CIVIL PROCEDURE

SIBERGRAMME 7/2007

ISSN 1814-0564

31 October 2007

BY: **MERVYN DENDY**

BCom LLB (cum laude), Attorney and Notary

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

This *Sibergramme* may not be copied or forwarded without permission from

Siber Ink CC

Subscriptions: subs@siberink.co.za or fax (+27) – 021 – 701 3947

IN THIS ISSUE:

Cases

Legislation

None

Literature

© Siber Ink CC, M Dendy

This *Sibergramme* may not be copied or forwarded without permission from

Siber Ink CC

1. INTRODUCTION

In this Sibergramme decisions on civil procedure reported in the **March 2007** issues of ***The All South African Law Reports***, ***Butterworths Constitutional Law Reports*** and ***The South African Criminal Law Reports*** are considered.

Cases reported in the January 2007 issue of *The South African Law Reports* will be dealt with in **Civil Procedure Sibergramme 8 of 2007**.

Literature relevant to civil procedure published during March 2007 is also surveyed in this issue.

2. PARTIES

Consignor by international air carriage

In ***Impala Platinum Ltd v Koninklijke Luchtvaart Maatschappij NV & another*** **[2007] 1 All SA 545 (SCA)** the question arose whether the appellant, a consignor in terms of a contract of international carriage by air, had locus standi to sue for the value of parcels lost in transit by the air carrier. The problem arose because the appellant had, at its own expense, insured the cargo in question and been indemnified by the insurers. It had accordingly suffered no loss. Distinguishing the decision in *Pan American World Airways Incorporated v SA Fire and Accident Insurance Co Ltd* 1965 (3) SA 150 (A) on which the court a quo had relied (paras 10–11 at 548*c*–549*b*), Navsa JA (Howie P, Farlam and Cloete JJA and Cachalia AJA concurring) held that the question had to be answered in the light of the provisions of the International Convention for the Unification of Certain Rules Relating to International Carriage by Air (promulgated in the Schedule to the Carriage by Air Act 17 of 1946), as interpreted in decisions of courts in other countries, from which the essential character and purpose of the Convention were apparent (para 12 at 549*b*–*c*). **In none of the cases did the problem of the locus standi of a nominal consignor (sc one that did not suffer any loss) seem to have been addressed**. This was a 'significant aspect' (para 14 at 549*e*–*f*), for it indicated that 'the right to sue is obvious, not only because of the clear wording of the Convention, but because it is the basis on which the international air carriage industry operates' (para 42 at 556*i*–557*a*). In decisions dealing with the extension of the right to sue to persons other than the consignor and consignee, the right of the consignor to sue (even where the consignor had suffered no loss) had been 'readily and correctly assumed to exist' (para 42 at 557*a*–*b*).

In the course of his judgment, Navsa JA referred to *Western Digital Corp & others v British Airways plc* [2001] 1 All ER 109 (CA), in which it was held that, although the Convention did not in terms give specific rights to persons such as owners who were not

© Siber Ink CC, M Dendy

This *Sibergramme* may not be copied or forwarded without permission from

Siber Ink CC

consignors or consignees, title to sue fell to be determined by domestic law, with the result that owners and others with recognizable interests were not without remedy (para 23 at 551*h–j*). Navsa JA also referred to *Gatewhite Ltd & another v Iberia Lineas Aereas de España SA* [1989] 1 All ER 944 at 950*d–g*, where Gatehouse J said the following**:**

> 'In my view the owner of goods damaged or lost by the carrier is entitled to sue in his own name and there is nothing in the convention which deprives him of that right. . . .
> 'It would be a curious and unfortunate situation if the right to sue had to depend on the ability and willingness of the consignee alone to take action against the carrier, when the consignee may be (and no doubt frequently is) merely a customs clearing agent, a forwarding agent or the buyer's bank. It would seem artificial in the extreme to require a special contract in the air waybill itself under art 15(2) to provide the goods owner with a remedy in such a normal situation.'

This passage, said Navsa JA, expressed a recurrent theme in a number of cases which extended the right to sue beyond the consignor or consignee, and was significant in addressing the issue of the locus standi of a consignor who suffered no loss (para 24 at 552*a–f*). The last part of the dictum addressed the desirability of granting the right to sue to others who had recognizable interests so as to ensure that persons such as true owners of lost cargo were not at the mercy of persons such as clearing or forwarding agents (para 38 at 556*d–e*).

The Convention catered for the facts of the *Impala Platinum* case, and the approach that where the Convention specifically dealt with an issue it should be regarded as exhaustive and exclusive of domestic law was in line with the exigencies of modern-day international carriage by air, and promoted uniformity and comity (para 26 at 553*b–c*). With reference to the Convention, Navsa JA referred to (inter alia) art 18(1) and art 30(3) of the Convention. Article 18(1), without specifying who has title to sue, provides that the carrier is liable for damage sustained in the event of the destruction or loss of, or damage to, any registered luggage or any goods, if the occurrence which caused the damage so sustained took place during the carriage by air. Article 30(3) provides (in the case of carriage to be performed by various successive carriers) that as regards luggage or goods, the passenger or consignor will have a right of action against the first carrier, and the passenger or consignee who is entitled to delivery will have a right of action against the last carrier, and each may take action against the carrier who performed the carriage during which the destruction, loss, damage or delay took place; those carriers will be jointly and severally liable to the passenger or to the consignor or consignee. The liability of the carrier in the *Impala Platinum* case, said Navsa JA, was clearly liability of the kind envisaged by art 18 (para 31 at 554*e–f*), and art 30 applied to the *Impala Platinum* case and on the face of it gave a consignor the right to sue for loss (para 33 at 554*j*).

Furthermore, in *Tasman Pulp and Paper Co Ltd v Brambles J B O'Loghlen Ltd* [1981] 2 NZLR 225 at 235, Pritchard J in the New Zealand High Court remarked that a right of action was expressly conferred by the Convention on consignor and consignee in certain circumstances for the good and sufficient reason that consignors and consignees with no proprietary interests could not, at common law, maintain any sort of action against the

© Siber Ink CC, M Dendy

This *Sibergramme* may not be copied or forwarded without permission from

Siber Ink CC

carrier. It did not follow that the right of the owner of the goods was therefore abrogated (para 39 at 556*e–f*).

It was accordingly evident that **consignors and consignees were frequently nominally involved, and were entitled by the Convention to sue in order to vindicate the rights of others with a recognizable interest in the cargo** (para 40 at 556*f–g*). To decide the *Impala Platinum* case in favour of the respondents would accordingly be to disregard the realities of modern-day international air carriage, would make no commercial sense and would offend against the need for uniformity (sc in the interpretation of the Convention in different jurisdictions) (para 42 at 557*a–b*). An appeal against the dismissal by the court a quo of the appellant's claim was accordingly upheld, and it was held that the appellant had title to sue (para 43 at 557*b–c*).

Fugitive from justice

The decision in ***National Director of Public Prosecutions v Braun & another*** **2007 (1) SACR 326 (C)** was previously reported in 2007 (1) SA 189 and [2007] 1 All SA 211, and was surveyed in Civil Procedure Sibergramme 3 of 2007 (24 July 2007) 3.

Intervention

See ***Gory v Kolver NO & others (Starke & others intervening)*** **2007 (3) BCLR 249 (CC)** and ***Fraser v Absa Bank Ltd*** **2007 (3) BCLR 219 (CC)**, which are surveyed under '**CONSTITUTIONAL PRACTICE: *Intervention***' below.

3. APPLICATIONS

Ex parte

The decision in ***National Director of Public Prosecutions v Braun & another*** **2007 (1) SACR 326 (C)** was previously reported in 2007 (1) SA 189 and [2007] 1 All SA 211, and was surveyed in **Civil Procedure Sibergramme 3 of 2007** (24 July 2007) 4–6.

Urgent applications

The decision in ***National Director of Public Prosecutions v Braun & another*** **2007 (1) SACR 326 (C)** was previously reported in 2007 (1) SA 189 (C) and [2007] 1 All SA 211, and was surveyed in **Civil Procedure Sibergramme 3 of 2007** (24 July 2007) 4–6.

4. INTERDICTS

Anti-dissipation interdict

An application for the preservation of moneys in the possession of a third party in the form of 'a prejudgment *Mareva*-type interdict' was brought in ***Johannes Petrus***

© Siber Ink CC, M Dendy

This *Sibergramme* may not be copied or forwarded without permission from

Siber Ink CC

Oosthuizen t/a Home Builders v Dai Nippon Construction (Pty) Ltd & another **[2007] 1 All SA 610 (T)**. In the English decision which gave its name to interdicts of this type, *Mareva Compania Naviera SA v International Bulkcarriers SA, The Mareva* [1980] 1 All ER 213 (CA), Lord Denning MR remarked as follows at 215*a–b*, after quoting from *Halsbury's Laws of England* to the effect that whenever a right which can be asserted either at law or in equity does exist, the court is enabled, in a proper case, to grant an injunction to protect that right**:**

> 'In my opinion that principle applies to a creditor who has a right to be paid the debt owing to him, even before he has established his right by getting judgment for it. If it appears that the debt is due and owing, and there is a danger that the debtor may dispose of his assets so as to defeat it before judgment, the court has jurisdiction in a proper case to grant an interlocutory judgment so as to prevent him disposing of those assets.'

(See *Oosthuizen's* case para 2 at 611*i–j*, where this passage is reproduced.) After remarking that in England the *Mareva* injunction is essentially a prejudgment anti-dissipation order and referring to the disapproval by the Appellate Division of the term 'anti-dissipation' on the ground that the interdict may be sought, not to prevent the respondent from dissipating assets, but from preserving them so well that the applicant cannot get his hands on them (*Knox D'Arcy Ltd & others v Jamieson & others* 1996 (4) SA 348 (SCA), [1996] 3 All SA 669 at 372B–C (SA), 689*h–i* (All SA)), Patel J in *Oosthuizen* pointed out that **the fundamental purpose of the *Mareva*-type interdict is to freeze or preserve an asset in issue between an applicant and a respondent. It is essentially an interlocutory interdict to restrain a respondent or even a third party who is in possession of an asset, even if it is money, in respect of which the applicant has neither a proprietary title nor a vindicatory claim** (para 4 at 612*e–g*, with reference to *Nieuwoudt v Maswabi NO & others* 2002 (6) SA 96 (O) para 6 at 100H–I, para 7 at 102E–F). (With regard to the quibble over the name to be given to the interdict, a possible palliative is the use of the expression '*Knox D'Arcy* interdict', after the name of the leading South African case in which an interdict of that type was recognized. See Mervyn Dendy 'Anti-dissipation Interdicts' 2004 (Mar) *De Rebus* 30, followed by Stephen Peté, David Hulme, Max du Plessis & Robin Palmer *Civil Procedure: A Practical Guide* (2005) 454n251.)

Patel J proceeded to quote with approval the formulation by Jennifer Cane 'Prejudgment *Mareva*-type Interdicts in South African Law' (1997) 114 *SALJ* 77 at 83 of the requirements that must be established by an applicant seeking such an interdict**:**

> '1 the right which is the subject-matter of the main action and which he seeks to protect by means of interim relief is clear or, if not clear, is prima facie established, though open to some doubt. It must also be established that the court has jurisdiction in respect of the main action;
> '2 if such a case is only prima facie established, there is a well-grounded apprehension of irreparable harm to the applicant if the interim interdict is not granted and the applicant ultimately succeeds in establishing his right;
> '3 there is no other satisfactory remedy; and

© Siber Ink CC, M Dendy

This *Sibergramme* may not be copied or forwarded without permission from

Siber Ink CC

> '4 the balance of convenience favours the granting of a *Mareva*-type interdict – this is closely linked to the court's discretion to refuse an interdict pendente lite'.

(These requirements are, of course, merely the product of an application of the standard requirements for the grant of an interim or interlocutory interdict to the typical situation which arises in cases where a need for an anti-dissipation interdict exists. On the requirements for interlocutory interdicts, see C B Prest SC *The Law & Practice of Interdicts* (1996) 50–79, *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 1065.) The onus is on the applicant to establish the above four requirements (para 9 at 613*f*).

The applicant in *Oosthuizen's* case sought an anti-dissipation interdict to prevent the first respondent from paying certain moneys to the second respondent pending an action to be instituted by the applicant against the second respondent for moneys due by the second respondent to it in respect of building work. The applicant was a subcontractor to the second respondent, which had in turn been contracted by the first respondent to build fourteen schools.

Turning, against this factual background, to the first of the above four requirements, Patel J quoted with approval from the article by Cane, to the effect that **it was highly desirable as a matter of policy that the applicant be able to obtain a prejudgment *Mareva*-type interdict upon satisfying the normal common-law requirements for interdicts pendente lite**. A requirement that the applicant establish that the respondent had no bona fide defence to the main action would fetter the court's discretion, robbing the court of the flexibility required to work justice in such matters**:** the court had to be free to determine the balance of convenience as justly as possible in situations where disputed issues between the parties could be properly determined only at trial. Before trial it might be necessary, in the interests of justice, to restrain the respondent from making himself 'judgment-proof' (para 10 at 613*h–j*, with reference to (1997) 114 *SALJ* at 87). On the facts before the court in *Oosthuizen*, the applicant had satisfied the first requirement for the grant of the interim order sought. The applicant had demonstrated that the building work in question had been performed by him, that the second respondent was indebted to him, and that the first respondent was due to make payment to the second respondent for the work which was done by the applicant. The second respondent could therefore not seriously dispute that the applicant had a prima facie right to freeze the moneys in question pending the determination of the action to be instituted against the second respondent (para 12 at 614*e–f*).

Turning to the second requirement, Patel J pointed out that the applicant had shown the second respondent to be 'an entity of straw', and thus that he had a reasonable apprehension of irreparable harm if the first respondent paid the second respondent and the latter absconded with the money (para 13 at 614*g–h*). The second respondent did not appear to have a solid financial foundation (para 15 at 614*i–j*). The applicant was unable to perfect any form of security, and **any judgment granted in his favour against the second respondent would be rendered nugatory if the interdict sought were not granted** (para 15 at 615*a–b*).

© Siber Ink CC, M Dendy

This *Sibergramme* may not be copied or forwarded without permission from

Siber Ink CC

With reference to the third requirement, the question was whether the applicant had any other satisfactory remedy. The question of an alternative remedy (for example one sounding in damages) did not arise in the context of an application for a prejudgment *Mareva*-type interdict, since the purpose of the interdict was not to be substitute for a claim for damages but simply to reinforce and render that claim more effective. The pertinent question was whether there was another ordinary remedy which would assist or protect the applicant. On the facts in *Oosthuizen*, **the applicant had no satisfactory remedy other than to secure as expeditiously as possible an interim order to freeze the moneys in the hands of the first respondent before the moneys were paid out to the second respondent**, pending the institution of action against the second respondent (para 16 at 615*c–e*, with reference to *Knox D'Arcy* 1996 (4) SA at 373B–C, [1996] 3 All SA at 690*h–i*, and Cane (1997) 114 *SALJ* at 89).

The final requirement, that the balance of convenience favoured the applicant, was intrinsically linked to the court's discretion whether or not to grant an interdict pendente lite. The court had 'an inherent jurisdiction to do justice' (para 17 at 615*g–i*, with reference to *Ex parte Millsite Investment Co (Pty) Ltd* 1965 (2) SA 582 (T) at 585H). In *Oosthuizen*, said Patel J, the balance of convenience certainly tilted the scales of justice and fairness in favour of the applicant. **The harm to the applicant lay in the fact that he might very well be left with a hollow judgment if the interim relief was not granted**. The only possible disadvantage to the second respondent was that it would not be able to receive the money immediately, but would have to wait until the finalization of the contemplated action and then, if successful, receive the money together with interest (para 19 at 616*a–b*).

The applicant was therefore entitled to an interdict, and an order was made in terms of a draft which provided (inter alia) for payment of the moneys in question into the trust account of the applicant's attorneys and for the withdrawal of those moneys upon provision of a satisfactory bank guarantee for payment to the applicant of the amount claimed by him in the event of a judgment being granted in his favour in the contemplated action (para 21 at 616*e*–617*a*).

5. JUDGMENTS AND ORDERS

Contempt of court

The decision in ***Dezius v Dezius*** **[2007] 1 All SA 483 (T)** was previously reported in 2006 (6) SA 395, and was surveyed in **Civil Procedure Sibergramme 2 of 2007** (13 July 2007) 11–13.

Reconsideration of order granted in urgent application

The decision in ***National Director of Public Prosecutions v Braun & another*** **2007 (1) SACR 326 (C)** was previously reported in 2007 (1) SA 189 and [2007] 1 All SA 211, and was surveyed in **Civil Procedure Sibergramme 3 of 2007** (24 July 2007) 4–6.

© Siber Ink CC, M Dendy

This *Sibergramme* may not be copied or forwarded without permission from

Siber Ink CC

6. APPEALS

Exercise of discretion by court a quo

The question whether it is just and equitable that a person be removed from office as the executor of a deceased estate in terms of s 54(1)*(a)*(v) of the Administration of Estates Act 66 of 1965 entails the exercise of a discretion by the High Court. **This is a discretion 'in the strict sense'**, and therefore an appellate court will ordinarily interfere with the exercise of that discretion only in limited circumstances, for example if it is shown that the High Court did not act judicially in exercising its discretion, or based the exercise of that discretion on a misdirection on the material facts or on wrong principles of law**:** ***Gory v Kolver NO & others (Starke & others intervening)*** **2007 (3) BCLR 249 (CC)** para 57 at 272F–G).

A similar conclusion was reached in ***Fraser v Absa Bank Ltd*** **2007 (3) BCLR 219 (CC)**, where the discretion conferred on a High Court hearing proceedings in terms of s 26(6) of the Prevention of Organised Crime Act 121 of 1998 (dealing with the release of property in order to provide for reasonable living or legal expenses of a person whose property is under a restraint order in terms of the Act) was held to be one with which a court of appeal will interfere only in limited circumstances. As a court of first instance, the High Court would necessarily have to take a somewhat robust approach, based on the facts before it. **Provision for reasonable legal expenses in a restraint order was not a final determination of the fate of the defendant's property, and an appellate court would not question whether the decision reached by the court of first instance was the correct one** (para 71 at 242C–D, with reference to *Giddey NO v JC Barnard and Partners* 2007 (2) BCLR 125 (CC) para 19 at 132F–133C). But where the discretion in such a case is exercised on the basis of an incorrect legal principle, it should be set aside (para 79 at 244G–H).

7. CONSTITUTIONAL PRACTICE

Application for leave to appeal to Constitutional Court

In determining, in an application for leave to appeal to the Constitutional Court, whether an argument raises a constitutional issue, and thus falls within the Court's jurisdiction, the Court is not strictly concerned with whether the argument will ultimately be successful. In the case of the development of the common law under s 39(2) of the Constitution of the Republic of South Africa, 1996, the question is whether the argument forces the Court to consider constitutional rights or values. Whether the submission is ultimately found to be sound is another matter altogether, and at the level of an application for leave to appeal, that concerns the question whether the appeal on that ground has reasonable prospects of success**:** ***Minister of Safety and Security v Luiters*** **2007 (3) BCLR 287 (CC)** para 23 at 294C–E.

The question whether it is in the interests of justice to hear the matter depends in part on the applicant's prospects of success (para 24 at 294E–F). The Constitutional Court

© Siber Ink CC, M Dendy

This *Sibergramme* may not be copied or forwarded without permission from

Siber Ink CC

will grant leave to appeal only if it is in the interests of justice to do so (para 31 at 295F–G). **It will seldom be in the interests of justice to grant leave to appeal to the Constitutional Court if there are no reasonable prospects of success** (para 32 at 296B–C, with reference to *S v Bierman* 2002 (5) SA 243 (CC), 2002 (10) BCLR 1078, 2002 (2) SACR 219 para 9 at 245H–246A (SA), 1081G–H (BCLR), 221*h*–222*a* (SACR) and *Mabaso v Law Society, Northern Provinces, & another* 2005 (2) SA 117 (CC), 2005 (2) BCLR 129 para 27 at 133A–C (SA), 141A–C (BCLR)). Finding that no such prospects existed in *Luiters*, the Court accordingly dismissed the application for leave to appeal (para 37 at 297C; para 43 at 298D).

The Constitutional Court in ***Fraser v Absa Bank Ltd*** **2007 (3) BCLR 219 (CC)** again considered, in the context of an application for leave to appeal, the question of what amounts to a constitutional matter in the light of s 167(3)(b) of the Constitution, which provides that the Court may decide only constitutional matters, and issues connected with decisions on constitutional matters. To attempt to define the limits of the term 'constitutional matter' rigidly, said Van der Westhuizen J (on behalf of the Court), was neither necessary nor desirable. Philosophically and conceptually, it was difficult to conceive of any legal issue that was not a constitutional matter within a system of constitutional supremacy. All law was, after all, subject to the Constitution, and law inconsistent with the Constitution was invalid. Nevertheless, the jurisdiction of the Court was expressly restricted to only those matters outlined in s 167(3)(b) (para 36 at 231F–232A, with reference to s 2 of the Constitution). **In a system of constitutional supremacy, it was inappropriate to construe the term 'constitutional matter' narrowly** (para 37 at 232A–B, with reference to *Pharmaceutical Manufacturers Association of SA & another: In re Ex parte President of the Republic of South Africa & others* 2000 (2) SA 674 (CC), 2000 (3) BCLR 241 (CC) para 20 at 687H–I (SA), 252F (BCLR) and *S v Boesak* 2001 (1) SA 912 (CC), 2001 (1) BCLR 36 para 14 at 918E–919C (SA), 41A–D (BCLR)).

A constitutional matter was presented where a claim involved**:**

- the interpretation, application or upholding of the Constitution itself, including issues concerning the status, powers or functions of an organ of state, and disputes between organs of state;
- the development of (or the failure to develop) the common law in accordance with the spirit, purport and objects of the Bill of Rights;
- a statute that conflicted with a requirement or restriction imposed by the Constitution;
- the interpretation of a statute in accordance with the spirit, purport and objects of the Bill of Rights (or the failure to do so);
- the erroneous interpretation or application of legislation that had been enacted to give effect to a constitutional right or in compliance with the legislature's constitutional responsibilities; or
- executive or administrative action that conflicted with a requirement or restriction imposed by the Constitution

© Siber Ink CC, M Dendy

This *Sibergramme* may not be copied or forwarded without permission from

Siber Ink CC

(para 38 at 232E–233C). While the conception of a constitutional matter was broad, the term was not completely open. The fact that s 167(3)(b) of the Constitution limited the Court's jurisdiction to constitutional matters presupposed that **a meaningful line had to be drawn between constitutional and non-constitutional matters**, and it was the responsibility of the Court to do so. Decisions of the Court had recognized the distinction (para 39 at 233C–D).

A contention that a lower court had reached an incorrect decision was not, continued Van der Westhuizen J, without more, a constitutional matter. Moreover, the Constitutional Court would not assume jurisdiction over a non-constitutional matter only because an application for leave to appeal was couched in constitutional terms. **It was incumbent on an applicant to demonstrate the existence of a bona fide constitutional question**. An issue did not become a constitutional matter merely because an applicant called it one. The other side of the coin, however, was that an applicant could raise a constitutional matter even though the argument advanced as to why an issue was a constitutional matter, or what the constitutional implications of the issue were, might be flawed. The acknowledgement by the Constitutional Court that an issue was a constitutional matter, furthermore, did not have to result in a finding on the merits of the matter in favour of the applicant who raised it (para 40 at 233D–234B).

The question raised by the application in *Fraser*, said Van der Westhuizen J, was whether the interpretation by the Supreme Court of Appeal of s 26 of the Prevention of Organised Crime Act 121 of 1998 had failed to promote the spirit, purport and objects of the Bill of Rights in terms of s 39(2) of the Constitution. Section 39(2) required more from a court than to avoid an interpretation which conflicted with the Bill of Rights. It demanded the promotion of the spirit, purport and objects of the Bill of Rights, which were to be found in the matrix and totality of rights and values embodied in the Bill of Rights. It could also in appropriate cases be found in the protection of specific rights, like the right to a fair trial in s 35(3), which was in issue in *Fraser*. The spirit, purport and objects of the protection of the right to a fair trial had therefore to be considered. A constitutional matter had thus been raised, and the Constitutional Court accordingly had jurisdiction to hear the matter (para 47 at 235F–I).

Turning to s 167(6) of the Constitution, Van der Westhuizen J added that an appeal could be brought to the Constitutional Court when it was in the interests of justice to grant leave to appeal. This was determined through a careful and balanced weighing-up of a number of factors (para 48 at 236A–B). The constitutional matter raised in the application in *Fraser* was of considerable importance, and that was highly relevant to the interests-of-justice enquiry. So was the complexity of the matter raised (para 49 at 236B–C). The prospects of success were also important in the determination whether to grant leave to appeal. It could not be said in *Fraser* that there were no prospects of success (para 50 at 236C), and leave to appeal had therefore to be granted (para 51 at 236C–D).

Costs

The Constitutional Court in ***Gory v Kolver NO & others (Starke & others intervening)*** **2007 (3) BCLR 249 (CC)** directed the Minister of Justice and Constitutional Development (fifth respondent in the proceedings before the Court) to pay the costs of

© Siber Ink CC, M Dendy

This *Sibergramme* may not be copied or forwarded without permission from

Siber Ink CC

the applicant, who had successfully sought an order declaring the omission from s 1(1) of the Intestate Succession Act 81 of 1987 of a reference to a partner in a permanent same-sex life partnership in which the partners had undertaken reciprocal duties of support to be unconstitutional, and also to pay the costs of the first respondent, who had been appointed as the executor of the deceased estate of the same-sex life partner of the applicant. The order covered costs not only in the Constitutional Court but also in the High Court, which had made an order of invalidity that was, subject to certain changes to the order, upheld in confirmation proceedings before the Constitutional Court. The basis on which the Minister was ordered to pay the applicant's and the first respondent's costs was that the state is under an ongoing constitutional obligation to 'respect, protect, promote and fulfil the rights in the Bill of Rights' (s 7(2) of the Constitution) by ensuring (inter alia) that legislation which violates constitutional rights is amended or replaced. Despite this obligation, and despite dicta of the Constitutional Court to the effect that comprehensive legislation accommodating same-sex life partnerships in a constitutionally acceptable manner was necessary, such legislation had (at the time of the judgment in *Gory's* case) not yet been forthcoming. Members of the gay and lesbian community had continued to have to approach the courts to challenge legislation violating their constitutional rights and, by doing so, to achieve piecemeal reform of the law. In the final analysis, it was the state which was responsible for the fact that s 1(1) of the Intestate Succession Act in its unconstitutional form remained on the statute books. **The effect of ordering the applicant or the parents of the deceased or the executor of the latter's estate to pay costs would be to burden those ill-resourced to do so with the costs of asserting important constitutional rights in the interests of the broader society**. These exceptional circumstances called for an exceptional costs order, and justice and equity required that the Minister be ordered to pay the applicant's costs, and those of the executor, in both the High Court and the Constitutional Court (para 65 at 276A–E; para 66(g) at 277I).

Delay in finalization of proceedings

In ***Minister of Safety and Security v Luiters*** **2007 (3) BCLR 287 (CC)**, where the Constitutional Court dismissed an application for leave to appeal against a judgment of the Supreme Court of Appeal holding the applicant liable for damages for injury caused by an off-duty policeman, Langa CJ (writing for the Court) remarked, in the light of the fact that eleven years had passed since the incident in which the injury was sustained, that **delay in litigation is 'deeply undesirable' and that 'it is important for courts to investigate significant delays where possible'** (para 38 at 297F–G).

Delays in personal-injury cases were of particular concern. Two factors of special relevance to persons severely disabled by catastrophe had to be borne in mind. The first was that the early period of recovery and rehabilitation was particularly stressful and likely to require expensive medical attention. The need for some form of financial support was particularly intense at that stage. The second was that the very disability giving rise to the claim weakened the capacity of the injured person to pursue the claim with all the vigour required (para 39 at 297G–I). The law in this area should, wherever possible, function in a manner that promoted justice to all concerned in as practical a

© Siber Ink CC, M Dendy

This *Sibergramme* may not be copied or forwarded without permission from

Siber Ink CC

manner as possible (para 40 at 297I–298A). The Chief Justice concluded by expressing the hope that the question of quantum of damages (which remained for determination) would be resolved in the speediest manner possible (para 41 at 298B–C).

Intervention

The Constitutional Court in ***Gory v Kolver NO & others (Starke & others intervening)*** **2007 (3) BCLR 249 (CC)**, in proceedings aimed at securing the confirmation of a High Court order of constitutional invalidity relating to s 1(1) of the Intestate Succession Act 81 of 1987, was faced with applications by third parties who were in dispute with one another to intervene in the proceedings. The outcome of the dispute between the third parties would hinge upon the outcome of the confirmation proceedings in *Gory*, and it was on that basis that the third parties sought to intervene. The applicants for leave to intervene cited Constitutional Court rule 8(1), which provides that any person entitled to join as a party or liable to be joined as a party in the proceedings may, on notice to all parties, at any stage of the proceedings apply for leave to intervene as a party. They acknowledged that uniform rule 12 (which deals with the intervention of persons as plaintiffs or defendants, and which is rendered applicable in motion proceedings by uniform rule 6(14)) is not expressly listed in Constitutional Court rule 29 as being one of the uniform rules which apply to proceedings in the Constitutional Court (although rule 6(14), which makes express reference to uniform rule 12, is so listed, thereby incorporating rule 12 by reference, as it were – a point apparently overlooked by Van Heerden AJ). Agreeing with a submission that the considerations applicable to uniform rule 12 as developed by the courts should be followed by the Constitutional Court in construing Constitutional Court rule 8 and the effect of it, Van Heerden AJ held that **the decisive criterion for a court in exercising its discretion whether or not to grant leave to intervene is whether the applicant for intervention has a direct and substantial interest in the subject matter of the litigation** (para 11 at 256B–D, with reference to *United Watch & Diamond Co (Pty) Ltd & others v Disa Hotels Ltd & another* 1972 (4) SA 409 (C) at 415C–416C).

The considerations applicable to uniform rule 12, continued Van Heerden AJ, are not necessarily wholly appropriate to a case involving an order of constitutional invalidity of a statute in terms of s 172 of the Constitution of the Republic of South Africa, 1996. The common-law principles relating to intervention of parties applied by the courts in respect of uniform rule 12 deal primarily with disputes in personam, whereas an order under s172 is an order in rem. In disputes concerning the constitutional validity of a statute, it was submitted that it would be impractical if the test of a direct and substantial interest in the subject matter of the action was again regarded as being the decisive criterion. This was because the Constitutional Court would not be able to function properly if every party with a direct and substantial interest in a dispute over the constitutional validity of a statute was entitled, as of right, to intervene in a hearing held to determine constitutional validity (para 12 at 256D–G). Describing this submission as ‘a convincing one’, Van Heerden AJ remarked that **in every case the Constitutional Court had to decide whether or not to allow intervention by considering whether it was in the interests of justice to grant leave to intervene**. Thus, in cases involving the constitutionality of a

© Siber Ink CC, M Dendy

This *Sibergramme* may not be copied or forwarded without permission from

Siber Ink CC

statute, while a direct and substantial interest in the validity or invalidity of the statute in question would ordinarily be a *necessary* requirement to be met by an applicant for intervention, it would not always be *sufficient* for the granting of leave to intervene. Even if the applicant was able to show a direct and substantial interest, the court had an overriding power to grant or refuse intervention in the interests of justice. Other considerations that could weigh with the court in this regard included the stage of proceedings at which the application for leave to intervene was brought, the attitude to the intervention application of the parties to the main proceedings, and the question whether the submissions which the applicant for intervention sought to advance raised substantially new contentions which might assist the Constitutional Court (para 13 at 256G–257B).

In *Gory*, the parties seeking intervention did have the requisite direct and substantial interest in the subject matter of the confirmation application, for at the time when the deceased in their dispute had died, there was no confirmed order of constitutional validity in respect of s 1(1) of the Intestate Succession Act. The rights conferred by that provision would cease if the High Court's order of constitutional invalidity in *Gory's* case were to be confirmed by the Constitutional Court and if there was found to be a relationship of the kind in issue in *Gory* between the deceased and the latter's same-sex partner at the time of the deceased's death. This gave the sisters of the deceased, who sought to intervene, a direct and substantial interest in the confirmation application (para 16 at 258A–D). Their application to intervene was brought as soon as reasonably possible after they became aware of the fact that the same-sex partner of their deceased brother claimed to be the latter's sole intestate heir. Neither the executor of the estate of the deceased in *Gory's* case nor the Minister opposed their application, although the applicant for confirmation in *Gory* took the view that the intervention application had no merit. **The submissions advanced by the sisters who sought intervention on certain of the issues before the Constitutional Court were substantially new contentions not canvassed in any detail (if at all) by the other parties, and as such were of considerable assistance to the Constitutional Court**. It would accordingly be unfair not to allow the sisters to participate in the proceedings, and the interests of justice required that their application for leave to intervene be granted (para 17 at 258D–F).

Once the sisters were allowed to intervene, the alleged same-sex partner of their deceased brother had also to be allowed to do so. He too had a direct and substantial interest in the subject matter of the confirmation application, his application was also timeously brought and his submissions countering those of the deceased's sisters were 'certainly cogent and helpful' to the Court. There could be no question that the interests of justice required that his application for intervention be granted (para 18 at 258F–H).

In the result, the applications to intervene by the would-be intervenors on both sides of the dispute succeeded, albeit with no order being made as to the costs of those applications (para 66(a) and (b) at 276E–F). The inference seems inescapable that in confirmation applications in which the would-be intervening parties are able to demonstrate a direct and substantial interest in the subject matter of the proceedings, **the question whether the parties who seek to intervene are able to advance new submissions which are helpful to the Constitutional Court will be crucial, and may well tip the balance between allowing and disallowing the application to intervene**.

© Siber Ink CC, M Dendy

This *Sibergramme* may not be copied or forwarded without permission from

Siber Ink CC

The issue of intervention was again considered in ***Fraser v Absa Bank Ltd*** **2007 (3) BCLR 219 (CC)**, this time in the context of an application by a judgment creditor to intervene in an application by a judgment debtor in terms of s 26(6) of the Prevention of Organised Crime Act 121 of 1998 for provision to be made for the latter's reasonable living and/or legal expenses where a restraint order was made under s 26 of the Act. Such a person, said Van der Westhuizen J (writing for the Court), must satisfy the court that he or she has disclosed under oath all his or her interests in property subject to the restraint order, and that he or she cannot meet the expenses for which an allowance is sought out of the unrestrained property. If the court is satisfied in this regard, s 26(6) gives the court a discretion**:** it may make such provision as it may think fit for reasonable living and/or legal expenses (para 55 at 237F–G). An obligation to satisfy a judgment was a relevant consideration to be taken into account in the exercise of the s 26(6) discretion, and s 30(5) of the Act supported a conclusion that concurrent debts were not irrelevant to what constituted realizable property (para 56 at 237H–I). The relevant provisions of the Act, however, could not mean that all concurrent creditors had under all circumstances to be allowed to intervene. Nor, even if permitted to intervene, could they automatically be treated as if they were preferent creditors, in a manner preventing a defendant from using his or her funds for reasonable legal expenses in the criminal trial or in forfeiture proceedings in terms of the Act (para 57 at 238A–B; see also para 74 at 243C). The purpose of a creditor's intervention would probably be to influence the court in the exercise of its discretion, for example to persuade it not to make an allowance for the defendant's legal expenses, or to limit the allowance so as to preserve as much of the defendant's estate as possible for the ultimate benefit of the judgment creditor (para 58 at 238B–C).

After detailing the circumstances in which a creditor may participate in the distribution of a defendant's estate which is subject to a restraint order (para 58 at 238C–239C), Van der Westhuizen J pointed out that s 31(1) of the Act expressly empowers the High Court to direct that payments be made from the proceeds of the defendant's estate under restraint before any of it is used to pay a confiscation order (to which the restraint order is intended as a precursor) (para 61 at 239G–H). **When a defendant's estate was under a restraint order and thus beyond the reach of creditors, it remained in their interest that as much of the estate as possible be preserved because part or all of it might still become available to them for the satisfaction of their claims**. If the defendant was paid a living- and/or legal-expense allowance from his or her estate while it was under restraint, the effect was to dissipate the estate and so reduce or even destroy creditors' prospects of recovery. It was accordingly usually in their interest to oppose any application in terms of s 26(6), in order to persuade the court not to allow the defendant to draw a legal-expense allowance (para 62 at 239H–240A). The High Court therefore had a discretion to allow a creditor to intervene (para 63 at 240A–B), and the correct view was that the relevant provisions of the Prevention of Organised Crime Act could not be understood to mean that a restraint order could necessarily elevate a defendant's legal expenses to a status similar to that of secured or preferent obligations (para 69 at 241E; see also para 77 at 243H–244A). The conclusion that **a concurrent creditor might under certain circumstances intervene** was justifiable on the wording of the Act (para 70 at 242A–B).

© Siber Ink CC, M Dendy

This *Sibergramme* may not be copied or forwarded without permission from

Siber Ink CC

The most practical approach appeared to be that any creditor who wished to intervene had to approach the court as soon as it became aware of s 26(6) proceedings, and that the court had to exercise its discretion as to whether to admit the creditor (para 74 at 243D–E).

Jurisdiction of Constitutional Court

Appeals to the Constitutional Court can be made only in constitutional matters or in relation to issues connected with decisions on constitutional matters (s 167(3)(b) of the Constitution of the Republic of South Africa, 1996). After referring to dicta in *Alexkor Ltd & another v The Richtersveld Community & others* 2004 (5) SA 460 (CC), 2003 (12) BCLR 1301 para 30 at 473A–D (SA), 1310I–1311C (BCLR) on the ambit of issues connected with decisions on constitutional matters, Van Heerden AJ (writing for the Court) in ***Gory v Kolver NO & others (Starke & others intervening)*** **2007 (3) BCLR 249 (CC)** held that whatever the precise meaning of the word 'connected' in s 167(3)(b), it must include a relationship of dependence between a primary order on a constitutional matter and an ancillary order. And what constitutes 'dependence' must be understood in a broad sense. There are important policy reasons for such an approach**: if a party may not approach the Constitutional Court for leave to appeal on ancillary matters, this would give rise to a bifurcated appeal and confirmation procedure in which the appeal on the ancillary matters could not be resolved before the Constitutional Court together with the confirmation application, but would have to be heard and resolved in separate proceedings before another court**. That would obviously be 'a most undesirable state of affairs', undermining the achievement of finality for the parties and resulting in an unnecessary waste of judicial resources (para 47 at 269F–I). Once the Constitutional Court decided (as it did in *Gory's* case) to confirm an order of constitutional invalidity in terms of s 172(2)(a) of the Constitution, it should logically also re-examine all ancillary orders made by the High Court, to determine whether those orders were just and equitable (para 50 at 270G). It might, added Van Heerden AJ, in any event well be that matters to which ancillary orders relate fall within the jurisdiction of the Constitutional Court as 'constitutional matters' in terms of s 167(3)(b). The High Court in *Gory*, in making various ancillary orders in the exercise of its powers in terms of s 172(1) of the Constitution, as a direct consequence of the declaration of invalidity and in the interests of justice and equity, was in every sense controlling the consequences of the declaration of invalidity. It was not only the direct order of unconstitutionality itself that had to be confirmed but all the orders made by the High Court which flowed from the finding of unconstitutionality. All of those orders would therefore be before the Constitutional Court as part of the confirmation proceedings (para 49 at 270A–C, with reference to *Dawood & another v Minister of Home Affairs & others*; *Shalabi & another v Minister of Home Affairs & others*; *Thomas & another v Minister of Home Affairs & others* 2000 (3) SA 936 (CC), 2000 (8) BCLR 837 para 18 at 954B–C, D (SA), 853B, C–D (BCLR)).

In ***Minister of Safety and Security v Luiters*** **2007 (3) BCLR 287 (CC)** the Constitutional Court held that it has the power to develop the common law in terms of s 173 of the Constitution of the Republic of South Africa, 1996 even in cases in which the

© Siber Ink CC, M Dendy

This *Sibergramme* may not be copied or forwarded without permission from

Siber Ink CC

claims arose at the time when the Constitution of the Republic of South Africa, Act 200 of 1993 was still in force. In the light of item 17 of Schedule 6 to the 1996 Constitution, the Court should deal with matters where claims were pending at the time when the 1996 Constitution came into operation (4 February 1997) on the basis that the interests of justice require the Court to apply the 1996 Constitution (para 17 at 292F–G, read with para 15 at 292C). Langa CJ (writing for the Court) relied on *Fedsure Life Assurance Ltd & others v Greater Johannesburg Transitional Metropolitan Council & others* 1999 (1) SA 374 (CC), 1998 (12) BCLR 1458 paras 110–11 at 413G–H, 414A–B (SA), 1496G–H, 1497A–B (BCLR), where it was held that the Supreme Court of Appeal after 4 February 1997 could deal, by virtue of its jurisdiction under the 1996 Constitution, without restriction with constitutional matters which were pending when that Constitution came into force. There was, it was held in *Fedsure*, no logical reason why the Supreme Court of Appeal should be considered competent to enforce the 1993 Constitution in proceedings which were not pending on 4 February 1997 (sc proceedings which were instituted only after that date) but not to enforce the 1993 Constitution in proceedings which were pending on that date. (It will be remembered that the Supreme Court of Appeal (then still known as the Appellate Division), under s 101(5) of the 1993 Constitution, had no jurisdiction to adjudicate any matter within the jurisdiction of the Constitutional Court.) By parity of reasoning, the Constitutional Court in *Luiters* held that **it would not be in the interests of justice to continue to enforce the limited jurisdiction of the Constitutional Court under the 1993 Constitution to develop the common law**. That would mean that matters would be sent back, even where there was no need to do so, to the High Court or to the Supreme Court of Appeal to develop the common law. Such a procedure would cause disruptions, delays and unnecessary costs in the disposal of appeals. Together with the fact that there was no substantial difference, in relation to the rights implicated in *Luiters*, between the 1993 Constitution and the 1996 Constitution, this led to the conclusion that it was in the interests of justice for the 1996 Constitution to be applied to cases where the development of the common law by the Constitutional Court was necessary, even where the facts might have arisen during the period of operation of the 1993 Constitution (para 17 at 292F–I).

Further on the jurisdiction of the Constitutional Court (in applications for leave to appeal), see under '***Application for leave to appeal to Constitutional Court***' above.

Postponement of Constitutional Court proceedings

It is 'most unusual' for the Constitutional Court to grant a postponement of a matter before it, as the judgment in ***Lekolwane & another v Minister of Justice and Constitutional Development*** **2007 (3) BCLR 280 (CC)** makes clear (para 8 at 283D). The applicants brought an application for leave to appeal against a decision of the High Court. Legal representatives appointed to act pro bono for the applicants filed heads of argument in preparation for a hearing in March 2006, but on the day of the hearing the first applicant expressed dissatisfaction with the contents of the argument filed by his representatives. The case was accordingly postponed to a date in August 2006 after the Chief Justice explained to the first applicant the unusual nature of a postponement in Constitutional Court proceedings, and made it clear that this would be a final

© Siber Ink CC, M Dendy

This *Sibergramme* may not be copied or forwarded without permission from

Siber Ink CC

postponement (para 8 at 283D–E). The day before the matter was due to resume in August, however, the applicants sought a further postponement of the hearing, and applied for condonation of their failure to file additional heads of argument and for an extension of time in which to do so. Both applications were dismissed, and the matter was struck off the roll on the date of the resumed hearing (para 15 at 284F–G).

Furnishing reasons for this order some three months later, the Court remarked that **the postponement of a matter set down for hearing on a particular date could not be claimed as of right. An applicant for postponement sought an indulgence from the Court, and a postponement would not be granted unless it was in the interests of justice to do so**. In this respect, the applicant would ordinarily show that there was good cause for the postponement. Whether a postponement would be granted was therefore in the discretion of the Court. In exercising that discretion, the Court took into account a number of factors, including (but not limited to) whether the application had been timeously made, whether the explanation given by the applicant for postponement was full and satisfactory, whether there was any prejudice to any of the parties, whether the application was opposed, and the broader public interest. All of those factors, to the extent appropriate, together with the prospects of success on the merits, would be weighed by the Court in order to determine whether it was in the interests of justice to grant the application (para 17 at 284H–285C, with reference to *Madnitsky v Rosenberg* 1949 (2) SA 392 (A) at 399, *National Coalition for Gay and Lesbian Equality & others v Minister of Home Affairs & others* 1999 (3) SA 173 (C), 1999 (3) BCLR 280 at 181D–E (SA), 287E–F (BCLR) and *National Police Service Union & others v Minister of Safety and Security & others* 2000 (4) SA 1110 (CC), 2001 (8) BCLR 775 paras 4–5 at 1112C–H (SA), 776H–777E (BCLR)).

If a postponement was refused and the applicant or his or her counsel was unable to argue the matter, it followed that the matter could not proceed and had to be struck off the roll. This did not mean that the doors were completely shut to a litigant, since a party could approach the Court afresh provided that good cause was shown and a full explanation given as to why the application should be enrolled in view of its history (para 18 at 285C–D).

The applicants in *Lekolwane*, continued the Court, had been given more than an ample opportunity to prepare their argument in the period preceding the hearing, but the applicants and their legal representatives had, rather carelessly, failed to treat the matter as one of urgency. Instead, they had adopted a lackadaisical approach to their application, despite knowing that the matter had already been finally postponed by the Court. They had failed, in seeking legal aid, to draw the attention of the Legal Aid Board to the fact that the matter was urgent. On the date of the resumed hearing, the Court had invited the applicants' legal representatives to proceed with argument on the basis of the heads of argument produced for the first hearing, but they were insufficiently prepared to do so. That lack of preparation could have been avoided had the applicant's legal representatives simply applied timeously for condonation and postponement. If the application had been rejected at that stage, the legal representatives could still have elected to proceed on the previous heads of argument submitted to the Court for hearing on the prior date – which the first applicant had intimated, with hindsight, had been adequate (para 19 at 285D–G).

© Siber Ink CC, M Dendy

This *Sibergramme* may not be copied or forwarded without permission from

Siber Ink CC

There accordingly did not appear to be any good cause shown for the application for condonation and postponement. On the contrary, the applicants had foregone opportunities to have the matter fully ventilated and had been warned that the previous postponement granted was a final one. To grant yet another postponement would have constituted 'a gross abuse of the processes of [the] Court', and as such it could not be considered in the interests of justice to grant the application. The request for condonation and postponement was accordingly dismissed (para 20 at 285H–I).

Unconstitutional statutory provision

In ***Gory v Kolver NO & others (Starke & others intervening)*** **2007 (3) BCLR 249 (CC)**, where the omission from s 1(1) of the Intestate Succession Act 81 of 1987 of a reference to a partner in a permanent same-sex life partnership in which the partners had undertaken reciprocal duties of support was declared unconstitutional, the question arose whether the declaration of unconstitutionality should operate prospectively or with retrospective effect. Writing for the Constitutional Court, Van Heerden AJ held that it would not be just and equitable to deny the applicant (who sought and was granted confirmation of an order of unconstitutionality, together with ancillary relief, made by the High Court) any effective constitutional relief by making the declaration of invalidity fully prospective, given that the applicant's same-sex life partner had died prior to institution of the proceedings, despite the effect which a retrospective declaration of invalidity would have on the interests of those who would otherwise have inherited on intestacy from the deceased (para 40 at 267D–E). The order of constitutional invalidity, it was held, should in the main operate retrospectively, but an order should be fashioned, in the exercise of the Court's powers in terms of s 172(1)(b)(i) of the Constitution of the Republic of South Africa, 1996, limiting the retrospective effect of the order of unconstitutionality so as to reduce the risk of disruption in the administration of deceased estates, and so as to protect the position of bona fide third parties as best possible (para 43 at 268E–F).

In the result, **the Court granted an order to the effect that the declaration of constitutional invalidity would not invalidate any transfer of ownership, prior to the date of the order, of any property pursuant to the distribution of the residue of an estate, unless it was established that when such transfer was effected, the transferee was on notice that the property in question was subject to a legal challenge on the grounds upon which the applicant had brought the application** in *Gory's* case (para 66(f).4 at 277B–D). If serious administrative or practical problems were experienced, any interested person could approach the Constitutional Court for a variation of the order (para 66(f).5 at 277D–E).

8. LITERATURE

***Fundamental Principles of Civil Procedure* (2006)** by **C Theophilopoulos, A W T Rowan, C M van Heerden and A Boraine**, all of whom are teachers of civil procedure at universities in Gauteng, is **an introductory work on civil procedure aimed at**

© Siber Ink CC, M Dendy

This *Sibergramme* may not be copied or forwarded without permission from

Siber Ink CC

students approaching the subject for the first time, usually in the course of their LLB studies. The authors express the hope in their preface, however, that candidate attorneys who are reading for the attorneys' admission examinations and pupil advocates preparing to sit the Bar Examination will also find the book of use. As one would expect in a work of this nature, the authors deal with practice and procedure in the Supreme Court of Appeal, the High Courts and the magistrates' courts (although not the Constitutional Court, except briefly and in passing).

Alastair Smith of the University of South Africa, in an article entitled 'In Whose Name?' **(2006) 14 *Juta's Business Law*** 105ff discusses recent case law on the question of **the correct person to cite in legal proceedings in terms of s 386(4)*(a)* of the Companies Act 61 of 1973**.

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

© Siber Ink CC, M Dendy

This *Sibergramme* may not be copied or forwarded without permission from

Siber Ink CC