any other relevant documents (para 23 at 337G—J). It was thus clear that an applicant could include a copy of any 'relevant decision' in his or her application, and also a certificate or affidavit by the Central Authority (in South Africa, the Chief Family Advocate appointed in terms of the Mediation in Certain Divorce Matters Act 24 of 1987) or any other 'competent authority' of the state of the child's habitual residence concerning the relevant law of that state. Had the father in *S v H* approached the Central Authority for its certificate concerning the legal position in South Africa, there could have been no objection. It could not conceivably make any difference to the position of

the mother that the father saw fit to approach the court – surely a 'competent authority' within the meaning of art 8 – for its view concerning the relevant law of this country. In any event, the application for return of the child could also be accompanied by 'any other relevant documents', and a judgment by the court containing declaratory relief had to be a relevant document for purposes of art 8 (para 24 at 337J—338C). The present case, which raised difficult questions on which our courts had not previously pronounced, was par excellence the type of matter in which it would be appropriate to approach the court for a declarator regarding the legal position (para 25 at 338C—D).

This conclusion, added Griesel J, was fortified by the attitude adopted by the English courts in similar matters, where it has been held that **an applicant who persuades the court that a child has been wrongfully removed from the jurisdiction in breach of the Hague Convention and who seeks declaratory relief to assist his prospects of obtaining substantive relief from the courts of the requested state will be entitled as of right to such a declaration, and can normally expect to have the court's discretion exercised in his favour** (para 26 at 338D—F; see also para 27 at 338G). In the circumstances, the court did in principle have the requisite jurisdiction to grant declaratory relief (para 28 at 338G—H). Furthermore, the jurisdiction of the court had been invoked and the court was seised of the matter by virtue of a prior action instituted by the mother in regard to the father's rights of access to the child, and a counterclaim by the father raising the issues of co-guardianship and joint custody. The mother had pleaded to the counterclaim and pleadings had closed, with the result that litis contestatio had been reached (para 50 at 343F—H).

The decision of Griesel J must, with respect, surely be supported for the additional reason that art 15 of the Convention is couched in purely permissive terms. It does not expressly prohibit a person from approaching the court within whose area of jurisdiction a child was habitually resident for a decision or determination in the absence of a prior request from the judicial or administrative authorities of a contracting state for such a decision or determination. Nor should such a requirement be implied, in the light of the fundamental principle that a child's best interests are of paramount importance in every matter concerning the child (s 28(2) of the Constitution of the Republic of South Africa, 1996, and more recently s 9 of the Children's Act 38 of 2005, as to which see C J Davel & A M Skelton (eds) *Commentary on the Children's Act* (2007) 2—9ff). Clearly, the best interests of abducted children require that they be returned to the care of the person from which they have been abducted or (where the abductor, as in *S v H*, is herself a parent of the abducted child) at the very least that legal proceedings to determine whether or not the child should be returned must be expedited, and not hamstrung by technical legal objections of the kind which the mother in *S v H* sought to raise.

Interim interdict

See ***Legal Aid Board v Jordaan*** **2007 (3) SA 327 (SCA)**, which is surveyed under '***Labour Court***' below.

International competence of foreign court

The decision in ***Richman v Ben-Tovim*** **[2007] 2 All SA 234 (SCA)** was previously reported in 2007 (2) SA 283, and was surveyed in **Civil Procedure Sibergramme 8 of 2007** (28 November 2007) 4—8.

Labour Court

The appellant in ***Legal Aid Board v Jordaan*** **2007 (3) SA 327 (SCA)** sought condonation of the late filing of an appeal record, and reinstatement of the appeal in question. The appeal was against the grant by a High Court of an interim interdict, restraining a disciplinary tribunal from proceeding with a hearing pending the finalization of a review application by the respondent, which turned on the question whether the disciplinary inquiry constituted administrative action under the Promotion of Administrative Justice Act 3 of 2000 (PAJA).

The High Court, said Farlam JA (Nugent, Conradie, Ponnan and Maya JJA concurring), **normally has jurisdiction to grant an order preserving or restoring the status quo ante pending the final determination of the rights of litigants in a matter before it**. Indeed, the powers of the High Court go even further than that because the High Court's jurisdiction to grant interim relief depends on its jurisdiction to maintain or restore the status quo and not on whether it has jurisdiction to decide the main dispute (para 5 at 328I—329B, with reference to *National Gambling Board v Premier, KwaZulu-Natal, & others* 2002 (2) SA 715 (CC), 2002 (2) BCLR 156 para 48—53 at 730G—732E (SA), 168A—169G (BCLR)). The High Court would have jurisdiction to decide whether the disciplinary inquiry instituted by the appellant against the respondent constituted administrative action, and therefore unless there was a statutory provision ousting its jurisdiction to give interim relief, there could be no question as to the High Court's jurisdiction to grant the order under consideration (para 6 at 329B—D).

The argument raised by counsel for the appellant, however, was that the jurisdiction of the High Court was ousted by s 157(1), read with s 158(1)*(a)*(ii) and (iii), of the Labour Relations Act 66 of 1995. Section 157(1) provided for the Labour Court to have exclusive jurisdiction in respect of all matters that elsewhere in terms of the Labour Relations Act or in terms of any other law were to be determined by the Labour Court. Section 158(1)*(a)*(ii) and (iii) provided that the Labour Court could make any appropriate order, including an interdict or an order directing the performance of a particular act which order, when implemented, would remedy a wrong and give effect to the primary objects of the Act. **The subparagraphs of s 158(1)*(a)***, however, **related not to matters that in terms of the Act were to be determined by the Labour Court, but to the powers of the Labour Court which it could use in the course of exercising the jurisdiction conferred upon it in the Act**. This was clear from subparagraphs of s 158(1)*(a)* other than those on which counsel relied (providing for the Labour Court to grant urgent interim relief, declaratory orders, awards of compensation or damages, and orders for costs). It followed that counsel's submission that the High Court's power to grant the order appealed against was ousted by s 157(1), read with s 158(1)*(a)*(ii) and (iii), had to be rejected (para 8 at 329H—J). The position could hardly be otherwise. Once one

accepted, as one had to do, that the High Court had jurisdiction to determine whether the disciplinary inquiry under consideration in the main case constituted administrative action under PAJA, it was difficult to see how Parliament could ever have intended to vest exclusive jurisdiction to grant interim relief pending that determination in the Labour Court. But the upholding of counsel's contention would necessarily involve the conclusion that that was indeed Parliament's intention (para 9 at 330A—C).

The jurisdiction of the High Court was accordingly held not to be ousted, and the application for condonation was dismissed on the ground that the appeal enjoyed no prospects of success on the merits (para 10 at 330C).

3. PARTIES

Joinder

A submission to the effect that the first respondent in ***University of Pretoria v South Africans for the Abolition of Vivisection & another*** **2007 (3) SA 395 (O)** had been wrongly joined as a party to the proceedings was dismissed by Musi J. The application was for declaratory and interdictory relief arising from the publication by the second respondent in the official newsletter of the first respondent of certain statements that were held to be defamatory of (inter alios) the applicant. The second respondent was a member of the first respondent when she wrote the defamatory article, and had sent the papers in the application to the first respondent, which had indicated to her that there was nothing it could add to the application or in opposition thereto. It was clear that **the first respondent was correctly joined because it had a real and substantial interest** in the matter. The first respondent had received the papers in the application, and had a representative who had argued its case. It was not in any way prejudiced (para 7 at 399H—J).

A pension fund was held in ***Chairman of the Board of the Sanlam Pensioenfonds (Kantoorpersoneel) v Registrar of Pension Funds*** **2007 (3) SA 41 (T)** not to have the direct and substantial interest in the subject matter of the litigation which was necessary in order for it to be joined as an essential party to the proceedings, in which the chairman of the board of the pension fund sought declaratory relief relating to the interpretation of provisions of the Pension Funds Act 24 of 1956 pertaining to the proper treatment of an actuarial surplus in the hands of the pension fund. On an analysis of s 15K of the Pension Funds Act (which provides that the Registrar of Pension Funds must appoint a special ad hoc tribunal to perform the functions of the board of a pension fund when the latter fails to submit to the registrar a scheme for the apportionment of an actuarial surplus in terms of s 15B), Mynhardt J held that the pension fund was not afforded the opportunity to participate in the proceedings. The furthest that s 15K went was to afford 'any stakeholder the right to a hearing' (s 15K(7)). The term 'stakeholder' was defined in s 1(1) but did not include a pension fund as such. Nor did s 15B afford the pension fund itself the opportunity to participate in the proceedings (para 19 at 48G—I). It was therefore clear that **the pension fund did not have any interest in the determination of the actuarial surplus which had to be apportioned in terms of s 15B** (para 20 at 48J—

49B). The test applied by Mynhardt J was, of course, that laid down in *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A) at 659, where it was held that the court will not deal with an issue in which a third party may have a direct and substantial interest without either having that party joined in the suit or, if the circumstances admit of such a course, taking other adequate steps to ensure that its judgment will not prejudicially affect that party's interests (unless the court is satisfied that the third party has waived his right to be joined).

Mynhardt J also dismissed a point in limine based upon the failure to join the person appointed by the pension fund in terms of s 15B(3) to represent the interests of former members of the fund 'in the development of the scheme' for the apportionment of any actuarial surplus. A practising attorney who had been thus appointed had filed an affidavit in which he had stated that he had been furnished with copies of all the affidavits filed of record and the notice of motion, and that he supported the application. In the light thereof, it was not necessary for him to be joined as a party to the proceedings (paras 21—2 at 49B—E).

Further on the *Sanlam Pensioenfonds* case, see under '***Pension fund disputes***' immediately below.

Pension fund disputes

The locus standi of the chairman of a pension fund to claim declaratory relief relating to the operation of certain provisions of the Pension Funds Act 24 of 1956 was unsuccessfully challenged by the respondent in ***Chairman of the Board of the Sanlam Pensioenfonds (Kantoorpersoneel) v Registrar of Pension Funds*** **2007 (3) SA 41 (T)**. Although the Sanlam Pensioenfonds was a juristic person by virtue of s 5(1) of the Act and capable of suing and being sued in its corporate name, and although the board of the Pensioenfonds was not a juristic person in terms of s 7A of the Act, the object of the board in terms of s 7C(1) was to direct, control and oversee the operations of the fund in accordance with the applicable laws and rules of the fund (para 11 at 45I—46B). In pursuing its object, the board of a pension fund had to 'act with due care, diligence and good faith' and 'avoid conflicts of interest' as laid down in s 7C(2)*(b)* and *(c)*. The board of a pension fund was also required by s 2*(a)* of the Financial Institutions (Protection of Funds) Act 28 of 2001 to 'observe the utmost good faith and exercise proper care and diligence' (para 12 at 46B—C). It was clear from those provisions that the board played an important role in the functioning of a pension fund and that the legislature had burdened it with specific responsibilities (para 13 at 46C—D). Section 37 of the Pension Funds Act (as it was worded at the time of the decision in the *Sanlam Pensioenfonds* case) provided that any person who fell foul of its provisions would be guilty of an offence. The word 'person', said Mynhardt J, was not defined in the Act, prima facie bore its ordinary grammatical meaning, and therefore included the board of a pension fund and the individual members of such a board. In addition, a civil penalty could be recovered from such a board or its members for failing to comply with the provisions of the Act (para 15 at 47A—B, D—E).

In the light of those considerations, **the conclusion was inescapable that the Pension Funds Act necessarily implied that an institution such as the board of a pension**

fund (and not the pension fund itself) could approach the court in a case where it was primarily and solely charged with certain duties and obligations in terms of the Act (para 16 at 47F—G). Accordingly, the applicant, who was the spokesperson of the board of the Pensioenfonds, had the necessary legal standing to approach the court (para 17 at 47G—H).

Although s 37 of the Pension Funds Act has been substituted subsequent to the judgment in the *Sanlam Pensioenfonds* case, it is submitted that the reasoning of Mynhardt J recognizing the chairman (or the board) of a pension fund as having locus standi to approach the court for declaratory relief relating to the functions of the board remains good law. For s 37(2) as substituted authorizes the Registrar of Pension Funds to impose a heavy administrative penalty for non-compliance with the Act if the registrar on reasonable grounds believes that an administrator, pension fund or third party has failed to comply with the Act. The expression 'third party' is not defined in the Act, and must (like the term 'person' which was used in the previous incarnation of s 37) be given its ordinary grammatical meaning. On the face of it, a member of the board of a pension fund would be included within the ambit of the term 'third party' and would thus be entitled to approach a court for a declaratory order as to the meaning and operation of the provisions of the Pension Funds Act which affect the work of the board. Besides, whatever the meaning of the phrase 'third party'in the substituted s 37(2), it is inconceivable that a board of a pension fund or its chairman would not have locus standi in such a matter in the light of the obligations imposed upon the board and (by implication) its members by s 7C of the Pension Funds Act and s 2*(a)* of the Financial Institutions (Protection of Funds) Act.

The decision in ***Old Mutual Life Assurance Co (South Africa) Ltd v Pension Funds Adjudicator & others*** **2007 (3) SA 458 (C)** was previously reported in [2007] 2 All SA 98, and was surveyed in **Civil Procedure Sibergramme 12 of 2007** (4 March 2008) 4—5.

4. REPRESENTATION OF PARTIES

Withdrawal of attorney

The decision in ***Makuwa v Poslson*** **2007 (3) SA 84 (T)**, also reported in [2007] 4All SA 1260, was surveyed in **Civil Procedure Sibergramme 2 of 2008** (8 April 2008) 4.

5. RECUSAL OF JUDICIAL OFFICER

Bias

The decision in ***S v Basson*** **2007 (3) SA 582 (CC)** was previously reported in 2005 (12) BCLR 1192 and 2007 (1) SACR 566, and was surveyed in **Civil Procedure Sibergramme 1 of 2006** (28 April 2006) 6—9.

6. APPLICATIONS

Dispute of fact

In ***University of Pretoria v South Africans for the Abolition of Vivisection & another*** **2007 (3) SA 395 (O)** Musi J, after repeating (in para 8 at 400A—E) the well-known dicta of Corbett JA in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634H—635C, held that on an application of the *Plascon-Evans* test there were no serious disputes of fact in the matter, and granted the declaratory and interdictory relief sought by the applicant pursuant to the publication of defamatory statements referring to it in the official newsletter of the first respondent. An over-fastidious approach, said Musi J, would seriously impede and delay justice, and **a respondent should not be allowed to delay or frustrate justice by a bare denial** (para 9 at 400F, with reference to *Soffiantini v Mould* 1956 (4) SA 150 (E) at 154F—H).

7. TRIAL ACTIONS

Collation, pagination and indexing

The decision in ***Makuwa v Poslson*** **2007 (3) SA 84 (T)**, also reported in [2007] 4All SA 1260, was surveyed in **Civil Procedure Sibergramme 2 of 2008** (8 April 2008) 5—6.

Exception

The decision in ***Makuwa v Poslson*** **2007 (3) SA 84 (T)**, also reported in [2007] 4All SA 1260, was surveyed in **Civil Procedure Sibergramme 2 of 2008** (8 April 2008) 6.

Notice of intention to defend

The decision in ***Makuwa v Poslson*** **2007 (3) SA 84 (T)**, also reported in [2007] 4All SA 1260, was surveyed in **Civil Procedure Sibergramme 2 of 2008** (8 April 2008) 7.

Rules of court

The decision in ***Makuwa v Poslson*** **2007 (3) SA 84 (T)**, also reported in [2007] 4All SA 1260, was surveyed in **Civil Procedure Sibergramme 2 of 2008** (8 April 2008) 7—8.

Summary judgment

Two objections raised against the granting of an application for summary judgment in ***Technological Pump Developments CC t/a TPD Water Services v Irving 630 CC t/a B & M Pumps & another*** **2007 (3) SA 370 (T)** were, first, that the 'managing director' of the applicant close corporation had not been authorized formally by the close corporation to depose to the affidavit filed in support of the application and, secondly, that accounts

attached to the particulars of claim bore the name of an entity known as 'TPD CC Water Services', a name which did not accord with that of the applicant.

Dismissing both objections, Van Rooyen AJ pointed out that it was not in dispute that the deponent to the applicant's affidavit was the 'managing director' of the applicant close corporation. Uniform rule 32(2) provides that the verifying affidavit may be made 'by [the plaintiff] himself or by any other person who can swear positively to the facts verifying the cause of action and the amount'. **The managing director would be the ideal person to depose to such an affidavit**. Furthermore, the affidavit in question was supported by an affidavit deposed to by the close corporation's attorney. In *Nedcor Bank Ltd v Behardien* 2000 (1) SA 307 (C) at 310H—311D Cleaver J had supported the authority of an informed legal adviser to depose to an affidavit in support of an application for summary judgment. And although, at the hearing in the *Technological Pump Developments* case, certain concessions had been made as to the amount of the claim, that did not detract from the professed knowledge which the two deponents had of the documentation in their possession. Full liability was, in any case, not denied by the first respondent. The first point in limine was accordingly rejected (para 4 at 372C—I, with reference also to *Kurz v Ainhirn* 1995 (2) SA 408 (D) at 410E—H).

As to the second point in limine, the reference to 'TPD CC Water Services' on the relevant invoices indeed differed from the full name of the applicant, but the difference was minute, and if the court followed a common-sense approach, as it should do, then the point was not well taken. No mala fides was alleged by the respondents and **to attach any weight to the argument as to the name on the invoice would amount to putting form above substance** (para 5 at 372I—373A).

Summary judgment was accordingly granted in favour of the first respondent in an amount in relation to which no bona fide defence had been made out (para 8 at 373F—G).

The judgment of Van Rooyen AJ is supported by dicta in *Ganes & another v Telecom Namibia Ltd* 2004 (3) SA 615 (SCA), where Streicher JA (writing for the court) pointed out that the deponent to an affidavit in motion proceedings need not be authorized by the party concerned to depose to the affidavit. It is the institution of the proceedings and the prosecution thereof which must be authorized (para 19 at 624G—H). Although this was said in relation to a substantive (main) application, there is no reason why this should not apply also in relation to an interlocutory application such as the application for summary judgment in the *Technological Pump Developments* case. Where, therefore, the deponent testifies to having personal knowledge of the facts deposed to, swears positively to the facts verifying the cause of action and the amount (if any) claimed, and states that in his or her opinion there is no bona fide defence to the action and that notice of intention to defend has been delivered solely for the purpose of delay, the authority of the deponent to an affidavit filed in support of an application for summary judgment will not be susceptible of legal challenge.

It should be noted that the term 'managing director' used in the *Technological Pump Developments* case is inappropriate in relation to a close corporation; the correct expression would be 'managing member', since a close corporation, unlike a company, is not run by directors and does not have a board of directors.

8. PROVISIONAL SENTENCE

Foreign judgment

The decision in ***Richman v Ben-Tovim*** **[2007] 2 All SA 234 (SCA)** was previously reported in 2007 (2) SA 283, and was surveyed in **Civil Procedure Sibergramme 8 of 2007** (28 November 2007) 4—8.

9. INTERDICTS

Interlocutory interdicts

Discretion of court

In exercising its discretion whether to grant an interlocutory interdict, the court is entitled to take into account several 'disparate and incommensurable features'**:** ***Treatment Action Campaign v Rath & others*** **2007 (4) SA 563 (C), [2007] 2 All SA 439** at 568F—G (SA), 443*c—d* (All SA), with reference to *Knox D'Arcy Ltd & others v Jamieson & others* 1996 (4) SA 348 (A), [1996] 3 All SA 669 at 361H—I (SA), 680*f—g* (All SA).

Jurisdiction

On the jurisdiction of the High Courts to grant interim interdicts to preserve or restore the status quo pending the final determination of the rights of litigants, see ***Legal Aid Board v Jordaan*** **2007 (3) SA 327 (SCA)**, which is surveyed under '**JURISDICTION: *Labour Court***' above.

Requirements

An interim interdict to restrain the publication of certain defamatory statements pending the final determination of an action instituted by the applicant for a final interdict, an apology and damages was granted in ***Treatment Action Campaign v Rath & others*** **2007 (4) SA 563 (C), [2007] 2 All SA 439**. Desai J (Louw and Moosa JJ concurring) held that a prima facie right to the court's protection had been established, as well as a well-grounded apprehension of irreparable harm which could not be remedied by the payment of damages, since the applicant was a 'mission-driven organisation' and the defamatory statements were intended to strike at the heart of its activities (at 571E—G (SA), 446*a—b* (All SA)).

10. JUDGMENTS AND ORDERS

Declaratory order

Determination of existing, future or contingent right or obligation

Declaratory relief concerning the proper interpretation of certain provisions of the Pension Funds Act 24 of 1956, relating to the treatment of an actuarial surplus in the hands of a pension fund, was sought and granted in ***Chairman of the Board of the Sanlam Pensioenfonds (Kantoorpersoneel) v Registrar of Pension Funds*** **2007 (3) SA 41 (T)**. **An existing dispute**, said Mynhardt J, **was not a prerequisite for a court to exercise its discretion to grant a declaratory order**. In the present case there was a dispute between the board of the pension fund and the Registrar of Pension Funds about whether certain subsections of s 15B of the Act were applicable to 'improper utilization' of an actuarial surplus that occurred before 7 December 2001. Whether the application succeeded or not, the order of the court would be binding on the parties to the litigation. In terms of s 19(1)*(a)*(iii) of the Supreme Court Act 59 of 1959 the High Court had jurisdiction to enquire into and determine any existing, future or contingent right or obligation at the instance of any 'interested person'. The board of the pension fund qualified as an interested person, since it was obliged to submit to the registrar a scheme of distribution of any actuarial surplus if such a surplus was actuarially established. The question which the board wanted answered was whether or not it should go further back in the history of the pension fund it administered than 7 December 2001 to search for 'improper utilization' of actuarial surplus. Although it had not yet been established that there was indeed an actuarial surplus in order to trigger s 15B, or that there was 'improper utilization' of actuarial surplus, the obligation of the board was at least a contingent one (para 25 at 50C—G).

The applicant had accordingly satisfied the requirements of the first stage of the enquiry that had to be undertaken in terms of s 19(1)*(a)*(iii) of the Supreme Court Act. In so far as the second leg of the enquiry was concerned, as explained in *Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd* 2005 (6) SA 205 (SCA), [2006] 1 All SA 103 para 18 at 213E—G (SA), 109*d—e* (All SA), the court should exercise its discretion in favour of the applicant and consider the issue between the parties and pronounce upon it. If the court found in favour of the applicant, a tangible and justifiable advantage to the applicant would flow from that. Likewise, in the event of a favourable finding for the respondent, both he and the applicant would be bound thereby and legal certainty would have been obtained. **This was not a case in which the judgment of the court would have no practical effect, justifying a refusal by the court to exercise its discretion** and dismiss the application on that ground alone (para 27 at 50I—51B, with reference to *Eagles Landing Body Corporate v Molewa NO & others* 2003 (1) SA 412 (T) paras 61—4 at 431F—432G).

Discretion of court to refuse relief

See ***Chairman of the Board of the Sanlam Pensioenfonds (Kantoorpersoneel) v Registrar of Pension Funds*** **2007 (3) SA 41 (T)** , which is surveyed under '**Determination of existing, future or contingent right or obligation**' immediately above.

Interpretation of court order

In ***Engelbrecht & another NNO v Senwes Ltd*** **2007 (3) SA 29 (SCA)** an agreement of settlement had been made an order of court. The basic principles of interpretation of contracts, held Malan AJA (Mpati DP and Streicher, Cloete and Mlambo JJA concurring), therefore needed to be applied to ascertain the meaning of the agreement. Following the approach in *Coopers & Lybrand & others v Bryant* 1995 (3) SA 761 (A) at 767D—768E, Malan AJA held that the common intention of the parties had to be ascertained from the language used in the instrument. Various canons of construction were available to ascertain their common intention at the time of concluding the contract. According to the 'golden rule' of interpretation, **the language in the document was to be given its grammatical and ordinary meaning, unless this would result in some absurdity, or some repugnancy or inconsistency with the rest of the instrument**. The mode of construction should never be to interpret the particular word or phrase in isolation (in vacuo) by itself. The correct approach to the application of the 'golden rule' of interpretation after having ascertained the literal meaning of the word or phrase in question was, broadly speaking, to have regard (1) to the context in which the word or phrase was used with its interrelation to the contract as a whole, including the nature and purpose of the contract, (2) to the background circumstances which explained the genesis and purpose of the contract (sc matters probably present to the minds of the parties when they contracted), and (3) to extrinsic evidence regarding the surrounding circumstances when the language of the document was on the face of it ambiguous, by considering previous negotiations and correspondence between the parties, and subsequent conduct of the parties showing the sense in which they acted on the document, save direct evidence of their own intentions (para 6 at 32D—33A).

The intention of the parties was ascertained from the language used, read in its contextual setting and in the light of admissible evidence. There were three classes of admissible evidence. **Evidence of background facts was always admissible. Those facts (matters probably present in the minds of the parties when they contracted) were part of the context and explained the 'genesis of the transaction' or its 'factual matrix'**. Its aim was to put the court 'in the armchair of the author(s)' of the document. Evidence of 'surrounding circumstances' was admissible only if a contextual interpretation failed to clear up an ambiguity or uncertainty. Evidence of what passed between the parties during negotiations that preceded the conclusion of the agreement was admissible only where evidence of the surrounding circumstances did not provide 'sufficient certainty' (para 7 at 33A—D).

Finding that the language of the settlement agreement in *Engelbrecht* was not ambiguous, Malan AJA held that evidence of surrounding circumstances was therefore

neither necessary nor admissible to determine the intention of the parties. The background facts (which were set out by the court) were not contentious, and were 'matters probably present in the minds of the parties when they contracted' and of which the parties were both aware (para 8 at 33D—E).

11. APPEALS

Application to the Supreme Court of Appeal for leave to appeal

The decision in ***S v Basson*** **2007 (3) SA 582 (CC)** was previously reported in 2005 (12) BCLR 1192 and 2007 (1) SACR 566, and was surveyed in **Civil Procedure Sibergramme 1 of 2006** (28 April 2006) 17.

Condonation of late prosecution of appeal

In ***Legal Aid Board v Jordaan*** **2007 (3) SA 327 (SCA)** the court (per Farlam JA) reaffirmed that an application for condonation of the late lodgement of the appeal record, and for reinstatement of the appeal which lapsed when the record was not lodged timeously, will not be granted where the applicant has no prospects of success on the merits (para 4 at 328H—I, para 10 at 330C).

Exercise of discretion by court a quo

The decision in ***S v Basson*** **2007 (3) SA 582 (CC)** was previously reported in 2005 (12) BCLR 1192 and 2007 (1) SACR 566, and was surveyed in **Civil Procedure Sibergramme 1 of 2006** (28 April 2006) 17.

Pension Funds Adjudicator determination

An application to the High Court in terms of s 30P(1) of the Pension Funds Act 24 of 1956 to set aside a determination made by the Pension Funds Adjudicator was held in ***Old Mutual Life Assurance Co (South Africa) Ltd v Pension Funds Adjudicator & others*** **2007 (3) SA 458 (C), [2007] 2 All SA 98** to be 'in the nature of a *sui generis* appeal', which had been described in *Meyer v Iscor Pension Fund* 2003 (2) SA 715 (SCA), [2003] 1 All SA 40 para 8 at 725I—726A (SA), 45*e—g* (All SA) as an appeal in the wide sense. The High Court was therefore not limited to a decision whether the adjudicator's determination was right or wrong. Nor was it confined to the evidence of the grounds upon which the adjudicator's determination was based. **The court could consider the matter afresh and make any order it deemed fit**. At the same time, however, the High Court's jurisdiction was limited by s 30P(2) to a consideration of the merits of the complaint in question. The dispute submitted to the High Court for adjudication had therefore still to be a 'complaint' as defined (in s 1(1) of the Act). Moreover, it had to be substantially the same 'complaint' as the one determined by the adjudicator (para 7 at 461A—C (SA), 100*e—g* (All SA)).

Refusal by Supreme Court of Appeal of leave to appeal

The decision in ***S v Basson*** **2007 (3) SA 582 (CC)** was previously reported in 2005 (12) BCLR 1192 and 2007 (1) SACR 566, and was discussed in **Civil Procedure Sibergramme 1 of 2006** (28 April 2006) 22.

12. REVIEWS

Distinction between appeal and review

The well-known and firmly entrenched distinction which exists in our law between appeals and reviews was upheld by Harms JA (Conradie, Cloete, Lewis and Ponnan JJA concurring) in ***Telcordia Technologies Inc v Telkom SA Ltd*** **2007 (3) SA 266 (SCA), [2007] 2 All SA 243, 2007 (5) BCLR 503** in the context of the review of consensual international commercial arbitration proceedings. The parties had bound themselves to an arbitration in terms of the Arbitration Act 42 of 1965 and if the Act, properly interpreted, did not allow a review for material error of law, a contrary term could not be implied (para 67 at 297B—C (SA), 264*g*—*h* (All SA), 525C—D (BCLR)). It could not be accepted that a 'material' error of law was any error of law which made a party lose the arbitration, and that a court could thus review the decision of the arbitrator on the ground that the mere existence of such an error constituted misconduct on the part of the arbitrator as contemplated in s 33(1)*(a)* of the Act or a gross irregularity in terms of s 33(1)*(b)*. For that approach rendered the difference between appeals and reviews meaningless and in effect gave a right of appeal, which the Act (in s 28) prohibits (para 68 at 297C—E (SA), 265*a*—*b* (All SA), 525D—E (BCLR)). Errors of law could, no doubt, lead to irregularities in the conduct of proceedings, as where an arbitrator, because of a misunderstanding of the audi alteram partem principle, refused to hear one party. Although in such a case the error of law gave rise to the irregularity, the reviewable irregularity was the refusal to hear that party, not the error of law. Likewise, an error of law might lead an arbitrator to exceed his powers or to misconceive the nature of the inquiry and his duties in connection with it (para 69 at 297E—F (SA), 265*b*—*d* (All SA), 525E—G (BCLR)). Where the complaint about the conduct of a judicial decision-maker (such as a magistrate) was directed at the method or conduct of the proceedings and not the result of the proceedings, the appropriate remedy was one of review. Where a legal issue had been left for the decision of the functionary, any complaint about how he had reached his decision had to be directed at the method and not the result (para 75 at 299I—300B (SA), 267*d*—*e* (All SA), 528A—B (BCLR), read with para 74 at 299D—I (SA), 266*i*—267*d* (All SA), 527E—528A (BCLR), referring to *Doyle v Shenker & Co Ltd* 1915 AD 233). **It was wrong to confuse the reasoning with the conduct of the proceedings**. As illustrated by the decision in *Administrator, South West Africa v Jooste Lithium Myne (Eiendoms) Bpk* 1955 (1) SA 557 (A) at 569D—E, the wrong interpretation of a regulation by a decision-maker would not afford a ground for review by the court (paras 76—7 at 300B—G (SA), 267*e*—268*c* (All SA), 528B—H (BCLR)).

It was, continued Harms JA, a fallacy to label a wrong interpretation of a contract, a wrong perception or application of South African law or an incorrect reliance on inadmissible evidence by the arbitrator as a (reviewable) transgression of the limits of his power. **The power given to the arbitrator was to interpret the agreement, rightly or wrongly; to determine the applicable law, rightly or wrongly; and to determine what evidence was admissible, rightly or wrongly. Errors of the kind referred to had nothing to do with the arbitrator exceeding his powers; they were errors committed within the scope of his mandate**. An arbitrator in a 'normal' local arbitration had to apply South African law but if he erred in his understanding or application of local law, the parties had to live with it. If such an error amounted to a transgression of his powers, it would mean that all errors of law were reviewable, which was absurd (paras 86—8 at 302D—303D (SA), 269*h*—270*g* (All SA), 530D—531D (BCLR), with reference to *Doyle v Shenker & Co Ltd* 1915 AD at 236—7 and 238, where reference was made to 'the distinction between procedure by appeal and procedure by review, so carefully drawn by statute and observed in practice' (at 236)).

The High Court in *Telcordia*, added Harms JA, had interpreted an agreement which formed part of the subject matter of the arbitration proceedings afresh, had come to a different conclusion about its meaning from the arbitrator, and had then concluded as a result that the arbitrator had not applied his mind to it in a proper manner, and that the arbitrator had misconceived the whole nature of the inquiry and his duties and had simultaneously exceeded the bounds of his powers. By its reinterpretation of the agreement, however, the High Court had dealt with the matter as an appeal, reasoning in effect that because the arbitrator was wrong it had to follow that he had committed an irregularity. **The failure to apply the applicable principles of interpretation or the arrival at a wrong conclusion did not amount to a 'gross irregularity'**, as dicta in *Doyle v Shenker & Co Ltd* illustrated. It was 'circuitous' to reason, as the High Court had done, that the arbitrator's failure to apply the applicable principles of interpretation amounted to a misconception of the whole nature of the inquiry and that consequently the failure amounted to a gross irregularity. The High Court had implied that by interpreting the agreement as he did, the arbitrator had acted outside his jurisdiction. That was 'simply wrong' (para 99 at 305H—306B (SA), 273*b*—*e* (All SA), 533H—534B (BCLR)). It did not matter, for purposes of a review, whether the arbitrator was right or wrong (para 101 at 306F—G (SA), 273*i* (All SA), 534F (BCLR)). The arbitrator might have been wrong but that did not mean that he had misconceived the nature of the inquiry or his duties, or that he had acted irrationally (para 122 at 312A—B (SA), 279*a*—*b* (All SA), 539I (BCLR)).

13. COSTS

Costs sought only in event of opposition

The respondent in ***Chairman of the Board of the Sanlam Pensioenfonds (Kantoorpersoneel) v Registrar of Pension Funds*** **2007 (3) SA 41 (T)**, having unsuccessfully resisted an application for a declaratory order, contended that an order for

costs should not, in principle, be made against him because, as a public official, he 'only complied with his duty to oppose the application and to put his views before the Court' (para 49 at 60H). Rejecting this argument, Mynhardt J pointed out that the respondent had actively and vehemently opposed the application, leaving no stone unturned in an effort to have it dismissed. It was certainly not a case in which the respondent had merely wished to place his views before the court and had decided to abide the decision of the court. The answering affidavit had concluded with a prayer that the application be dismissed with costs. The notice of motion, on the other hand, had contained a prayer for costs only against any person who opposed the application. The respondent, said Mynhardt J, should have heeded that warning. The principle enunciated in *Maclean v Haasbroek NO & others* 1957 (1) SA 464 (A) at 468 in fine—469B was of application. There it was held that **where no costs were sought against a person unless he opposed, there was no reason why, if he opposed unsuccessfully, he should not be ordered to pay the costs occasioned by his opposition unless there were circumstances which entitled the court in the exercise of its discretion to make no order as to costs**. Where a respondent had acted in a judicial or quasi-judicial capacity, he had had no personal interest in the result and he should not have taken sides. He should have submitted to the judgment of the court and could, if he had wished to do so, have filed his reasons for coming to the decision which was the subject of the attack. In the *Sanlam Pensioenfonds* case, there was accordingly no reason why the court should exercise its discretion in the respondent's favour and make no order as to costs (para 50 at 60H—61D). The respondent was accordingly ordered to pay the applicant's costs, including the costs of two counsel (at 61F).

The reasoning on costs in the *Sanlam Pensioenfonds* case should be compared with the reasoning on costs in ***Old Mutual Life Assurance Co (South Africa) Ltd v Pension Funds Adjudicator & others*** **2007 (3) SA 458 (C)**, previously reported in [2007] 2 All SA 98, which was surveyed in **Civil Procedure Sibergramme 12 of 2007** (4 March 2008) 11.

De bonis propriis

The decision in ***Makuwa v Poslson*** **2007 (3) SA 84 (T)**, also reported in [2007] 4All SA 1260, was surveyed in **Civil Procedure Sibergramme 2 of 2008** (8 April 2008) 9—10.

Successful party deprived of costs

Although the applicant in ***S v H*** **2007 (3) SA 330 (C)** was substantially successful in obtaining certain declaratory relief, he succeeded on the basis of arguments that had not previously been accepted by our courts. The respondent's opposition could not, in the circumstances, be described as unreasonable, and the relief initially claimed differed quite substantially from the relief eventually sought in the notice of motion as amended. In the process, the applicant created a considerable amount of unnecessary work for the respondent's legal representatives. Because the case in addition involved rights of custody of a child, it was fair not to make any order as to costs (para 51 at 343I—344C).

The decision in ***Old Mutual Life Assurance Co (South Africa) Ltd v Pension Funds Adjudicator & others*** **2007 (3) SA 458 (C)** was previously reported in [2007] 2 All SA 98, and was surveyed in **Civil Procedure Sibergramme 12 of 2007** (4 March 2008) 11.

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