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3. PARTIES

Restoration of registration of company

In terms of s 73(6)*(a)* of the Companies Act 61 of 1973, a court may, on application, make an order that the registration of a deregistered company be restored if the court is satisfied that the company was at the time of its deregistration carrying on business or was in operation, or otherwise that it is just that the registration of the company be restored. The company is thereupon deemed to have continued in existence as if it had not been deregistered. In terms of s 73(6)*(b)*, any such order may contain such directions and may make such provision as to the court seems just for placing the company and all other persons in the position, as nearly as may be, as if the company had not been deregistered.

In ***Insamcor (Pty) Ltd v Dorbyl Light & General Engineering (Pty) Ltd; Dorbyl Light & General Engineering (Pty) Ltd v Insamcor (Pty) Ltd*** **2007 (4) SA 467 (SCA)** Brand JA (Harms, Nugent and Ponnan JJA and Snyders AJA concurring) held that an order restoring the registration of a deregistered company may not be made without giving third parties who will or may be prejudiced by the restoration order the opportunity to persuade the court not to exercise its discretion in favour of making a restoration order. Alternatively, they may endeavour to persuade the court to make the order subject to such directions under s 73(6)*(b)* as may serve to alleviate the prejudicial consequences of the order. **All third parties who will or may suffer prejudice as a result of the restoration order have a direct and substantial interest in the outcome of the application for such an order, and should be joined as necessary parties to the application**, as contemplated in *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A) at 659 (para 27 at 476D—F). This is because, as a result of the

deregistration of the company, third parties may have acquired or lost rights, or they may have decided not to exercise their rights against the company precisely because the company did not exist. Through the operation of a restoration order, obligations towards the company which were extinguished because of deregistration would revive with retrospective effect. Furthermore, a restoration order seems to validate, retrospectively, all things done since deregistration, including the institution of legal proceedings, on behalf of a company that did not exist (para 23 at 475F—G). It is therefore an oversimplification to regard a restoration order as no more than a reversion to the position in which parties found themselves immediately prior to the deregistration. Restoration of registration can clearly cause severe prejudice to third parties, for example those who, upon deregistration, acquired rights to company property, and who will lose those rights when the registration of the company is restored (para 24 at 475H—I). Third parties must be afforded an opportunity to be heard in opposition to the granting of a restoration order because the court is given a discretion by s 73(6)*(a)* to grant such an order, as is apparent from the word 'may' at the start of that provision. The court is not bound to grant a restoration order even if all the prerequisites imposed by the section are satisfied, and one of the considerations to which the court will inevitably have regard in the exercise of its discretion is the potential prejudice the restoration may cause to third parties (para 26 at 476B—C).

Where there are numerous third parties who may potentially be prejudiced by the grant of a restoration order, some of whom are unknown, the problem of affording such parties an opportunity to oppose the application for such an order is solved by the mechanism of issuing a rule nisi as an alternative to actual joinder of all necessary parties. Proof of consent to the order is then inferred from failure to object after the issue of a rule nisi served in the manner and on the person directed by the court (para 28 at 476G—I, with reference to *Ex parte Gold* 1956 (2) SA 642 (T) at 649E—F). The issue of a rule nisi should occur, as a matter of practice, in all applications for restoration orders under s 73(6). Since failure to react to the rule nisi will give rise to deemed consent, proper care should be taken in issuing directions as to service of the rule. Where a particular party can be identified as, a priori, a necessary party, service of the rule on that party should be directed, while notice to unknown potentially interested parties can be ensured through publication of the rule (para 29 at 477A—C).

Taxing master

The taxing master does not have a direct and substantial interest in an application for a stay of a warrant of execution pending finalization of a review of taxation, and need not be joined as a party to the application for a stay of execution. The order granting a stay can be carried into effect without prejudicing the taxing master**:** ***Standard Bank of South Africa Ltd & another v Malefane & another: In re Malefane v Standard Bank of South Africa Ltd & another*** **2007 (4) SA 461 (Tk)** para 13 at 465E—G.

Third party procedure

In terms of uniform rule 13(3)*(b)*, a third party notice in terms of which a party to an existing High Court action claims a contribution or an indemnification from any other person who is not a party to the proceedings may be served after close of pleadings only with the leave of the court. In ***Pitsiladi & others v Absa Bank & others*** **2007 (4) SA 478 (SE)** Van Zyl J had to consider an application for leave to be permitted to serve third party notices on proposed third parties after the close of pleadings. In a comprehensive judgment, Van Zyl J set out the following rules and principles governing such an application**:**

- The fact that the plaintiffs' particulars of claim are amended after the close of pleadings and that the defendant amends its plea and files a counterclaim pursuant thereto does not alter the fact that the pleadings are closed and that a defendant who wishes thereafter to serve a third party notice must obtain the leave of the court to do so in terms of rule 13(3)*(b)* (para 8 at 481F—G).
- An application for leave to serve a third party notice after the close of pleadings is of the same genus as an application for the rescission of a default judgment, removal of bar, leave to defend and applications for extension of time for the filing of pleadings. **The applicant must accordingly show good cause for the relief sought. The court has a wide discretion, which must be exercised judicially upon a consideration of all the facts**. Those facts are usually the explanation advanced by the applicant for his failure to give notice before the close of pleadings (erroneously referred to in the reported judgment as the 'close of proceedings'), and whether the applicant has made out a prima facie case on the merits against the third party. To these requirements may be added the prejudice which any of the parties may suffer by the grant or refusal of the application, and the administration of justice (sc the purpose of the rule), namely the avoidance of a multiplicity of actions and to consolidate, in specified circumstances, a multiplicity of issues between a number of litigants all in a single action. The list of relevant factors is not closed (para 9 at 481G—482C).
- A draft third party notice must be attached to the application and confirmed under oath (para 10 at 482D, with reference to *Mercantile Bank Ltd v Carlisle & another* 2002 (4) SA 886 (W)).
- Even if a prima facie case is made out in this manner, the applicant may be unsuccessful if the common-cause facts, as they emerge from the affidavits, make it clear that the case against the third party is totally unfounded. Although the considerations or facts relevant to the court's exercise of its discretion are interrelated and not individually decisive, it must be accepted that **where the applicant's case against the third party is undoubtedly without any merit, the granting of leave to join the third party would be pointless and be prejudicial to the plaintiff, whose claims would be unnecessarily delayed, and to the proposed third party, who would unnecessarily become a party to the proceedings and incur costs**. It must, however, be borne in mind that factual disputes are better left to the trial court to

decide, and that joinder should be refused only in the clearest of cases (paras 10—11 at 482G—J, with reference to *Carlisle* at 889D—H).

- It is not, however, necessary that the draft third party notice annexed to the application for leave under rule 13(3)*(b)* be shown by the applicant not to be excipiable. This is because an exception is a legal objection that is essentially directed at the particular pleading itself, whereas a draft third party notice is not a pleading, at least not until such time as the applicant has been granted leave as envisaged by the rule. The purpose of the draft notice is to satisfy the court that the applicant has a prima facie case against the third party, and not that the draft notice constitutes a legally valid pleading (para 12 at 482J—483A, 483C—F). Furthermore, the issuing of a third party notice is specifically provided for in the rules, and an applicant in proceedings under rule 13(3) is therefore simply asking for an extension of time in which to file a pleading he would otherwise have been entitled to file had he done so timeously. In addition, **to dismiss the application on the basis that the draft third party notice is excipiable would be to deny the applicant the opportunity to amend the notice and remove the cause of complaint, as he might otherwise have been able to do if an exception was delivered in terms of rule 23**. That might leave the applicant remediless against the third party, or might result in a multiplicity of actions, exactly what rule 13 was intended to avoid (para 13 at 483F—H).

- To determine whether an applicant under rule 13(3) has established a prima facie case by asking whether a draft third party notice is excipiable also runs counter to the provisions of rule 13(6), which provides that the third party may plead or except to the third party notice as if he were a defendant to the action. This raises the question whether it would be open to a third party once again to raise an exception to a defendant's third party notice under subrule (6) on the same or new grounds once the court has found, in an application under subrule (3), that the notice is not excipiable. If so, then it is surely more convenient to deal in a single hearing with each and every objection once they have been clearly formulated and properly raised as required in rule 23(3) (para 14 at 483H—J).

- The quantum of proof of the existence of a prima facie case, or the precision with which the applicant must set out his claim, must be considered in the light of the principles stated above. The court has a wide discretion and it is undesirable that limitations should be laid down (para 15 at 484C—D). To establish a prima facie case for purposes of rule 13(3)*(b)* means that the applicant's case on the merits must not be totally unfounded, and should be based on facts mentioned in outline which, if proved, constitute a claim. **Unless the court is satisfied on a conspectus of all the facts that the applicant's case is clearly without merit, factual and legal issues raised by an application in terms of rule 13(3) are rather to be determined at the trial or left to be addressed in the pleadings which the third party is entitled to file in terms of rule 13** (para 15 at 484E—G).

- Where it is convenient or expedient to do so, no reason in principle exists why a judgment sounding in money cannot be issued against a third party joined under rule 13(1)*(b)* (which provides for the issue of a third party notice where any question or

issue in the action is substantially the same as a question or issue which has arisen or will arise between such party and the third party, and should properly be determined not only as between any parties to the action but also as between such parties and the third party or between any of them) (para 23 at 487C, with reference to *IPF Nominees (Pty) Ltd v Nedcor Bank Ltd (Basfour 130 (Pty) Ltd, Third Party)* 2002 (5) SA 101 (W) at 118A—I).

- Only in exceptional cases will the issue of prescription (sc of the intended claim against the proposed third parties) be determined without its having first been raised in a special plea. A claim of prescription introduces fresh matter outside the averments in the draft third party notice annexed to the rule 13(3)*(b)* application, and raises factual issues that may require the hearing of evidence. The issue of prescription can be effectively raised by way of a special plea as envisaged by rule 13(6). **It is not desirable, in the absence of its being patently clear that the factual issues raised by the plea have to be decided against the party seeking leave to issue the third party notice, to attempt in a rule 13(3) application to determine an issue of that nature** (para 24 at 487E—H).

Applying these principles, Van Zyl J held that leave had to be given to the defendant to issue certain third party notices after the close of pleadings because the defendant could not be blamed for the delay in issuing those notices. *Pitsiladi* was not one of those cases in which it could be said that it was or should have been obvious to a litigant that there was gross neglect by his legal representative. The defendant had not been made aware that evidence existed of a relationship between the plaintiffs and the relevant respondents that would entitle it (sc the defendant) to the joinder of third parties and to seek relief against them. The nature of the pleadings was such that without advice from its legal representatives and knowledge of the facts, it could not reasonably have been expected of the defendant to have exercised a measure of supervision to ensure that it enjoyed protection to the fullest extent. In the circumstances, the defendant had given a satisfactory explanation for its failure to file the third party notices timeously (para 20 at 486A—D). It could not be said that the defendant's claims against the intended third parties were so patently unfounded that the application should be refused (para 21 at 486E—F).

Van Zyl J also rejected a contention by the proposed third parties that, should they be joined as third parties, they would be prejudiced in their defence to a criminal trial arising out of the same allegations of fraud and theft as were being made against them in the draft third party notices. Joinder as third parties in civil proceedings arising out of their activities, they argued, would force them to disclose their defence prematurely, and would compel them to divert their attention away from the criminal trial. There was, said Van Zyl J, no merit in those contentions. Criminal proceedings were not an automatic bar to the launching of civil proceedings. Any issue relating to possible prejudice could be addressed by the court at such time as the respondents had to file their pleas. It would serve no purpose to anticipate, in the rule 13(3)*(b)* application, what the position would be with regard to progress made in the criminal trial when the time arrived for the filing of their pleas by the proposed third parties (para 25 at 487H—488A).

Further on *Pitsiladi*, see under '**TRIAL ACTIONS: *Exception***' and '**COSTS: *Party seeking indulgence***' below.

4. REPRESENTATION OF PARTIES

Authority of attorney

The respondent in ***Creative Car Sound & another v Automobile Radio Dealers Association 1989 (Pty) Ltd*** **2007 (4) SA 546 (D)**, opposing an application for the rescission of a summary judgment, took inter alia the point that the applicant's candidate attorney, who had deposed to the founding affidavit in support of the application, had no locus standi to do so and had not been granted the necessary authority to bring the application. Applying *Ganes & another v Telecom Namibia Ltd* 2004 (3) SA 615 (SCA), [2004] 2 All SA 609, Madondo AJ held that **a respondent who wishes to challenge the authority of an attorney who has instituted motion proceedings purportedly on behalf of an applicant should follow the procedure set out in uniform rule 7**. On the papers, the respondent had not challenged the authority of the candidate attorney who purported to represent the applicant to institute the proceedings, and had raised the point for the first time in heads of argument. As the candidate attorney's authority had not been challenged from the outset, it did not serve any meaningful purpose to raise 'this technical point' for the first time in the heads of argument (para 35 at 553H—554C). The respondent, if it was challenging the locus standi of the candidate attorney to bring the rescission application, should have followed the procedure laid down in rule 7. Had the respondent in fact intended to challenge the authority of the candidate attorney, it should have raised the matter as a point in limine. Alternatively, if the respondent had had reason to believe that the proceedings had not been properly authorized by the applicants, it should have in its opposing affidavit set out the grounds of its belief, in which event the attorneys for the applicants would have been required to satisfy the court first that they had the necessary authority to bring the rescission application on behalf of the applicants (para 36 at 554C—E). The applicants had opposed the granting of summary judgment against them, and in all probability they would have brought a rescission application. No evidence had been adduced by the respondent to show that the applicants' attorneys did not have the necessary authority. There was accordingly no merit in the respondent's objection to the institution of the rescission application (para 37 at 554E—F), and it mattered not that an averment on oath by the candidate attorney that he was duly authorized to depose to the founding affidavit in support of the rescission application was not corroborated in a confirmatory affidavit (see para 33 at 553E—F).

5. APPLICATIONS

Attestation of affidavit

In ***Standard Bank of South Africa Ltd & another v Malefane & another: In re Malefane v Standard Bank of South Africa Ltd & another*** **2007 (4) SA 461 (Tk)** each

of the affidavits filed on behalf of the applicants contained a certificate above the signature of the commissioner of oaths reading as follows**:**

> 'I certify that the deponent has acknowledged that he knows and understands the contents of this affidavit which was sworn to and signed before me at Mthatha this . . . day of . . . 2006, the regulations contained in the Government Notice 35 dated 14th March 1980 having been complied with.'

The affidavits, complained the first respondent, were defective because the certificate should instead have referred to the regulations published under Government Notice R1258 of 21 July 1972 as amended. Luthuli AJ, however, condoned the defect since it was of a formal nature only, and there had been substantial compliance with reg 4 promulgated under the latter Government Notice. The requirement of such a certificate that the deponent has acknowledged that he knows and understands the contents of the affidavits was directory, and failure to comply with it had been condoned in a number of cases, especially where there had been substantial compliance. In the present case, the deponents had acknowledged that they knew and understood the contents of the relevant affidavits as required by reg 4 (para 12 at 465A—D, with reference to *Ex parte Du Toit* 1962 (1) SA 445 (E)).

Authority to depose to affidavits

The dictum in *Ganes & another v Telecom Namibia Ltd* 2004 (3) SA 615 (SCA), [2004] 2 All SA 609 para 19 at 624G—I (SA), 615*c—d* (All SA) that the deponent to an affidavit in motion proceedings need not be authorized by the party concerned to depose to the affidavit, but that it is the institution of proceedings and the prosecution thereof which must be authorized, was reiterated and applied in ***Creative Car Sound & another v Automobile Radio Dealers Association 1989 (Pty) Ltd*** **2007 (4) SA 546 (D)** para 34 at 553G—H.

Further on this aspect of *Creative Car Sound*, see under '**REPRESENTATION OF PARTIES: *Authority of attorney***' above.

Dispute of fact

The decision in ***North West Provincial Government & another v Tswaing Consulting CC & others*** **2007 (4) SA 452 (SCA)** was previously reported in [2007] 2 All SA 365, and was surveyed in **Civil Procedure Sibergramme 15 of 2007** (26 August 2008) 3—4.

In ***Standard Bank of South Africa Ltd & another v Malefane & another: In re Malefane v Standard Bank of South Africa Ltd & another*** **2007 (4) SA 461 (Tk)** a dispute of fact was raised as to whether the applicants' attorney had objected, on taxation, to certain items of a bill of costs. Luthuli AJ held that it was for the court seised of an application brought in terms of uniform rule 48 (for review of the taxing master's decision) to determine that dispute of fact, and that the existence of the dispute could not prevent the applicant from seeking a stay of a warrant of execution issued in order to recover the amount of the taxing master's allocatur from the applicants. **The dispute of**

fact was not material for the purposes of the application for a stay of the warrant (para 15 at 465I—J).

Ex parte

In ***Tiffin v Woods NO & others*** **[2007] 3 All SA 454 (C)** Dlodlo J said that ex parte applications necessitate a full disclosure of the facts, whether or not they are deemed to be material by the applicant. A failure in an ex parte application to disclose material facts which might have affected the court's discretion could give rise to the applicant being non-suited and the proceedings being dismissed (para 4 at 457*b*—*c*). This applies equally in all ex parte applications, whether brought before a magistrate's court or before the High Court. Non-disclosure and misstatement have been linked to the requirement of utmost good faith. Two principles must be noted**:**

- the court always retains a discretion whether or not to grant extraordinary relief ex parte, and the value of the applicant's interest requiring protection will have to be weighed against the prejudice which the respondent may suffer as a result of the grant of the ex parte order; and
- an interdict will not be granted in an ex parte application unless good ground is shown why notice has not been given

(para 4 at 457*d*—*g*).

Striking-out

See ***Tiffin v Woods NO & others*** **[2007] 3 All SA 454 (C)**, which is surveyed under '**COSTS: *Attorney-and-client costs***' below.

Urgent applications

Following the judgment in *Commissioner, South African Revenue Services v Hawker Air Services (Pty) Ltd*; *Commissioner, South African Revenue Service v Hawker Aviation Partnership & others* 2006 (4) SA 292 (SCA), [2006] 2 All SA 565 para 11 at 300E—G (SA), 569f—i (All SA), Dlodlo J held in ***Tiffin v Woods NO & others*** **[2007] 3 All SA 454 (C)** that urgency relates to form, not substance, and is not a prerequisite to a claim for substantive relief. Where an (allegedly) urgent matter is not properly on the court's roll, by virtue of not being truly urgent or by virtue of an insufficient case having been made out for urgency, the court is entitled to decline to hear it and to strike it from the roll. **If, however, the court hears the merits, the application should not (on appeal) be struck from the roll, or dismissed, for want of urgency at the time when it was initially set down**. It should be adjudicated on the merits. There was thus, in *Tiffin*, no basis for a magistrate to have dismissed the entire application on its return date in April 2006 on the ground that it was not urgent when it was first considered in November 2005 on an ex parte basis. Even if the ex parte application had not been sufficiently urgent in November

2005, once the merits had been dealt with, the question of urgency and form became academic (para 6 at 458b—e).

6. TRIAL ACTIONS

Exception

An exception is a legal objection that is essentially directed at the particular pleading itself. It complains of a defect inherent in the pleading. When an exception is allowed, the court will usually give the affected party an opportunity to remove the cause of complaint and file an amended pleading within a stated time**: *Pitsiladi & others v Absa Bank & others* 2007 (4) SA 478 (SE)** para 12 at 483C—E, with reference to *Makgae v Sentraboer (Koöperatief) Bpk* 1981 (4) SA 239 (T) at 244H—in fine, *Group Five Building Ltd v Government of the Republic of South Africa (Minister of Public Works and Land Affairs)* 1993 (2) SA 593 (A) at 602D and 603E—H and *Trope & others v South African Reserve Bank* 1993 (3) SA 264 (A) 269E—I; see also *Dendy v University of the Witwatersrand, Johannesburg & others* 2005 (5) SA 357 (W), [2005] 2 All SA 490, 2005 (9) BCLR 901 para 76.1 at 387E (SA), 517*b—c* (All SA), 927E—F (BCLR). Applying these principles, Van Zyl J proceeded to hold that **leave to issue a third party notice after close of pleadings in terms of uniform rule 13(3)*(b)* may be granted even where a draft of the notice attached to the application for leave is not shown to be unexcipiable**. A draft third party notice annexed to an application for such leave is not a pleading, and its purpose is merely to satisfy the court that the applicant has a prima facie case against the third party. The purpose of such a draft notice is not that it constitutes a legally valid pleading (para 12 at 482J—483A, 483D—F).

Further on this aspect of *Pitsiladi*, see under '**PARTIES: *Third party procedure***' above.

On the appealability of an order dismissing an exception, see ***Gutsche Family Investments (Pty) Ltd & others v Mettle Equity Group (Pty) Ltd & others* [2007] 3 All SA 223 (SCA)**, which is surveyed under '**APPEALS: *Appealability***' below.

An exception to particulars of a claim by an unsuccessful tenderer for damages for loss of profit was upheld in ***Moniel Holdings (Pty) Ltd v Premier of Limpopo Province & others* [2007] 3 All SA 410 (T)**, and the plaintiff was ordered to pay the costs of the exception proceedings because, unlike the tenderer in ***Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 (3) SA 121 (CC), 2007 (3) BCLR 300** (surveyed under '**CONSTITUTIONAL PRACTICE: *Jurisdiction of Constitutional Court***' below), it had not sought to vindicate a constitutional right to administrative justice and to have the common law developed so as to expand the reach of delictual liability related to government tenders (para 15 at 422*e—g*). Unfortunately, the order made by Sithole AJ merely dismissed the exception and dealt with the issue of costs, without affording the plaintiff a specific period of time in which to file an amended set of particulars of claim.

7. RES JUDICATA

The decision in ***National Director of Public Prosecutions v Braun & another*** **2007 (4) SA 72 (C)** was previously reported sub nom *National Director of Public Prosecutions v Braun & another (No 2)* in 2007 (1) SACR 556, and was surveyed in **Civil Procedure Sibergramme 10 of 2007** (7 January 2008) 10.

8. INTERDICTS

Final interdict

The requirements for the grant of a final interdict were stated in ***Tiffin v Woods NO & others*** **[2007] 3 All SA 454 (C)** in the context of the law of nuisance as proof on a balance of probabilities of a clear right of ownership of land, or a lawful right of use and enjoyment of land, proof that this clear legal right was being infringed to the prejudice of the applicants (sc that the respondent's conduct constituted an actionable nuisance), and the absence of any suitable alternative remedy (para 13 at 461*g—h*).

9. JUDGMENTS AND ORDERS

Arbitration award

The decision in ***Phillips & others v Van den Heever NO & another*** **2007 (4) SA 511 (W)** was previously reported in [2007] 3 All SA 159, and was surveyed in **Civil Procedure Sibergramme 17 of 2007** (8 October 2008) 11.

Interpretation of court order

The decision in ***Phillips & others v Van den Heever NO & another*** **2007 (4) SA 511 (W)** was previously reported in [2007] 3 All SA 159, and was surveyed in **Civil Procedure Sibergramme 17 of 2007** (8 October 2008) 12.

Rescission

Where summary judgment has been granted against a defendant in default of an appearance to oppose an application for it, the judgment does not fall within the ambit of a default judgment contemplated in uniform rule 31(2)*(b)*. That rule refers to a judgment in an action in which the claim is not for a debt or liquidated demand, where the defendant is in default of delivery of a notice of intention to defend or of a plea. Where the action is for payment of an ascertained amount of money, the defendants have through their attorneys delivered a notice of intention to defend, and before the defendants can tender a plea the plaintiff lodges an application for summary judgment, the case is removed from the ambit of rule 31**:** ***Creative Car Sound & another v***

Automobile Radio Dealers Association 1989 (Pty) Ltd **2007 (4) SA 546 (D)** para 18 at 550C. A defendant is not in default of a plea where he has delivered a notice of intention to defend and is prevented from proceeding with his defence by an application for summary judgment under and by virtue of the provisions of uniform rule 32. **The fact that he was absent from court and not represented when the application for summary judgment was heard and granted does not make the judgment a default judgment of the kind contemplated in rule 31** (para 19 at 550E—F, with reference to *Louis Joss Motors (Pty) Ltd v Riholm* 1971 (3) SA 452 (T) at 454F—H). Since a judgment granted against the defendants summarily in their absence is not a default judgment in the sense contemplated by rule 31, the remedy provided by that rule is not available to them (para 20 at 550F—G).

Applicants seeking rescission of such a judgment, however, may still do so under common law on any grounds on which a restitution in integrum could be granted by law (para 21 at 550G, with reference to *Bristow v Hill* 1975 (2) SA 505 (N) at 507A—B).

Turning to the question whether the applicants in *Creative Car Sound* had satisfied the common-law requirements for the relief sought, Madondo AJ pointed out that an applicant for rescission of a judgment taken against him by default must show good cause *(a)* by giving a reasonable explanation of his default, *(b)* by showing that his application is made bona fide, and *(c)* by showing that he has a bona fide defence to the plaintiff's claim which prima facie has some prospect of success (paras 38—9 at 554F—I, with reference to *De Wet & others v Western Bank Ltd* 1979 (2) SA 1031 (A) at 1042F—1043A and *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)* 2003 (6) SA 1 (SCA), [2003] 2 All SA 113 para 11 at 9E—F (SA), 118*h*—119*a* (All SA); see also *Chetty v Law Society, Transvaal* 1985 (2) SA 756 (A) at 765B—D). When the question of the sufficiency of a defendant's explanation for his default is finely balanced, the circumstance that his proposed defence carries reasonable or good prospects of success on the merits might tip the scale in his favour in the application for rescission (para 42 at 555C—D).

On the facts before the court in *Creative Car Sound*, the applicants had given as an explanation for their default the fact that their attorney incorrectly diarized the date of the hearing, recording it as 25 July 2006 when in truth it was 24 July 2006. For the applicants to succeed in their explanation of the default, they had to show that they were blameless. There was, in the circumstances, no way in which the applicants could have known the true position, and there was thus before the court sufficient proof that the applicants 'do not have any blemish in this regard'. It would not be fair or just to punish the applicants for the inept conduct of their attorneys. By opposing an application for summary judgment, the applicants had sufficiently demonstrated an intention to defend the respondent's claim (para 43 at 555F—I).

That, however, was not the end of the matter, for the applicants in addition had to demonstrate that they had a substantial and bona fide defence to the respondent's claim which prima facie had some prospects of success (para 44 at 555I—J). In essence, the applicants were required to demonstrate reasonable prospects of success on the merits. That meant that **the grounds of defence had to be set forth with sufficient particularity and detail to enable the court to conclude that there was a bona fide defence and that the application for rescission was not being brought purely for the**

purposes of delay (para 45 at 555J—556B). The applicants in *Creative Car Sound*, however, had not been able to put up a defence which had good prospects of success. Their prospect of success was too remote, in that it could not safely be said that what they had raised as a defence constituted a bona fide defence. The claim was for the payment of the price of the goods sold and delivered to the applicants. The defence was that some of the items were defective and were returned to the seller (the respondent), which had failed to pass a credit or to replace the returned items. In addition, the respondent had incorrectly invoiced the first applicant, in that goods delivered were not as stipulated in the invoice, at times the respondent had over-invoiced the first applicant, and the respondent had issued invoices to the first applicant for goods not delivered (para 46 at 556B—D). The applicants, however, had not specified or given details of the items that were allegedly defective and returned to the seller. Nor had the applicants given the particulars and details in respect of which the first applicant had been incorrectly invoiced, and in respect of those goods for which the first applicant had been over-invoiced. The applicants had also failed to give details of the invoice allegedly issued for goods not delivered. The first applicant had failed to attach documentation upon which it relied for its defence (para 47 at 556D—F). The applicants, said Madondo AJ, must surely have kept documentation relating to defective and returned goods, incorrect invoicing and other invoicing. On the applicants' version, such documentary proof was not available and, as a result, it could not be obtained and tendered in evidence. The applicants had therefore made a bald statement in that regard (para 48 at 556H—I).

In the premises, the court was not satisfied that the applicants had disclosed fully the nature, grounds and material facts upon which they relied for their defence. **They should have disclosed that defence and the material facts relied upon with sufficient particularity and detail to enable the court to determine whether they had a bona fide defence. The particularity of an affidavit was evidence of bona fides**. The bald, vague and embarrassing affidavit which the applicants had put up was indicative of the fact that the applicants wished to avoid the danger inherent in presenting a full and clear exposition of their defence (para 49 at 556I—557A). The applicants' affidavit lacked forthrightness, as well as the particularity that a candid disclosure ought to embody. The impression received was that the applicants were being deliberately vague, and were leaving it open to themselves to produce the documentary proof later. It was inconceivable that the applicants would have no documentation relating to any of their allegations, whereas orders were recorded and invoices were issued when the delivery of goods took place. The applicants' affidavit was therefore not sufficiently full to persuade the court that what the applicants had alleged, if proved at trial, would constitute a defence to the respondent's claim (para 50 at 557 B—D).

The consequent dismissal of the application for rescission (para 51 at 557D—E) should therefore be understood as an instance of the principle that where a defence is averred in a manner which appears in all the circumstances to be needlessly bald, vague or sketchy, that will constitute material for the court to consider in relation to the requirement of bona fides, and will generally result in judgment being granted in an application for summary judgment or not being rescinded in an application for rescission (see *Breitenbach v Fiat SA (Edms) Bpk* 1976 (2) SA 226 (T) at 228E—F and H J Erasmus et al *Superior Court Practice* (1994) B1—223).

10. APPEALS

Appealability

The decision in ***National Director of Public Prosecutions v Braun & another*** **2007 (4) SA 72 (C)** was previously reported sub nom *National Director of Public Prosecutions v Braun & another (No 2)* in 2007 (1) SACR 556, and was surveyed in **Civil Procedure Sibergramme 10 of 2007** (7 January 2008) 10.

The settled principle that no appeal lies to the Supreme Court of Appeal against the dismissal by the High Court of an exception was applied in ***Gutsche Family Investments (Pty) Ltd & others v Mettle Equity Group (Pty) Ltd & others*** **[2007] 3 All SA 223 (SCA)** para 8 at 225*g—h* and para 12 at 226*f—g*, with reference to *Maize Board v Tiger Oats Ltd & others* 2002 (5) SA 365 (SCA), [2002] 3 All SA 593 para 14 at 373I—J (SA), 599*c—d* (All SA). Accordingly, **the dismissal by an arbitrator of an exception was not appealable where the arbitration agreement incorporated by reference rule 22.8 of the rules of the Arbitration Foundation of South Africa (AFSA), which provided that the nature of an appeal and cross-appeal against the arbitrator's award, and the powers of the appeal arbitrator or arbitrators, would be the same as if it were a civil appeal and cross-appeal to the Appellate Division of the Supreme Court of South Africa** (paras 11—12 at 226*c—f*). Because the dismissal of an exception in the High Court was not appealable under the Supreme Court Act 59 of 1959, the Supreme Court of Appeal would decline to exercise jurisdiction over an appeal of that nature, and would strike the appeal from the roll. Similarly, where an arbitration agreement incorporating the AFSA rules did not confer on an appeal arbitrator the power to entertain the dismissal of an exception, he had no power to entertain the appeal. He could consider the appeal only provisionally, as the Supreme Court of Appeal would, for the purposes of deciding the extent of his jurisdiction (para 13 at 226*g*—227*b*).

Cachalia JA (Harms ADJP and Farlam, Jafta and Ponnan JJA concurring) added that in such circumstances, the appeal arbitrator could not extend the area of his jurisdiction by means of a (wrong) decision to the effect that he had jurisdiction to determine the matter on its merits. A contention that an appeal arbitrator was empowered finally to determine his own jurisdiction was 'a far-reaching contention implying that the [arbitration] agreement constituted an ouster of the court's jurisdiction'. Such an agreement had to be provided for specifically, and in the clearest terms. In (erroneously) holding that he had jurisdiction to determine the matter, the appeal arbitrator had acted beyond his mandate, since the arbitration agreement contained no provision empowering the appeal arbitrator to make a final determination as to his own jurisdiction (para 14 at 227*b—d*; see also para 15 at 227*d—e*). By deciding the jurisdictional question wrongly and then hearing and deciding the merits of the appeal, the appeal arbitrator had exceeded his powers, and his award accordingly fell to be set aside in terms of s 33(1) of the Arbitration Act 42 of 1965. The arbitration appeal thus fell to be declared of no force and effect (para 15 at 227*e—g*).

Heads of argument

The decision in ***North West Provincial Government & another v Tswaing Consulting CC & others*** **2007 (4) SA 452 (SCA)** was previously reported in [2007] 2 All SA 365, and was surveyed in **Civil Procedure Sibergramme 15 of 2007** (26 August 2008) 6.

Mode of address in Supreme Court of Appeal

The practice directive summarized in **Civil Procedure Sibergramme 8 of 2007** (28 November 2007) 3—4 has been published as ***Practice Direction*** **2007 (4) SA 1 (SCA)**.

11. COSTS

Attorney-and-client costs

The general reluctance of our courts to order a losing litigant to pay costs on the scale as between attorney and client was again demonstrated in ***Tiffin v Woods NO & others*** **[2007] 3 All SA 454 (C)**, where Dlodlo J, after referring to various cases in which such costs awards were considered, remarked that it was apparent from them that **attorney-and-client costs as a scale 'need to be sparingly resorted to'. Such costs applied appropriately in 'extremely extraordinary and indeed very exceptional cases'**. In *Tiffin*, an application to strike out was withdrawn, accompanied by an offer to pay the costs of the application on the usual party-and-party scale. That offer, said Dlodlo J, should have been acceptable to the magistrate seised of the matter, but the magistrate had ordered the applicant to pay the costs of the application on the scale as between attorney and client. The fact that the application to strike out was not proceeded with had not in itself brought about a delay in the finalization of the matter, and in fact had facilitated the speedy hearing and disposal of the matter. The court's time had not been spent on the interlocutory application, and the abandonment of the application had enabled the court to focus then and there on the merits of the main matter before it. The presiding officer should have been slow in unduly punishing litigants as an expression of the court's displeasure at procedural steps taken by them (para 18 at 463*g*—*i*). A classic example of the kind of circumstances that had to be found to prevail before resort was made to a punitive order of attorney-and-client costs was *MEC for Public Works, Roads and Transport, Free State v Esterhuizen & others* 2007 (1) SA 201 (SCA) (surveyed in **Civil Procedure Sibergramme 4 of 2007** (31 July 2007) 16), where leave to appeal had been granted solely on account of grave (and, in the result, unfounded) accusations of impropriety on the part of the trial judge. The Supreme Court of Appeal had there found the cavalier allegations of impropriety to be unacceptable, and had held the effect of them to be that the respondents had been put to considerable expense and inconvenience in defending an appeal completely devoid of merit, while scarce judicial resources had been wasted in the hearing of the appeal. A punitive attorney-and-client costs order had in those circumstances been made by the Appeal Court (paras 19—20 at 463*i*—464*d*). In

Tiffin, on the other hand, the applicant to strike out had been undeservedly subjected to a punitive costs order by the presiding magistrate. It was 'extremely rare' that the presiding officer's discretion in the making of a costs order was interfered with, but the magistrate had not properly and judiciously exercised the discretion entrusted to him. The costs order in respect of the interlocutory application was thus altered on appeal to one on the scale as between party and party (para 20 at 464*d—e*).

De bonis propriis

The decision in ***Phillips & others v Van den Heever NO & another*** **2007 (4) SA 511 (W)** was previously reported in [2007] 3 All SA 159, and was discussed in **Civil Procedure Sibergramme 17 of 2007** (8 October 2008) 13—15.

Discretion of court

The decision in ***Phillips & others v Van den Heever NO & another*** **2007 (4) SA 511 (W)** was previously reported in [2007] 3 All SA 159, and was discussed in **Civil Procedure Sibergramme 17 of 2007** (8 October 2008) 13—15.

In ***Tiffin v Woods NO & others*** **[2007] 3 All SA 454 (C)** the court repeated that the basic rule in relation to costs is that an award of costs is in the discretion of the court, and a court of appeal will interfere with the exercise of the trial court's discretion in this regard only if it is established that the discretion was not exercised properly or judicially (para 15 at 462*e—f*, with reference to *Kruger Bros and Wasserman v Ruskin* 1918 AD 63 at 69).

Failure to index, paginate and secure court file

The decision in ***Manna v Lotter & another*** **2007 (4) SA 315 (C)** was previously reported in [2007] 3 All SA 50, and was surveyed in **Civil Procedure Sibergramme 17 of 2007** (8 October 2008) 15.

Party seeking indulgence

The defendant (applicant) seeking leave to serve third party notices in terms of uniform rule 13(3)*(b)* after close of pleadings in ***Pitsiladi & others v Absa Bank & others*** **2007 (4) SA 478 (SE)** was ordered to pay the costs of opposition to its application notwithstanding that the application was successful, since the defendant was seeking an indulgence and it could not be said that the respondents' opposition to the application was unreasonable or totally without merit (para 26 at 488A—B).

Retention of moneys to meet taxed costs

The decision in ***Manna v Lotter & another*** **2007 (4) SA 315 (C)** was previously reported in [2007] 3 All SA 50, and was surveyed in **Civil Procedure Sibergramme 17 of 2007** (8 October 2008) 15—16.

Taxation

The decision in ***Phillips & others v Van den Heever NO & another*** **2007 (4) SA 511 (W)** was previously reported in [2007] 3 All SA 159, and was surveyed in **Civil Procedure Sibergramme 17 of 2007** (8 October 2008) 16.

12. EXECUTION

Prior personal right to property executed against

Uniform rule 45(10) provides that where property subject to a *real* right of any third person is sold in execution, the sale is subject to the rights of that person unless he otherwise agrees. Does the same apply, however, to property subject to a *personal* right which is attached and thereafter sold in execution? The question was considered in ***Dream Supreme Properties 11 CC v Nedcor Bank Ltd & others*** **2007 (4) SA 380 (SCA)** and generated opposing views on the part of the members of the court. The appellant appealed against the dismissal by the High Court of an application brought by it for an order setting aside a sale in execution of certain immovable property to the second respondent, and for an order directing the third respondent (who was the owner of the property) to transfer the property to the appellant pursuant to an agreement of sale entered into prior to the attachment of the property by the first respondent, in whose favour a judgment had been granted against the third respondent. Subsequent to the attachment at the instance of the first respondent, there was a further attachment of the same property, this time at the instance of Standard Bank Financial Nominees (Pty) Ltd, in whose favour a judgment had also been granted against the third respondent. The first respondent knew of the prior agreement of sale at the time of its attachment of the property, but Standard Bank Financial Nominees (Pty) Ltd did not.

Writing for the majority, Streicher JA (Mthiyane and Mlambo JJA and Malan AJA concurring) began by remarking that the first respondent, by attaching the property in execution, acquired a real right, known as a pignus judiciale, to the property. That real right entitled the first respondent, subject to certain qualifications, to proceed with the sale in execution and to an entitlement to the proceeds of the sale of the property (para 14 at 386H—I). The majority then proceeded to survey conflicting decisions on the question whether the execution creditor's knowledge of a third party's prior personal right to the property precluded the execution creditor, on an application of the so-called 'doctrine of notice', from causing the property to be attached and sold in execution. In some of those decisions, an analogy had been drawn between such a creditor and a second or subsequent purchaser in a double sale, who purchases property in the knowledge that it has already been sold (but not yet delivered) to a third party. Rejecting the analogy, Streicher JA held that it did not follow that because an inference of fraud on the part of a second purchaser was drawn from the mere fact of knowledge of a prior sale (as some of the earlier cases had held), an inference of fraud likewise had to be drawn from such knowledge on the part of an execution creditor who attached in execution of a judgment

property which his debtor had previously sold. **In terms of the common law, such an execution creditor could, with some exceptions, attach the assets of which his debtor was the owner in order to obtain satisfaction of his debt** (para 24 at 390C—D, with reference to *The South African Tattersall's Subscription Rooms v Myers Brothers* 1905 TS 769 at 771). Effect was given to that right in s 36 of the Supreme Court Act 59 of 1959, read with uniform rule 45. Rule 45(1) provided that the party in whose favour any judgment of the High Court had been pronounced could, at his own risk, sue out of the office of the registrar one or more writs for execution thereof, provided (subject to certain exceptions) that no such process could be issued against the immovable property of any person until execution had been levied in respect of his movable property and the registrar was satisfied that the debtor did not have sufficient movable property to satisfy the writ. Section 36(1) of the Act (erroneously referred to in the reported judgment as s 45 of the Act) provided that the sheriff should execute all writs of the court directed to him. There were certain statutory exceptions to the general right of an execution creditor to execute against the assets of his debtor, one such exception being contained in s 39 of the Supreme Court Act, but no mention was made of property subject to a personal right of which the judgment creditor was aware (para 24 at 390D—H).

The third respondent had sold the property to the appellant but had not transferred it. He was still the owner of the property, and it was still an asset in his estate to which creditors were entitled to look for the satisfaction of their claims. Should he be sequestrated, the property would fall into his insolvent estate and the trustee, on the instructions of the creditors, would be entitled either to enforce the agreement of sale or to cancel it and resell the property (para 25 at 390H—I). It followed that, **unlike the purchaser of a property with knowledge of a prior sale, the first respondent had done what, according to the uniform rules, he was entitled to do. There could be no question of regarding his actions as a species of fraud. To extend the doctrine of notice to situations such as the one in *Dream Supreme Properties* would open the door to unscrupulous debtors to fabricate personal rights which would be difficult for a creditor to expose for what they were**. It would discourage prospective purchasers from taking part in sales in execution where a claim to a prior personal right was made by a third party. Very few such prospective purchasers would be prepared to investigate the validity of such a claim by a third party, and even less would they be prepared to involve themselves in litigation against such a third party. In the result, to extend the doctrine of notice to situations such as the present would create, to the detriment of the creditor as well as the debtor, uncertainty as to the title obtained at a sale in execution, and so reduce the effectiveness of such a sale, the purpose of which was to obtain satisfaction of a judgment debt (para 26 at 390I—391D).

The doctrine of notice should therefore not be applied to the situation before the court in *Dream Supreme Properties*, and thus the knowledge on the part of the first respondent of the sale of the property to the appellant had not affected the validity of the subsequent attachment and sale in execution of that property. The High Court had therefore correctly dismissed the appellant's application (para 27 at 391D—E).

The application in *Dream Supreme Properties* was, of course, instituted after the sale in execution had been held, and the question arises whether the same result would have to be arrived at if an application were brought *before* the sale in execution for an interdict to

prohibit the sale on the ground that the property under attachment was subject to a personal right in favour of a third party, for example the right to demand transfer of the property in terms of an earlier agreement of sale. Although, in such circumstances, the consideration would not apply that uncertainty as to the title passed at a sale already held in execution should not be put in doubt, it would appear that **an interdict to prevent the sale from taking place should nevertheless be refused, on the other grounds adumbrated by Streicher JA** (sc that the execution creditor, in arranging a sale in execution, is merely doing what the rules of court entitle him to do, and that dishonest debtors should not be allowed to protect property owned by them against attachment in execution, thereby rendering judgments of the courts bruta fulmina, by the stratagem of fabricated prior sales to third parties which it might be difficult or impossible to prove are not bona fide).

Farlam JA dissented, conceding at the outset that the sale in execution could not be set aside and that an order could not be granted directing the transfer of the property to the appellant as a result of the writ of execution issued at the instance of Standard Bank Financial Nominees (Pty) Ltd, since the latter was not aware of the prior sale to the appellant at the time when it caused the property to be attached. The execution sale was valid because of the fact that it took place pursuant to the writ issued to Standard Bank Financial Nominees (Pty) Ltd, and the second respondent was accordingly entitled to have the property transferred to her, against payment of the price realized at the execution sale and the transfer costs (para 31 at 391I—392C). That being so, there was little real purpose to the order that Farlam JA would have made (as to which, see para 39 at 394B—E), other than to settle the question of the costs of the proceedings, for the appellant would in any event have been denied the essence of the relief it sought, sc the setting aside of the sale in execution and an order directing the third respondent to transfer the property to the appellant. It was not necessary, said Farlam JA, in a double-sale case, to prove 'a type of fraudulent conspiracy' (para 34 at 392G—I, with reference to *Hassam v Shaboodien & others* 1996 (2) SA 720 (C) at 726J—727C and *Associated South African Bakeries (Pty) Ltd v Oryx & Vereinigte Bäckereien (Pty) Ltd en andere* 1982 (3) SA 893 (A) at 910G—H). The situation in *Dream Supreme Properties* was therefore not in essence any different from that which applies in a double-sale situation. (Although Farlam JA did not express himself in those terms, that is the effect of his reasoning in rejecting (in para 35 at 392I) the conclusion arrived at in *Reynders v Rand Bank Bpk* 1978 (2) SA 630 (T), where it was held that the doctrine of notice, although applicable to double sales in which the second purchaser has knowledge of the sale to the first purchaser, does not apply where a sale in execution takes place despite the knowledge on the part of the execution creditor of a prior personal right to the attached property vesting in a third party.)

It was important, continued Farlam JA, to stress that the third respondent had not been shown to be insolvent, and that if the execution effected at the instance of the first respondent were set aside, the first respondent had not been shown to be unable to recover what was owed to it by the third respondent. (In short, the first respondent had another remedy against its debtor, the third respondent.) It followed that the main consequence of dismissing the appellant's appeal (or, one might add, of refusing, as did the majority, to grant leave to appeal) would be to hold that the appellant's as yet

unregistered ius in personam ad rem acquirendam (personal right to acquire the property) could be defeated by a party who had prior knowledge of it, with the result that it would lose its 'beperkte saaklike werking' (limited real effect) against those with knowledge of the right. Such a decision would not be legally sound. Such a conclusion was not a necessary inference from uniform rule 45, and in any event the common law on the point could not be overridden by a rule of court (para 37 at 393E—H).

Furthermore, concluded Farlam JA, it was not correct to regard *Dream Supreme Properties* as a case where the court was called upon to *extend* the doctrine of notice (as the majority had held) to cases of execution where the execution creditor had knowledge of the right. It was more accurate to say that what the first respondent was asking the court to do was to create an exception and to *exclude* the operation of the doctrine of notice in such cases. Even if the court had the power to uphold such an exclusion (which Farlam JA doubted), a case in favour of doing so had not been made out. The mere fact that some people might fraudulently claim rights which would enjoy 'beperkte saaklike werking' where the judgment creditor had been told about them in advance could not justify depriving someone of such rights where there was no fraud and he or she genuinely possessed such rights (para 38 at 393H—394B).

To the present writer, the reasoning of Farlam JA is unconvincing, and the reasoning of the majority must respectfully be supported. **The central point of difference between the majority and Farlam JA was that the majority took the view that the right of an excution creditor to execute against any property whatsoever of his debtor, other than property protected by statute against execution, was an established common-law principle which overrode the so-called doctrine of notice**, according to which a creditor with prior knowledge of even a personal right, vesting in a third party, to property of the debtor must apparently adopt a noli tangere attitude towards that property. **Farlam JA, on the other hand, proceeded from the starting point that the doctrine of notice had to take precedence**. The trouble with Farlam JA's view is that it leads in practice to precisely the problems outlined by the majority judges, in particular the concoction of fabricated claims to property by dishonest debtors anxious to protect their assets against attachment by their creditors. The right of judgment creditors to execute money judgments against property of their judgment debtors is indispensable to the entire judicial process, in the sense that without that right, litigating for the payment of money ceases to have any point whatsoever. The right to execute against a judgment debtor's property is thus of cardinal importance, and the interests of judgment creditors in the satisfaction of judgments ad pecuniam solvendam granted in their favour is clamant and paramount. It must enjoy precedence over the so-called doctrine of notice in the interests of a sound and effective legal system. To assert, in the face of these policy considerations, that 'the common law on the point cannot be overridden by a Rule of Court' (para 37 at 393H) is unpersuasive for two reasons**:** first, the common law on the point cannot be held to be that notice of a prior personal right to take transfer of property precludes attachment of that property at the instance of a judgment creditor, and secondly, even if it were the common law, it is overridden not only by a rule of court but also by s 36(1) of the Supreme Court Act, which states that the sheriff 'shall execute all . . . judgments, writs, . . . warrants, commands and processes of the court directed to the sheriff'. It is trite that a principle of the common law is overridden by a conflicting

provision in an Act of Parliament which passes constitutional muster, as s 36(1) surely does.

Stay of execution pending review of taxation

A stay of a warrant of execution in respect of a taxing master's allocatur pending an application for review of the taxation may be ordered despite the fact that the review application (in terms of uniform rule 48(1)) is launched out of time. This is because the late delivery of the review application may be condoned (in terms of rule 27(1)) by the court which hears it. It is not correct to argue that because the notice of application for review is delivered out of time, there is no review pending, or the notice is a nullity**:** ***Standard Bank of South Africa Ltd & another v Malefane & another: In re Malefane v Standard Bank of South Africa Ltd & another*** **2007 (4) SA 461 (Tk)** para 14 at 465F—I. The court has an inherent discretion to stay a writ of execution where real and substantial justice requires such a stay, by reason of its power to control its own process (para 17 at 466A—D, with particular reference to *Strime v Strime* 1983 (4) SA 850 (C) at 852A—B). **The fact that a review of taxation is pending constitutes a good ground for ordering a stay of execution**. The review would not affect the liability for costs, but would affect the amount of costs payable. The seizure of assets which might be found after the review of taxation to be needlessly in excess of the amount of the allocatur would constitute an injustice (paras 18—19 at 466D—F).

Further on this aspect of the decision in *Malefane*, see under '**PARTIES: *Taxing master***' above.

13. CONSTITUTIONAL PRACTICE

Application for leave to appeal to Constitutional Court

See ***Steenkamp NO v Provincial Tender Board, Eastern Cape*** **2007 (3) SA 121 (CC), 2007 (3) BCLR 300**, which is discussed under '***Jurisdiction of Constitutional Court***' immediately below.

Jurisdiction of Constitutional Court

In ***Steenkamp NO v Provincial Tender Board, Eastern Cape*** **2007 (3) SA 121 (CC), 2007 (3) BCLR 300** the Constitutional Court was called upon to consider whether an action in delict was available against a tender board to a successful tenderer that had incurred out-of-pocket expenses in order to carry out the tender which had become wasted when the tender was set aside on review at the instance of a rival tenderer owing to administrative irregularity on the part of the tender board. The first question which arose was whether this raised a constitutional issue, and the second was whether it was in the interests of justice to grant an application by the liquidator of the successful tenderer for leave to appeal against a judgment of the Supreme Court of Appeal refusing to award damages to the successful tenderer.

Rejecting an argument that no constitutional issue was raised because the matter could be decided against the applicant on the ground that the tenderer (a company) had not been registered and incorporated at the time when it purported to tender, and thus had had no capacity to accept the invitation to tender, Moseneke DCJ held that **the applicant, as the party aggrieved by the decision of the Supreme Court of Appeal, sought an appeal against the substantive decision that no legal duty was owed by a tender board to any successful tenderer not to cause it loss by means of the irregular award of a tender**. The Supreme Court of Appeal had decided the matter on the substantive ground that the loss arising from the administrative breach of the tender board was not actionable in delict, and had dealt with the (in)validity of the tender only as a secondary issue, for the sake of completeness. Once it was found that the loss incurred by the successful tenderer was not recoverable in damages, it mattered not whether the tender was valid or not on the closing day for the submission of tenders. The Constitutional Court was seised of the matter and there was no good reason why it should decline to resolve the substantive issue on appeal (para 19 at 130C—F (SA), 306F—307A (BCLR)).

There were, continued Moseneke DCJ, other cogent reasons why the application involved constitutional issues. First, when a tender board procured goods and services on behalf of government, it wielded power derived first from the Constitution of the Republic of South Africa, 1996 and from legislation passed in pursuit of constitutional goals. **The exercise and control of public power was always a constitutional matter** (para 20 at 130F—131A (SA), 307A—B (BCLR)). Secondly, the question of the private-law liability of a tender board involved significant policy considerations relating to fairness and justice, which had to be settled in the light of s 39(2) of the Constitution. Thirdly, although an invitation to tender and its acceptance might be susceptible to common-law rules of contract, when a tender board evaluated and awarded a tender, it acted within the domain of administrative law. Its decision in awarding or refusing a tender constituted an administrative action because the decision was taken by an organ of state which wielded public power or performed a public function in terms of the Constitution or legislation, and the decision materially and directly affected the legal interests or rights of tenderers. The right to just administrative action was now a constitutional imperative (para 21 at 131B—132B (SA), 308A—D (BCLR)). Finally, a breach of the right to administrative justice ordinarily entitled an aggrieved party to 'appropriate relief' within the meaning of s 38 of the Constitution. The enquiry into what was the just and equitable remedy available to an aggrieved tenderer in itself triggered constitutional concern (para 22 at 132B—C (SA), 309A—B (BCLR)). There could thus be no doubt that the issues which arose for determination in *Steenkamp* concerned constitutional matters (para 23 at 132C—D (SA), 309B (BCLR)).

It was, furthermore, clearly in the interests of justice that the application for leave to appeal be granted (para 26 at 133E—F (SA), 310B—C (BCLR)). This was because the applicant's submissions were far from frivolous. There was a prospect that the Constitutional Court might decide differently the issue whether an initially successful tenderer which incurred out-of-pocket expenses was owed a 'duty of care'. The applicant had put up important common-law issues that implicated the Constitution and enjoyed some prospect that the decision against which the appeal lay might be varied (para 24 at 133B—C (SA), 309E—G (BCLR)). In any event, **prospects of success on appeal,**

though important, were not the only or decisive considerations in assessing where the interests of justice lay. Other factors were also relevant in deciding what best advanced justice. A decision by the Constitutional Court was likely to clarify the new matter of the scope of delictual liability of tender boards in relation to initially successful tenderers. The decision would be in the public interest because it was likely to be of practical value to tenderers, on the one hand, and to state tender boards, on the other, in their function to procure goods and services for the state (para 25 at 133C—E (SA), 309G—310B (BCLR)).

It is noteworthy that the general principle that a court should not decide a constitutional issue unless it is necessary to do so (as to which, see Mervyn Dendy *Civil Procedure Sibergramme Yearbook 2005* (2006) 173 and authorities there cited) was not followed by the Supreme Court of Appeal in *Steenkamp*, leading to an appeal to the Constitutional Court which would not have eventuated at all had that principle been followed by the Supreme Court of Appeal. (The latter court could have decided the matter against the liquidator of the successful tenderer on the narrow basis that the tenderer lacked the capacity to tender at the time when it purported to do so, and thus that the tender was a nullity. This line of attack upon the tenderer's claim did not involve a constitutional issue, and it is surprising that the Supreme Court of Appeal should have relegated it to a place of subsidiary importance in its judgment when the principle of deciding cases (if possible) without reaching constitutional issues dictated the contrary approach.)

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