CIVIL PROCEDURE

SIBERGRAMME 20/2007

ISSN 1814-0564

24 April 2009

BY: **MERVYN DENDY**

BCom LLB (cum laude), Attorney and Notary

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

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

IN THIS ISSUE:

Cases

Legislation
None

Literature
None

1. INTRODUCTION

This Sibergramme deals with cases reported in **October 2007** that have not already been considered in earlier issues, as well as dicta in ***Terminus Centre CC v Henry Mansell (Pty) Ltd & others*** **[2007] 3 All SA 668 (C)**.

2. JURISDICTION

Arbitration clause

The court in ***Kmatt Properties (Pty) Ltd v Sandton Square Portion 8 (Pty) Ltd & another*** **2007 (5) SA 475 (W)** declined to hear a counterclaim which an agreement between the parties provided should be referred to arbitration. Refusing to exercise his discretion in terms of s 3(2)*(b)* of the Arbitration Act 42 of 1965 (which states that the court may at any time on the application of any party to an arbitration agreement, on good cause shown, order that any particular dispute referred to in the arbitration agreement shall not be referred to arbitration), Blieden J cited dicta in *Metallurgical and*

Commercial Consultants (Pty) Ltd v Metal Sales Co (Pty) Ltd 1971 (2) SA 388 (W) at 391E—G (para 41 at 487B—E), *The Rhodesian Railways Ltd v Mackintosh* 1932 AD 359 at 369, *Polysius (Pty) Ltd v Transvaal Alloys (Pty) Ltd & another* 1983 (2) SA 630 (W), *Transvaal Alloys (Pty) Ltd v Polysius (Pty) Ltd* 1983 (2) SA 630 (T) at 656D—E (para 46 at 488B—D) and *Universiteit van Stellenbosch v J A Louw (Edms) Bpk* 1983 (4) SA 321 (A) at 334pr—A (para 47 at 488D—F), which render it clear that **a very strong case must be made out before a court will exercise its discretion to absolve a party from a contract to have a dispute referred to arbitration**. The mere fact that the dispute involved a pure question of law and nothing else did not justify the court in refusing a stay of proceedings, since the issues for arbitration referred to in the agreement between the parties plainly included legal issues (para 42 at 487E—F). The main application had been considered and determined by the court because the applicant had relied on a situation created by its alleged need for urgent relief, but the counterclaim (although premised on the findings of the court in regard to the merits of the applicant's application) was 'something entirely different' (para 44 at 487H—J; see also para 48 at 488F—G). The arbitration clause therefore precluded the court from adjudicating the counterapplication, which was accordingly dismissed (para 48 at 488G—H).

Labour relations

A former employee in ***Boxer Superstores Mthatha & another v Mbenya*** **2007 (5) SA 450 (SCA)** sought an order from the High Court declaring that a disciplinary hearing which had preceded her dismissal from her employment be set aside and its outcome be declared unlawful, a declaratory order that her dismissal was unlawful and of no force, reinstatement in her former position with all salaries and benefits, back pay and costs. The first appellant, her former employer, raised in terms of uniform rule 6(5)*(d)*(iii) a point of law, objecting that the High Court lacked any jurisdiction in the matter. As there was no answering affidavit before court, said Cameron JA (Van Heerden and Jafta JJA and Hancke and Theron AJJA concurring), the allegations in the founding affidavit had to be taken to be established facts, and the question had to be determined whether, if those facts were true, the High Court had jurisdiction (para 4 at 452F—G).

Turning to the question whether the jurisdiction of the High Court was excluded by the provisions of the Labour Relations Act 66 of 1995, Cameron JA referred to s 157(1) (which provides that, subject to the Constitution of the Republic of South Africa, 1996 and s 173 of the Act (dealing with the jurisdiction of the Labour Appeal Court), and except where the Act itself provides otherwise, the Labour Court has exclusive jurisdiction in respect of all matters that elsewhere in terms of the Act or in terms of any other law are to be determined by the Labour Court). Despite the seeming breadth of that provision, Cameron JA remarked, it was now well established that**:**

- **s 157 does not purport to confer exclusive jurisdiction on the Labour Court generally in relation to matters concerning the relationship between employer and employee, and** (since the Labour Relations Act affords the Labour Court no general jurisdiction in employment matters) **the jurisdiction of the High Court is**

not ousted by s 157(1) simply because a dispute is one that falls within the overall sphere of employment relations;

- the remedies created by the Labour Relations Act against conduct which may constitute an unfair labour practice are not exhaustive of the remedies that might be available to employees in the course of the employment relationship – particular conduct may not only constitute an unfair labour practice, but may give rise to other rights of action**:** provided that the employee's claim as formulated does not purport to be one that falls within the exclusive jurisdiction of the Labour Court, the High Court has jurisdiction even if the claim could also have been formulated on the basis of an unfair labour practice;
- an employee may therefore sue in the High Court where a dismissal constitutes a breach of contract giving rise to a claim for damages; and
- similarly, an employee may sue in the High Court for damages for a dismissal in breach of the employer's own disciplinary code which forms part of the contract of employment between the parties

(para 5 at 452H—453G).

The novel question in *Mbenya* was whether an employee could sue in the High Court for relief on the basis that the disciplinary proceedings and the dismissal were 'unlawful', without alleging any loss apart from salary. The answer, said Cameron JA, could only be Yes. The common-law contract of employment had been developed in accordance with the Constitution to include the right to a pre-dismissal hearing, and consequently every employee now had a common-law contractual claim (not merely a statutory unfair-labour-practice right) to a pre-dismissal hearing. Contractual claims were cognizable in the High Court, and the fact that they might also be cognizable in the Labour Court through that court's unfair-labour-practice jurisdiction did not detract from the jurisdiction of the High Court (para 6 at 453G—454B). It would, moreover, be illogical to hold that an employee could claim damages for breach of the common-law contract of employment in the High Court but could not claim a declarator, as sought in *Mbenya* (para 8 at 454D). And by adjudicating a claim by the employee in *Old Mutual Life Assurance Co SA Ltd v Gumbi* 2007 (5) SA 552 (SCA), [2007] 4 All SA 866, where a dismissal was challenged on the basis of a complaint about the fairness of pre-dismissal disciplinary proceedings, the courts had implicitly decided the question at issue in *Mbenya*, for the High Court and the Supreme Court of Appeal in *Gumbi* would have been obliged to raise the lack of jurisdiction had the matter fallen within the Labour Court's exclusive statutory competence (para 7 at 454C—D).

The ordinary courts, added Cameron JA, had to be careful in employment-related matters not to usurp the remedial powers of the Labour Courts and the special skill and expertise of the latter (para 9 at 454G). That meant that even if the factual allegations made in *Mbenya* proved to be true, the employee might well not ultimately be entitled to the relief she sought, particularly since (according to her founding papers) she had had an internal right to appeal, which she had failed to exercise. At best she might be entitled to have the hearing set aside and the matter remitted to the employer. But that was not the pivotal issue, since the employer's objection involved a challenge to whether the High

Court had jurisdiction to entertain the application at all, or to afford the employee any portion of the relief she sought (para 10 at 454G—I).

Rejecting an argument that the employee was in truth invoking the unfair-labour-practice jurisdiction of the Labour Court and that the High Court should have given effect to the substance rather than the form of the employee's case, Cameron JA stated that **jurisdictional limitations often involved questions of form, and that the employee had formulated her claim carefully to exclude any recourse to fairness, relying solely on contractual unlawfulness** (para 12 at 455C—D). The jurisdiction of the High Court had therefore to be upheld, and the first appellant's objection to that jurisdiction had to be dismissed (para 13 at 455F).

3. PARTIES

Company shareholder

The question in ***Letseng Diamonds Ltd v JCI Ltd & others; Trinity Asset Management (Pty) Ltd & others v Investec Bank Ltd & others*** **2007 (5) SA 564 (W)** was whether two shareholders in a company, JCI, had locus standi to have a suite of agreements between JCI and a third party, Investec, declared invalid after those agreements had been largely implemented. The shareholders were not party to the agreements, and the parties themselves regarded all the agreements as binding on them.

Blieden J began by remarking that the point of locus standi, taken (as it was in *Letseng Diamonds*) as a separate issue, had (like an exception) to be dealt with on the assumption that all the allegations of fact relied upon by the party whose locus standi was attacked were true (para 13 at 571H—I, with reference to *Kuter v South African Pharmacy Board & others* 1953 (2) SA 307 (T) at 313E—F).

It was a principle of law that A could not, as a general rule, bring an action against B to recover damages or secure other relief on behalf of C. C was the proper plaintiff because C was the party injured and therefore the person in whom the cause of action was vested (para 18 at 573C—D). To put it another way**: a third party could not interfere in the terms and conditions contained in an agreement between two other parties**. It was between them and them alone, and the terms of the agreement operated only between them and no one else. In company law, the principle was sometimes described as the rule in *Foss v Harbottle* (1843) 2 Hare 461, 67 ER 189 when referring to the relationship between shareholders and a company. That rule, preventing strangers from interfering in contracts, was fundamental to any rational system of jurisprudence (para 19 at 573D—F). The consequence of the rule was that an individual shareholder could not bring an action to complain of an irregularity (as distinct from illegality) in the conduct of the company's internal affairs provided that the irregularity was one which could be cured by a vote of the company in general meeting (para 21 at 573G—H).

Blieden J then turned to consider s 19(1)*(a)*(iii) of the Supreme Court Act 59 of 1959, which gives the court, in its discretion and at the instance of any interested person, the power to enquire into and to determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon

that determination. The Supreme Court of Appeal in *Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd* 2005 (6) SA 205 (SCA), [2006] 1 All SA 103 para 16 at 212I—213B (SA), 108*h—j* (All SA) had confirmed the correctness of the approach adopted in *Durban City Council v Association of Building Societies* 1942 AD 27 at 32, where Watermeyer JA had said that the question whether or not an order had to be made under a similar legislative provision then in force had to be examined in two stages. First, the court had to be satisfied that the applicant was a person interested in an 'existing, future or contingent right or obligation', and then, if satisfied on that point, the court had to decide whether the case was a proper one for the exercise of the discretion conferred on it (para 24 at 574E—G). The person interested in an 'existing, future or contingent right or obligation' had to have a direct right concerning the subject matter of the litigation, and not merely a financial interest which was only an indirect interest in such litigation (as it was put by Horwitz AJP in *Henri Viljoen (Pty) Ltd v Awerbuch Brothers* 1953 (2) SA 151 (O) at 169H—in fine). A good example of what was meant by an 'indirect interest' which did not give a litigant the right to apply for relief was provided in *United Watch & Diamond Co (Pty) Ltd & others v Disa Hotels Ltd & another* 1972 (4) SA 409 (C) at 417A—D, where Corbett J had held that in an action for ejectment against a tenant at the suit of a landlord, the subtenant had no legal interest in the contract between the landlord and the tenant although he might have a very substantial financial or commercial interest which might be prejudicially affected by the judgment, and consequently no direct legal interest in proceedings in which the tenant's continued right of occupation was in issue, however much the termination of that right might affect him commercially and financially (para 25 at 574G—575C).

If the court was satisfied that the applicant was an 'interested party', continued Blieden J, it was settled law that a court would not make a declaratory order unless there were interested parties on whom the declaration would be binding. It was not the function of the court to give advice (para 26 at 575C—D, with reference to *Ex parte Nell* 1963 (1) SA 754 (A) at 760B—C). What was meant by 'binding' in this context was not the effect of stare decisis but 'binding' in the sense of res judicata (para 27 at 575D—E, with reference to *Ex parte Ginsberg* 1936 TPD 155 at 158). It was therefore plain that unless the effect of the declaratory order was one that bound some parties, it was not open to any litigant to bring an application praying for declaratory relief merely in order to be advised of his legal position (para 28 at 575G—H, with reference to *Ex parte Prokureur-Generaal, Transvaal* 1978 (4) SA 15 (T)).

Turning to apply these principles to the facts before him, Blieden J held that **where directors contracted on behalf of a company in breach of their fiduciary duties, and the other contracting party was aware that the directors were acting in breach of those duties, the legal consequence was that the company, and only the company, at its election, could avoid the contracts**, because the directors owed their fiduciary duties to the company and not to individual shareholders (para 33 at 577E—G, with reference to M S Blackman 'Companies' in W A Joubert (ed) *The Law of South Africa* Volume 4 Part 2 First Reissue (1996) para 126 at 202—4 and M S Blackman et al *Commentary on the Companies Act* (2002) Volume 2 at 8—104 to 8—106). A shareholder could not usurp the functions of directors and exercise that election on behalf of the company. That was obvious if one asked the question**:** what would happen if different shareholders purported

to exercise conflicting elections on behalf of the company? And what would happen if the shareholders in general meeting by majority voted to ratify the acts of the directors? (para 34 at 577G—I). It was JCI as a company, not individual shareholders, that was entitled to take issue with alleged fiduciary indiscretions (para 35 at 577I—J; see also para 36 at 578B). The distinction between having a legal interest and having a financial interest applied, and the individual shareholders had only financial interests. They were in the same position as the subtenant in the *United Watch & Diamond* case (para 38 at 578D).

Put differently, **an insuperable impediment to the two individual shareholders having locus standi to apply for the declaratory orders for which they prayed was that they had no interest in an 'existing, future or contingent right or obligation' in the issues concerned. It was only JCI and Investec that had such an interest**, and they had chosen to be bound by the agreements concerned. It was not for a court to decide whether an agreement was binding on parties unless the affected parties required such a decision to be made (para 39 at 578D—F). The question before the court in *Letseng Diamonds* was whether the two applicants, as individual shareholders of JCI, were entitled to have agreements set aside in the face of the affected parties to those agreements adopting the stance that such contracts were binding. They had no locus standi to do that (para 42 at 579C—D). It was only the decision of the general meeting that could have influence on the ratification or otherwise of the agreements concerned. There was nothing to stop either of the applicants informing the shareholders of JCI of their views before the general meeting and canvassing the individual shareholders at the meeting to refuse to ratify the actions of the board in regard to the agreements concerned (para 43 at 579D—F). What the applicants were in essence asking the court to do was to advise them as to the validity of certain agreements when the parties to those agreements had no difficulty inter se in understanding and accepting what they had agreed to. The applicants had no locus standi to apply for such an order (para 48 at 580B—D).

In summary, said Blieden J, minority shareholders such as the applicants had, save for certain exceptional instances, no locus standi to interfere in the contractual arrangements arrived at by the board of JCI and Investec. The rules relating to the way in which companies were to be run were designed to ensure that business could be done by those entities in a proper and controlled manner. **If each shareholder had the right to take it upon himself to act in a way which he bona fide thought was in the best interests of the company, there would be chaos** (para 49 at 580D—F). In the present case, where there were thousands of shareholders owning millions of shares, allowing individual shareholders to bring claims against the company, save in exceptional circumstances, would result in anarchy in the affairs of the company (para 61 at 583G—H).

The applicant shareholders were attempting to usurp the functions of the general meeting, and to anticipate the result of such a meeting. They were not entitled to act in that way, and had no locus standi to raise the issues before the court (para 65 at 584G—H; see also para 66 at 584H—I).

Joinder

In ***Bowring NO v Vrededorp Properties CC & another*** **2007 (5) SA 391 (SCA)** Brand JA (Streicher, Heher, Van Heerden and Maya JJA concurring) remarked that the enquiry relating to non-joinder of a party is one of substance rather than one of the form of the claim (with reference to *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A) at 657) and reiterated that **the substantial test is whether the party which is alleged to be a necessary party for purposes of joinder has a legal interest in the subject matter of the litigation that may be prejudicially affected by the judgment of the court in the proceedings concerned** (with reference to *Aquatur (Pty) Ltd v Sacks & others* 1989 (1) SA 56 (A) at 62A—F and *Transvaal Agricultural Union v Minister of Agriculture and Land Affairs & others* 2005 (4) SA 212 (SCA) paras 64—6 at 226F—227C) (para 21 at 398F—H). In the absence of any prejudicial effect upon the legal interests of the party in question, a defence based on non-joinder of that party must fail (para 23 at 399B—C).

4. REPRESENTATION OF PARTIES

In ***The MT 'Yeros' v Dawson Edwards & Associates & another*** **[2007] 4 All SA 922 (C)** Bozalek J was called upon to consider an application challenging the authority of a firm of attorneys to represent a party, Arlancex SA, which alleged that it was the owner of certain cargo laden aboard the MT 'Yeros'. The attorneys produced a power of attorney purporting to have been signed on behalf of 'the owners of the cargo lately laden on board the MT YEROS'. Although, held Bozalek J, a power of attorney could be delivered in those terms (sc without identifying in it the owners of the cargo) (at 924*j*), and although Admiralty Rule 22(4)*(a)* provided that in such an event an undertaking had to be filed by the attorney to pay any costs awarded against the party represented by him or her and any damages awarded against that party, **uniform rule 7 (which deals with powers of attorney) was not excluded by the provisions of the Admiralty Rules**. It was necessary for the court to ensure that, notwithstanding the existence of an indemnity for costs or an unfavourable award, parties were properly authorized to represent litigants (at 927*h—i*; see also at 926*g*). Furthermore, **the question of the authority of a party, in this instance a legal representative, to represent another party was clearly an issue that should be resolved at the earliest opportunity**. Accordingly, an application for an order directing that proof of authority to act be furnished ought not to stand over and be determined only after the evidence in the trial had been heard (at 923*i—j*).

Uniform rule 7 provided for the situation where the authority of a party to act on behalf of another was disputed. One aspect of that question was the concern that, should an adverse costs order be made against such a party, upon execution that party might repudiate the authority of the representative to have instituted or defended the proceedings (at 926*g—h*). The mischief which rule 7 sought to prevent was, however, not completely alleviated by provisions which obliged the representative to furnish security for any adverse costs order or award which might be given against the party it purported to represent. In the absence of a mechanism to call for and determine the authority of a

party to represent another party, there remained the possibility that such a party could emerge at a later stage and institute a further action arising out of the same cause of action, which could lead to a party having to defend two actions. There was also the undesirable possibility of awards or orders being made in favour of or against a party which was not properly before the court, albeit that such an award might in the first place be made against or in favour of a party or parties generally described as the owners or insurers of a named vessel or cargo (at 926*h*—927*a*).

Holding that, in the circumstances of *MT 'Yeros'*, good cause existed to permit the applicant to bring its application disputing the first respondent's authority albeit that such an application was out of time (at 928*f*—*g*) and that the first respondent had not established that it was authorized to represent Arlancex SA as it purported to do (at 931*g*), Bozalek J ordered the first respondent (the firm of attorneys in question) to furnish proof to the satisfaction of the applicant or, failing that, to the satisfaction of the court, of its authority to represent Arlancex SA as the latter's attorneys of record, prohibited the first respondent from acting on behalf of Arlancex SA until it produced proof of that authority in a form acceptable to the applicant or to the court, and stayed the trial of the action until such time as the first respondent produced the authority in question or until such time as Arlancex SA ceased to be a plaintiff in the action (at 932*b*—*e*; see also at 931*g*—*j*).

5. SECURITY FOR COSTS

The decision in ***Giddey NO v J C Barnard and Partners*** **2007 (5) SA 525 (CC)** was previously reported in 2007 (2) BCLR 125, and was surveyed in **Civil Procedure Sibergramme 6 of 2007** (25 September 2007) 3—7.

6. APPLICATIONS

Eviction

In ***Deorist A 144 (Pty) Ltd & others v Jacobs & others*** **[2007] 4 All SA 737 (T)** Du Plessis J dismissed an application for eviction of the respondents in terms of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 because the requirements of s 4(2) of that Act had not been complied with. (Section 4(2) states that at least fourteen days before the hearing of the eviction proceedings, the court must serve written and effective notice of the proceedings on the unlawful occupier and on the municipality having jurisdiction.) Citing *Cape Killarney Property Investments (Pty) Ltd v Mahamba & others* 2001 (4) SA 1222 (SCA), [2001] 4 All SA 479 para 12 at 1227H—J, 482*j*—483*b* to the effect that an application for the eviction of an unlawful occupier must be served in the ordinary manner in terms of the rules of court in addition to the s 4(2) notice, Du Plessis J added that s 4(2) requires 'effective' notice and that **the attention of the occupier must therefore, as far as possible, be drawn pertinently to the s 4(2) notice which the court has authorized and directed** (para 11 at 739*h*—740*c*). In *Jacobs*, only the notice of motion, the founding affidavit and the annexures to

the founding affidavit had been served on the respondents. The s 4(2) notice had not been separately served on them, and accordingly the applicant had failed to comply, substantially or otherwise, with the provisions of s 4(2) and with an order of court directing the service of the notice in terms of that provision. **Although that notice had been one of the annexures to the founding affidavit, its 'incidental service' did not constitute a separate and effective notice such as was required by s 4(2)**. The respondents' attention had not been drawn to the notice. Even if the respondents had read the notice as part of the papers, it was doubtful that they would have realized its importance (para 13 at 740*d*—*f*). Accordingly, when the application for eviction had been moved, the applicant had not complied with the provisions of s 4(2) (para 14 at 740*f*).

Founding affidavits

In ***Moila v Fitzgerald & another*** **[2007] 4 All SA 909 (T)** at 917*a*—*d* Bertelsmann J referred, in reliance upon dicta in *Schlesinger v Schlesinger* 1979 (4) SA 342 (W) at 348G—H, to **the duty (whether in ex parte applications, urgent applications or other applications) of utmost good faith which must be observed by applicants in placing material facts before the court** (see also *Herbstein & Van Winsen The Civil Practice of the Supreme Court of South Africa (Now the High Courts and the Supreme Court of Appeal)* 4 ed (1997) by the late Louis de Villiers van Winsen, Andries Charl Cilliers & Cheryl Loots 367, where a passage cited in *Schlesinger* from an earlier edition of that work now appears). Finding that the applicant in *Moila* had deliberately withheld information which was directly relevant to the issues in dispute (at 917*d*) and that the failure to disclose those facts amounted to a serious dereliction of the duty which rested upon the applicant to take the court into his confidence (at 917*g*—*h*), Bertelsmann J took into account the 'grave failure' by the applicant to disclose all relevant facts to the court, and the absence of a bona fide claim in law on his part to the order sought by him, as being sufficient cause to hold that the applicant had deliberately abused the process of the court. The application was accordingly dismissed and the applicant was ordered to pay most of the costs on the scale as between attorney and own client (at 921*f*—*h*).

Further on *Moila*, see under '**COSTS: *Attorney-and-own-client costs***' below.

Irregular step

In ***Kmatt Properties (Pty) Ltd v Sandton Square Portion 8 (Pty) Ltd & another*** **2007 (5) SA 475 (W)** Blieden J dismissed an application in terms of uniform rule 30 to set aside a notice of set down as being an irregular step, since the sole motivating force behind the application was the fact that the applicant anticipated that the counsel who had up to then represented the applicant would not be available to argue the matter during the week for which it had been set down by the first respondent. As it turned out, the applicant's counsel had indeed become available and was present in court when the matter was called on the date for which it was set down. Nevertheless, counsel still persisted with the application to strike out the notice of set-down. This was despite his indicating that the applicant did not require the matter to be postponed on the ground that he was not ready to proceed. He was, he said, ready to argue the matter if the application to strike out the

notice of set-down was not granted. Since the whole application was 'little but a stratagem to get the matter postponed at the first respondent's costs', Blieden J in the exercise of his discretion dismissed the rule 30 application and ordered that the matter proceed (paras 51—3 at 490B—E). Taking into account all the circumstances, particularly the persistence of the applicant's counsel in arguing that the rule 30 application be upheld, Blieden J ordered the applicant to pay the costs of that application (para 54 at 490E—F).

Striking-out

The decision in ***Jeebhai v Minister of Home Affairs & another*** **[2007] 4 All SA 773 (T)** was previously reported in 2007 (4) SA 294 and 2007 (10) BCLR 1146, and was surveyed in **Civil Procedure 17 of 2007** (8 October 2008) 8.

7. TRIAL ACTIONS

Amendment of pleadings

In ***BMW Financial Services (SA) (Pty) Ltd v Harding & another*** **[2007] 4 All SA 716 (C)** Moosa J remarked that it is a trite principle of our law that the primary object of allowing an amendment is to obtain a proper ventilation of the dispute between the parties, so that the court will not be bogged down by technicalities and formalities, and to determine the real issues between the parties, so that justice may be done (para 5 at 718*h*—719*b*, with particular reference to *Robinson v Randfontein Estates GM Co Ltd* 1925 AD 173 at 198). Holding that the evidence led in *BMW Financial Services* had sufficiently covered the issues raised in amendments sought by both parties towards the end of the trial, and that the parties would not suffer any prejudice or injustice if such amendments were allowed, the amendments of both parties were allowed (para 6 at 719*b—d*; see also para 8 at 719*h—i*). Moosa J added that, from a procedural point of view, an amendment usually operated (retroactively) from the time when a pleading has been filed, but from the perspective of substantive law, it operated only from the time when the amendment had been granted. Prescription was accordingly interrupted in respect of a new cause of action introduced by amendment from the date on which the amendment was granted (para 9 at 719*j*—720*b*, with reference to J S Saner 'Prescription' in W A Joubert *The Law of South Africa* Volume 21 First Reissue (2000) para 147 at 67).

Moosa J proceeded to hold that, since the cause of action in *Harding* had remained unchanged and the plaintiff had effectively merely brought about a change in the quantum of the damages claimed, rather than the introduction of a new cause of action, by means of an amendment, **the substituted claim was founded on the same cause of action as the original claim and the service of the summons interrupted the running of prescription in terms of s 15(1) of the Prescription Act 68 of 1969** (para 11 at 720*g—j*, para 13 at 721*e—f*; cf the discussion of *Firstrand Bank Ltd v Nedbank (Swaziland) Ltd* 2004 (6) SA 317 (SCA) in Mervyn Dendy *Civil Procedure Sibergramme Yearbook 2005* (2006) 54—5).

In addition, prescription in respect of interest on the capital amount claimed was interrupted by the service of summons claiming such interest, and the amendment of the prayer for interest so as to bring the rate of interest claimed into line with the rate permissible by law (a reduction from 17 per cent to 15,5 per cent per annum) did not lead to the conclusion that the claim for interest at the latter rate had prescribed (para 12 at 721*a*—*c*, para 13 at 721*e*—*f*).

Discovery

The plaintiff in ***Terminus Centre CC v Henry Mansell (Pty) Ltd & others*** **[2007] 3 All SA 668 (C)** was ordered to pay the wasted costs of a postponement arising out of its failure to make discovery in a High Court trial action of documentation which ought to have been discovered in terms of uniform rule 35(1). After referring to the importance of timeous and adequate discovery in the finalization of civil trials, Van Reenen J remarked that **where there had been inadequate discovery, there was an onus (in an application for a consequent postponement) on the defaulting party to show an absence of prejudice on the part of the innocent party, not vice versa**. As the plaintiff had not even attempted to provide a reason for its failure to make discovery, the onus had not been discharged (para 34 at 678*a*—*c*, with reference to *Ferreira v Endley* 1966 (3) SA 618 (E) at 621E—F).

Exception

The decision in ***Gutsche Family Investments (Pty) Ltd & others v Mettle Equity Group (Pty) Ltd & others*** **2007 (5) SA 491 (SCA)** was previously reported in [2007] 3 All SA 223, and was surveyed in Civil Procedure Sibergramme 18 of 2007 (8 December 2008) 16.

8. JUDGMENTS AND ORDERS

Contempt of court

The decision in ***Jeebhai v Minister of Home Affairs & another*** **[2007] 4 All SA 773 (T)** was previously reported in 2007 (4) SA 294 and 2007 (10) BCLR 1146, and was surveyed in **Civil Procedure 17 of 2007** (8 October 2008) 11—12.

Declaratory order

Determination of existing, future or contingent right or obligation

See ***Letseng Diamonds Ltd v JCI Ltd & others; Trinity Asset Management (Pty) Ltd & others v Investec Bank Ltd & others*** **2007 (5) SA 564 (W)**, which is surveyed under '**PARTIES: *Company shareholder***' above.

9. APPEALS

Appealability

The decision in ***Gutsche Family Investments (Pty) Ltd & others v Mettle Equity Group (Pty) Ltd & others*** **2007 (5) SA 491 (SCA)** was previously reported in [2007] 3 All SA 223, and was surveyed in **Civil Procedure Sibergramme 18 of 2007** (8 December 2008) 16.

Exercise of discretion by court a quo

The decision in ***Giddey NO v J C Barnard and Partners*** **2007 (5) SA 525 (CC)** was previously reported in 2007 (2) BCLR 125, and was surveyed in **Civil Procedure Sibergramme 6 of 2007** (25 September 2007) 9—10.

Factual findings by trial court

In ***Naude v Joubert*** **[2007] 4 All SA 933 (E)** Plasket J reiterated that the powers of a court of appeal to interfere with factual findings made by a trial court are limited. Referring to the judgment of Jones J in *Meintjies v Esterhuizen & another* (ECD 8 November 2003 (case no 777/02), unreported) para 4, Plasket J agreed with the explanation given by Jones J that **a trial judge who had not disqualified himself by misdirection was in a better position than a court of appeal to make a correct determination of the facts because, being steeped in the atmosphere of the trial, he had had the opportunity of seeing, hearing and appraising the witnesses**. He was best able to assess the credibility of the witnesses and the reliability and honesty of their versions. That advantage was not necessarily confined to the fact-finding process, but might extend also to the correct inferences to be drawn from the facts. The result was that the trial judge's findings of fact were presumed to be correct, and it was 'only in exceptional cases' that a court of appeal would interfere with that evaluation of oral testimony. An appeal court would do so only when, after making due allowance for the trial judge's advantages, it was quite satisfied that the evidence taken as a whole could not support his conclusions (para 22 at 938*i*—939*d*). In *Naude*, the rejection by the magistrate (sc the trial court) of the evidence of the appellant as untruthful appeared to be fully justified (para 23 at 939*d*), and there was accordingly no ground to interfere with it.

10. COSTS

Attorney-and-client costs

A punitive costs order was made against South African Airways (Pty) Ltd in ***Claase v Information Officer, South African Airways (Pty) Ltd*** **2007 (5) SA 469 (SCA)** after the airline had persistently refused to make available to the appellant a record containing information which the appellant had repeatedly requested and to which he was entitled.

Applying dicta in *MEC for Roads and Public Works, Eastern Cape, & another v Intertrade Two (Pty) Ltd* 2006 (5) SA 1 (SCA) paras 20—1 at 8I—9E, Combrinck AJA (Mpati DP and Brand, Cloete and Mlambo JJA concurring) held that **where a record of information is requested in terms of (s 11 or) s 50 of the Promotion of Access to Information Act 2 of 2000 and the state body or private person or institution in question obdurately and unreasonably refuses to furnish the record in circumstances where it obviously should have done so, the court may make a punitive award of costs to mark its displeasure**. The conduct of SAA in the *Claase* case warranted such an order (para 11 at 474E—F). Even if its conduct in persistently refusing to make available the record in question was not intentionally vexatious, it had that effect (para 11 at 475A—B). Its conduct illustrated 'how a disregard of the aims of the Act and the absence of common sense and reasonableness' had resulted in the Supreme Court of Appeal having to deal with a matter which should never have required litigation (para 1 at 471B—C).

The first and second defendants in ***BMW Financial Services (SA) (Pty) Ltd v Harding & another*** **[2007] 4 All SA 716 (C)** were ordered to pay the plaintiff's costs on an attorney-and-client scale where the second defendant, acting pursuant to a power of attorney given to him by the first defendant, became engrossed in the proceedings despite the first defendant having decided to abide the decision of the court, and **persisted unrelentingly with defences which had very little prospect of success**, with a view to ensuring that the first defendant avoided payment of the amount claimed by the plaintiff (para 39 at 729*a—b*, para 40 at 729*d—e*). Although the defendants were ordered to pay the costs jointly and severally, the one paying the other to be absolved, the costs order was made subject to the proviso that the assets and estate of the second defendant had first to be excussed before execution was levied against the assets and the estate of the first defendant. Since the matters raised by the defendants were of sufficient importance and complexity to justify the employment by the plaintiff of two counsel, allowance for the costs of two counsel was made in the order granted by Moosa J (para 41 at 729*f—h*, para 42 at 730*a—b*).

Attorney-and-own-client costs

The applicant in ***Moila v Fitzgerald & another*** **[2007] 4 All SA 909 (T)** was ordered to pay most of the costs of the application on the scale as between attorney and own client as a result of **the 'gross unlawfulness' of his actions towards the respondents, his 'grave failure' to disclose all relevant facts to the court in his founding affidavit and the absence of a bona fide claim in law to a final order after he had earlier obtained a rule nisi against the respondents by withholding material facts from the court**. Those factors, said Bertelsmann J, were 'more than sufficient cause to hold that [the applicant] deliberately abused the process of this Court'. The fact that he might have been aided and abetted by his legal advisers could not save him from the consequences of his actions (at 921*f—h*). Earlier in the judgment, Bertelsmann J pointed out that the applicant had been aware at all times, or must have been so aware, that he had had no leg to stand on. His legal advisers must also have been so aware. His continuation with his application had amounted to an abuse of the process of the court. He had conducted himself toward

the respondents in an aggressive and vituperative fashion, allegedly with the full knowledge and tacit approval of his legal advisers, and this was 'deserving of severe censure'. His repetitive insults to and assaults upon the reputation and integrity of the second respondent (a university) as an institution, and upon the personality and character of the persons associated with it, were grossly defamatory and clearly unlawful (at 921*c*—*e*).

Land claims

In ***Haakdoornbult Boerdery CC & others v Mphela & others*** **2007 (5) SA 596 (SCA)** the court held, with reference to *Alexkor Ltd & another v The Richtersveld Community & others* 2004 (5) SA 460 (CC), 2003 (12) BCLR 1301, that no rule had been laid down by the Constitutional Court to the effect that participating owners must pay the costs of proceedings in the Land Claims Court, and that the former practice of the Land Claims Court not to award costs in the absence of special circumstances had to be followed (para 75 at 618A—C). With regard to costs on appeal against a judgment of the Land Claims Court, some judgments of the Supreme Court of Appeal had ordered costs to follow the result and others had made no orders as to costs. The time had come to be consistent and to hold that **in such cases there should not be any costs orders on appeal absent special circumstances** (para 76 at 618C—D).

11. CONSTITUTIONAL PRACTICE

Application for leave to appeal to Constitutional Court

In ***Barkhuizen v Napier*** **2007 (5) SA 323 (CC), 2007 (7) BCLR 691** the majority (per Ngcobo J) held that although an application for leave to appeal to the Constitutional Court clearly raised a constitutional issue, the question which had to be determined was whether it was in the interests of justice to grant leave to appeal. A consideration of what was in the interests of justice involved the weighing-up of the relevant factors, including prospects of success. The issues raised by the applicant were important constitutional issues that warranted consideration by the Constitutional Court. Accordingly, it was in the interests of justice to grant leave to appeal (para 43 at 337C—E (SA), 703F—704B (BCLR)).

The decision in ***Giddey NO v J C Barnard and Partners*** **2007 (5) SA 525 (CC)** was previously reported in 2007 (2) BCLR 125, and was surveyed in **Civil Procedure Sibergramme 6 of 2007** (25 September 2007) 11.

Authority of legal representatives to act in Constitutional Court

The decision in ***Shilubana & others v Nwamitwa (National Movement of Rural Women and Commission for Gender Equality as Amici Curiae)*** **2007 (5) SA 620 (CC)** was previously reported sub nom *Shilubana & others v Nwamitwa & others* in 2007 (9)

BCLR 919, and was surveyed in **Civil Procedure Sibergramme 11 of 2007** (15 January 2008) 9.

Costs

In ***Barkhuizen v Napier*** **2007 (5) SA 323 (CC), 2007 (7) BCLR 691** Ngcobo J (writing for the majority), after dismissing an appeal to the Constitutional Court, held that the case was not one where an order for costs should be made. The applicant had raised important constitutional issues relating to the proper approach to constitutional challenges to contractual terms. The determination of those issues was beneficial not only to the parties themselves but to all those who were involved in contractual relationships. In the circumstances, justice and fairness required that the applicant should not be burdened with an order for costs. **To order costs in the circumstances of the case might have a chilling effect on litigants who might wish to raise constitutional issues**. The parties should bear their own costs, both in the Constitutional Court and in the courts below (sc the High Court and the Supreme Court of Appeal) (para 90 at 349D—F (SA), 715I—716B (BCLR)). This reasoning is significant because the proceedings were between private individuals. The conduct of the Constitutional Court in declining to make costs awards in important constitutional cases is therefore not restricted to matters instituted against the state. See, in this regard, also ***Shilubana & others v Nwamitwa (National Movement of Rural Women and Commission for Gender Equality as Amici Curiae)*** **2007 (5) SA 620 (CC)**, which was previously reported sub nom *Shilubana & others v Nwamitwa & others* in 2007 (9) BCLR 919, and which was discussed in **Civil Procedure Sibergramme 11 of 2007** (15 January 2008) 9.

The decision in ***Giddey NO v J C Barnard and Partners*** **2007 (5) SA 525 (CC)** was previously reported in 2007 (2) BCLR 125, and was surveyed in **Civil Procedure Sibergramme 6 of 2007** (25 September 2007) 12.

Equality of arms

The decision in ***Shilubana & others v Nwamitwa (National Movement of Rural Women and Commission for Gender Equality as Amici Curiae)*** **2007 (5) SA 620 (CC)** was previously reported sub nom *Shilubana & others v Nwamitwa & others* in 2007 (9) BCLR 919, and was surveyed in **Civil Procedure Sibergramme 11 of 2007** (15 January 2008) 12—13.

Point of law raised for first time on appeal

In ***Barkhuizen v Napier*** **2007 (5) SA 323 (CC), 2007 (7) BCLR 691** the respondent challenged the right of the applicant to raise a public-policy argument for the first time on appeal to the Constitutional Court. Even if the point was indeed being raised for the first time (which the majority held was not the case), said Ngcobo J, the respondent's challenge could not succeed. **The mere fact that a point of law was raised for the first time on appeal was not in itself sufficient reason for refusing to consider it. If the point was covered by the pleadings and its consideration on appeal involved no**

unfairness to the other party against whom it was directed, the Court could in the exercise of its discretion consider the point. Unfairness might arise where, for example, a party would not have agreed on material facts, or on only the facts set out in the agreed statement of facts, had the party been aware that there were other legal issues involved. It would similarly be unfair to the other party if the law point and all its ramifications were not canvassed and investigated at trial (paras 38—9 at 336C—E (SA), 702F—703A (BCLR)). Since the point in question in *Barkhuizen* had been canvassed in the plaintiff's replication, the respondent could hardly suggest that he would not have agreed to the stated facts which were before the Constitutional Court had he been aware that the point was to be raised in argument. Nor could he suggest any unfairness arising from the fact that the point and all its ramifications were not canvassed and investigated at trial. All of the facts which the parties considered sufficient for the determination of the law points were before the Court, and the point taken by the respondent had to be rejected (paras 41—2 at 337A—C (SA), 703D—F (BCLR)).

Postponement of Constitutional Court proceedings

The decision in ***Shilubana & others v Nwamitwa (National Movement of Rural Women and Commission for Gender Equality as Amici Curiae)*** **2007 (5) SA 620 (CC)** was previously reported sub nom *Shilubana & others v Nwamitwa & others* in 2007 (9) BCLR 919, and was discussed in **Civil Procedure Sibergramme 11 of 2007** (15 January 2008) 13—17.

Preparation by counsel

The decision in ***Shilubana & others v Nwamitwa (National Movement of Rural Women and Commission for Gender Equality as Amici Curiae)*** **2007 (5) SA 620 (CC)** was previously reported sub nom *Shilubana & others v Nwamitwa & others* in 2007 (9) BCLR 919, and was surveyed in **Civil Procedure Sibergramme 11 of 2007** (15 January 2008) 17.

Author: Mervyn Dendy
Subscribers wishing to contact the author by e-mail may do so by clicking here.