CIVIL PROCEDURE

SIBERGRAMME 21/2007

ISSN 1814-0564

8 May 2009

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

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1. INTRODUCTION

This Sibergramme, which is the last in the 2007 subscription year, deals with cases reported in the **November 2007** issues of ***The South African Law Reports*** and ***The All South African Law Reports***.

2. JURISDICTION

Transfer of proceedings from one High Court to another

Section 9(1) of the Supreme Court Act 59 of 1959 provides**:**

> 'If any civil cause, proceeding or matter has been instituted in any provincial or local division, and it is made to appear to the court concerned that the same may be more conveniently or more fitly heard or determined in another division, that court may, upon application by any party thereto and after hearing all other parties thereto, order such cause, proceeding or matter to be removed to that other division.'

In *Welgemoed & another NNO v The Master & another* 1976 (1) SA 513 (T) at 523B—D McEwan J held that a court has no power to transfer a case to another court in terms of s 9(1) of the Supreme Court Act on the ground of convenience unless the court transferring the case had jurisdiction to entertain the case in the first place.

Section 3(1) of the Interim Rationalisation of Jurisdiction of High Courts Act 41 of 2001 provides**:**

> 'If any civil proceedings have been instituted in any High Court, and it appears to the Court concerned that such proceedings –
> *(a)* should have been instituted in another High Court; or
> *(b)* would be more conveniently or more appropriately heard or determined in another High Court,
> the Court may, upon application by any party thereto and after hearing all other parties thereto, order such proceedings to be removed to that other High Court.'

In ***Amalgamated Services v Bojanala Platinum District Municipality*** **2007 (6) SA 143 (T)** the novel question arose whether the plaintiff was entitled to an order removing an action from the Transvaal Provincial Division to the Bophuthatswana High Court in terms of s 3(1)*(a)* of the Interim Rationalisation of Jurisdiction of High Courts Act where the defendant was an incola of the Bophuthatswana High Court and the action should

have been instituted in that High Court, but the Transvaal Provincial Division would have had jurisdiction to entertain the matter had it not been for a notice excising the magisterial district of the defendant municipality from the area of jurisdiction of the Transvaal Provincial Division and adding it to the area of jurisdiction of the Bophuthatswana High Court. The alteration to the areas of jurisdiction of the two High Courts had occurred some nine months before the action was instituted, resulting in the Transvaal Provincial Division not having jurisdiction to hear the action at the time when it was instituted.

After referring to the decision in *Welgemoed*, Patel J remarked that it was important that that decision was delivered prior to the present constitutional dispensation and, specifically, prior to the introduction of the Interim Rationalisation of Jurisdiction of High Courts Act. **The court, by the very meaning of s 3 of the Act, had been given jurisdiction to entertain an application of the kind before it, regardless of whether it would have had jurisdiction to entertain the matter on its merits**. Patel J apparently accepted the submission by counsel for the plaintiff that it was clearly the intention of the legislature, by enacting the Act, that no litigant should be prejudiced, or at least non-suited, should it appear that an action was erroneously instituted in a specific court which would otherwise have had jurisdiction but for a change in jurisdiction in terms of the Act. That was clear from, inter alia, the wording of the preamble to the Act, with the specific reference that it was envisaged, in item 16(6) of Schedule 6 to the Constitution of the Republic of South Africa, 1996 that the rationalization process would be a comprehensive one requiring a considerable period of time to bring to conclusion. It also appeared from the preamble that specific reference was made to 'equity' in relation to the administration of justice throughout the whole of the Republic (para 7 at 145I—146D).

It was, continued Patel J, furthermore of importance that no allegations of mala fides on the part of the plaintiff were made or appeared to be present. Nothing therefore prevented an order as sought by the plaintiff, bearing in mind the principles of interpretation of statutes 'and especially the purposefulness thereof' (para 8 at 146D—E; see also para 11 at 146H—I). There was no need for any deviation from the literal, clear and unambiguous language of s 3 of the Act (para 9 at 146F).

It was not necessary for the court to deal with the question whether s 3 of the Interim Rationalisation of Jurisdiction of High Courts Act had superseded, without expressly repealing, s 9 of the Supreme Court Act. **Section 3 provided an additional ground for removal of a matter from one High Court to another – that the proceedings should have been instituted in that other High Court** (para 10 at 146F—H).

If the application for the transfer of the matter was not granted, added Patel J, the plaintiff would effectively be non-suited because it was evident that a successful plea of prescription would then of necessity be upheld (para 12 at 146I—J). An order was accordingly granted that the matter be removed to the High Court of Bophuthatswana in terms of s 3(1)*(a)* of the Interim Rationalisation of Jurisdiction of High Courts Act (para 14 at 147E).

Finally, although the matter was res nova, Patel J ordered the defendant to pay the costs of the application because the defendant had been requested by the plaintiff's attorney to have due regard to s 3 of the Act and to furnish the plaintiff with its consent to have the matter removed, as there would be no prejudice in doing so. That request had been 'blatantly denied' when, upon a proper consideration of the matter and upon diligent

action, such consent should have been forthcoming, obviating the need for the application. Since the matter was not ripe for hearing, there could be no prejudice to any of the parties if the matter was so transferred, and there was 'no reason in principle or logic why the plaintiff should be mulcted with any costs whatsoever', regardless of the fact that the matter could be described as res nova. The defendant was, after all, a legal entity created by statute and, as a local authority forming part of the three cornerstones of government, it carried responsibility for good governance and the efficient promotion of equity as envisaged in the preamble to the Act. There was no reason why the plaintiff/applicant should be out of pocket to any extent with regard to the costs in the matter (para 14 at 147A—E).

The proper interpretation of s 3 of the Interim Rationalisation of Jurisdiction of High Courts Act arose again for consideration in ***Gumede v Road Accident Fund*** **2007 (6) SA 304 (C)**, where an application was brought for the removal of an action from the Cape Provincial Division to the Natal Provincial Division. The action had been instituted in the former High Court because it was believed that the claim was being administered by the Cape Town office of the Road Accident Fund (even though the collision giving rise to the claim had occurred in KwaZulu-Natal), and because a notice published in 1997 *De Rebus* 383 stated that legal proceedings could be instituted in the High Court within whose area of jurisdiction the office of the Road Accident Fund administering a claim was situated.

Referring to the use of the word 'any' in the expression '[i]f any civil proceedings have been instituted in any High Court' appearing at the start of s 3(1), Van Reenen J pointed out that the word 'any', unless restricted by the subject matter or the context, is prima facie a word of wide and unqualified generality that includes all things to which it relates. Accordingly, the use of the word 'any' in s 3(1) in connection with 'civil proceedings' and 'High Court' clearly signified an intention on the part of the legislature that its provisions were to apply to all forms of civil proceeding and all High Courts without exclusion. Section 3(1) provided that courts 'may' upon application order any civil proceedings to be removed to another High Court if it appeared that either of the following circumstances was present**:** *(a)* that the proceedings before the court should have been instituted in another High Court; or *(b)* that such proceedings would be more conveniently or more appropriately heard or determined by another High Court. The word 'may' was used in the context of s 3(1) in a permissive sense consistent with an intention to confer upon High Courts a discretion in the sense of the power or competence to transfer civil proceedings to other High Courts if it appeared to them that such circumstances were present (para 13 at 309B—H). It was clear upon even a cursory reading of s 3(1)*(a)* and *(b)* that the circumstances referred to therein were disparate. **The reference in s 3(1)*(a)* to another High Court in which the proceedings should have been instituted was clearly intended to be a reference to the court which enjoyed jurisdiction in terms of the provisions of s 19(1)*(a)* of the Supreme Court Act, and implied that the High Court in which proceedings had been instituted did not have jurisdiction** (para 14 at 309H—I). Section 3(1)*(a)*, unlike s 3(1)*(b)*, had no equivalent in the similarly worded s 9(1) of the Supreme Court Act (para 15 at 309I—J).

It had, continued Van Reenen J, been held in a long line of cases, supported by text-book writers, that a court might order the removal of a matter to another court only if the former court itself had jurisdiction to hear the matter. It had also been held that, unlike

the court which ordered the removal, the court to which the matter was removed did not need to have jurisdiction, and that there was a firmly established practice that jurisdiction could in that manner be conferred on the court to which the matter had been removed. There was no apparent reason why the requirement that the court transferring a matter to another court should itself have jurisdiction should not find application in the case of s 3(1)*(b)*, but it was unnecessary to make any firm findings in that regard because the basis of the application for removal in *Gumede* was restricted to the provisions of s 3(1)*(a)* of the Act (para 15 at 310C—G).

Turning to the question whether it was necessary for the court transferring civil proceedings to another court in terms of s 3(1)*(a)* to have jurisdiction itself, Van Reenen J remarked that the line of decided cases which had apparently served as the foundation of the finding in later cases to the effect that the court exercising powers of removal in terms of s 9(1) of the Supreme Court Act must itself have had jurisdiction were based on an interpretation of then extant statutory provisions which permitted a transfer from one court to another in not dissimilar terminology. Such considerations, however, did not apply in the case of s 3(1)*(a)* (para 16 at 310G—J). A High Court's jurisdiction under s 19(1)*(a)* of the Supreme Court Act was determined with reference to the common law, any relevant statutes and its inherent jurisdiction. It was apparent from the wording of s 3(1)*(a)* that it envisaged the removal of civil proceedings which had been instituted in a court other than one in which it ought to have been instituted (sc one without jurisdiction) to another court where it should have been instituted (sc one with jurisdiction). **That subsection, at least by clear implication, empowered a High Court which did not enjoy jurisdiction to order the removal of any civil proceedings before it to another court which enjoyed jurisdiction and in that manner brought about a pro tanto statutory amplification of the jurisdiction of High Courts** (para 17 at 310J—311C). The court therefore did have jurisdiction to grant the removal sought by the applicant if the court was satisfied, on all the relevant facts, that it should exercise its discretion in the applicant's favour (para 18 at 311C—E). The reference to the High Court in which the proceedings should have been instituted in s 3(1)*(a)* was consistent with a recognition by the legislature of the generally accepted precepts of jurisdiction rather than a negation thereof, and any fears that that construction might lead to abuse by litigants who knowingly and deliberately instituted civil proceedings in courts which lacked jurisdiction were allayed by the fact that any malpractices which might manifest themselves could be taken into account by courts in exercising their discretion whether to transfer or not (para 19 at 311E—G).

The unconventionality of the amplification of the jurisdiction of High Courts by means of an Act promulgated for a specific and limited purpose and intended to operate merely on an interim basis had to be conceded, but the language used in s 3(1)*(a)* was so unambiguous and unrestricted that it was difficult to arrive at a conclusion other than that that was exactly what the legislature intended (para 20 at 311G—H).

On the issue whether the court should exercise its discretion in favour of the applicant, Van Reenen J pointed out that if proceedings were to be instituted anew in the Natal Provincial Division, costs additional to those already incurred would have to be incurred. Such a procedure would result in further delays in the finalization of the matter, and the respondent would be in a position to avail itself of the opportunity of arguing that the

claim had partly become prescribed (para 21 at 311H—312A). Having regard to the absence of any blame on the part of the applicant personally as regards the court in which the proceedings were instituted, that the respondent had had adequate notification of the claim, that it was not improbable that the applicant's attorneys had been misled by the notice in *De Rebus* on which they had relied, the substantial prejudice the applicant would suffer if her claim was disallowed in part on the basis of prescription, the further delays that would result, the costs that would have been incurred abortively and the further costs that would result if the application were to be refused, and the absence of any material prejudice to the respondent should the application be granted, it was appropriate for the court's discretion to be exercised in favour of the applicant (para 21 at 312D—G).

The application for removal was accordingly granted (para 22 at 312G).

The decision in *Gumede* that a removal may not take place in terms of s 3(1)*(b)* unless the court ordering the removal has jurisdiction to hear the merits of the matter must respectfully be supported on the basis of the similarity between that provision and s 9(1) of the Supreme Court Act, to which the same principle applies. The decision that a court may order a removal in terms of s 3(1)*(a)* notwithstanding its lack of jurisdiction on the merits must also be supported, on the basis that the formulation 'should have been instituted in another High Court' can only mean 'should not have been instituted where the claim was indeed instituted despite the fact that the claim is justiciable at High Court level'. And the reason why a claim should not have been instituted where it was, even though another High Court is competent to hear it, is that the High Court in which the proceedings were in fact instituted lacks jurisdiction to hear the claim on its merits.

3. PARTIES

Taxing master

The decision in ***Standard Bank of SA Ltd & another v Malefane & another: In re Malefane v Standard Bank of SA Ltd & another*** **[2007] 4 All SA 1059 (Tk)** was previously reported in 2007 (4) SA 461, and was surveyed in **Civil Procedure Sibergramme 18 of 2007** (8 December 2008) 5.

4. APPLICATIONS

Attestation of affidavit

The decision in ***Standard Bank of SA Ltd & another v Malefane & another: In re Malefane v Standard Bank of SA Ltd & another*** **[2007] 4 All SA 1059 (Tk)** was previously reported in 2007 (4) SA 461, and was surveyed in **Civil Procedure Sibergramme 18 of 2007** (8 December 2008) 9—10.

Authority to depose to affidavits

In ***Alton Coach Africa CC v Datcentre Motors (Pty) Ltd t/a CMH Commercial*** **2007 (6) SA 154 (D)** the applicant challenged the locus standi of the respondent to oppose an application for an interdict on the basis that the deponent to the respondent's answering affidavit did not allege or prove that he had authority to depose to the affidavit filed on behalf of the respondent.

Dealing with this objection, Ndlovu J remarked that the authority to act on behalf of a corporate entity (such as the respondent) which was a party to judicial proceedings, and the entitlement of the other party to challenge such authority, was governed by uniform rule 7(1) (para 18 at 159I—J). Although generally a legal point could be raised at any stage of the proceedings, it was not acceptable that the applicant had challenged the authority of the respondent's deponent only in supplementary heads of argument, since rule 7(1) contemplated that the person whose authority was challenged had to be accorded an opportunity to rectify the defect or to respond to the challenge in some other way (para 19 at 160B—D). The rationale behind rule 7(1) was, among other things, to safeguard and protect corporate entities against unscrupulous and opportunistic employees or persons who could well conduct dealings on behalf of an entity but against the wishes of the entity concerned. In the present case, however, it was clear from the deponent's unchallenged averments that he occupied a position at a senior level of the respondent's management, and was the person who had been involved with the transaction which had led to the legal proceedings in question. Indeed, it did not seem, from the respondent's perspective, that there would have been any better and more knowledgeable person who could more appropriately have dealt with the matter on behalf of the respondent. And if the deponent had not been duly authorized, the respondent would obviously have intervened and brought to the court's attention that that was the position (para 20 at 160D—G). The issue, however, should have been brought up some time prior to the hearing of the application in a way that would have allowed the respondent an opportunity to respond accordingly. In the present instance, the respondent had not been afforded the opportunity either to file the necessary authority or to respond in a manner it deemed appropriate. Furthermore, in the light of the deponent's position in the respondent's organization, he had indeed been authorized by the respondent to depose to the answering affidavit. The applicant's objection accordingly had to fail (para 21 at 160G—J, with reference to *Fourways Mall (Pty) Ltd & another v South African Commercial Catering and Allied Workers Union & another* 1999 (3) SA 752 (W) at 758C—H and *Moosa & Cassim NNO v Community Development Board* 1990 (3) SA 175 (A) at 180H—181C).

Although (with respect) Ndlovu J was clearly correct to dismiss the applicant's objection, the court overlooked the real reason why that objection could not be sustained**: it is not necessary for the deponent to an affidavit in motion proceedings to be authorized by the party concerned** (in *Alton Coach Africa*, the respondent). It is the institution and prosecution of proceedings which must be authorized, not the deposition by individuals to affidavits in support of or in opposition to the application, as the case may be**:** *Ganes & another v Telecom Namibia Ltd* 2004 (3) SA 615 (SCA), [2004] 2 All SA 609 para 19 at 624G—H (SA), 615*c—d* (All SA), *Land and Agricultural*

Development Bank of South Africa t/a Land Bank v The Master & others 2005 (4) SA 81 (C) at 85A—B (also in 2005 (5) SA 235 at 240C—D) and *Creative Car Sound & another v Automobile Radio Dealers Association 1989 (Pty) Ltd* 2007 (4) SA 546 (D) para 34 at 553F—H. Rule 7(1) therefore does not apply at all to the question whether a particular deponent is or is not authorized to depose to an affidavit on behalf of a juristic person which has become a party to motion proceedings.

Condonation of late delivery of affidavit

In ***Gumede v Road Accident Fund*** **2007 (6) SA 304 (C)** an application was brought by the plaintiff for the action to be transferred from the Cape Provincial Division to the Natal Provincial Division. A timetable was determined by the court for the filing of answering and replying affidavits and for the filing of heads of argument. The applicant, however, delivered a replying affidavit some three and a half months later than the date ordered by the court, together with an application for condonation of the late filing of the affidavit. Although the respondent's counsel contended that the condonation application was lacking in merit, she did not actively oppose the granting of condonation but intimated that the respondent would abide the decision of the court in regard to that application.

Van Reenen J remarked that **condonation of the non-observance of court orders and rules was not a mere formality. A party seeking condonation had to satisfy the court that there was sufficient cause for excusing the non-compliance. Whether condonation should be granted or not was a matter of discretion that had to be exercised having regard to all the circumstances of the particular case**. The following factors, identified in *United Plant Hire (Pty) Ltd v Hills & others* 1976 (1) SA 717 (A) at 720E—G, were to be taken into account in the exercise of the court's discretion**:** *(a)* the degree of non-compliance; *(b)* the adequacy of the explanation for such failure; *(c)* the prospects of success; *(d)* the importance of the case; *(e)* the respondent's interest in the finality of the judgment (where the application for condonation was made in the context of an appeal); *(f)* the convenience of the court; and *(g)* the avoidance of delays in the administration of justice. The list was not exhaustive. Those factors were not individually decisive, but were interrelated and the one was weighed against the other so that the strength of one or more might compensate for the weakness of one or more of the others. The fact that a party chose not to oppose the granting of condonation was a relevant but by no means overriding consideration (para 7 at 307D—H, with reference also to *Torwood Properties (Pty) Ltd v South African Reserve Bank* 1996 (1) SA 215 (W) at 228B—F and *Saloojee & another NNO v Minister of Community Development* 1965 (2) SA 135 (A) at 138E—F).

The explanation put forward by the applicant in *Gumede* for the late filing of the replying affidavit revealed 'regrettable disorganisation and slackness' on the part of those to whom the applicant had entrusted the matter. On the papers, there was no basis upon which knowledge of and blame for the delays in the filing of the replying affidavit could be attributed to the applicant, and she should not be prejudiced by any lack of application displayed by the attorneys representing her, who were probably unknown to her. In the circumstances, the fate of the condonation application would be dependent on the applicant's chances of success in the main application (para 8 at 307H—308A).

Holding that the main application ought to succeed, Van Reenen J accordingly granted the application for condonation as well (para 22 at 312G).

The dicta in *Gumede* are in accordance with other recent authorities relating to the requirements and relevant criteria for the granting of condonation, for example *Uitenhage Transitional Local Council v South African Revenue Service* 2004 (1) SA 292 (SCA), [2003] 4 All SA 37 para 6 at 297I—J (SA), 39*j*—40*b* (All SA) and *Omar v Government of SA & others* [2005] 3 All SA 65 (N) at 67*f*—*h* (as to the latter of which, see Mervyn Dendy *Civil Procedure Sibergramme Yearbook 2005* (2006) 40).

Dispute of fact

The decision in ***Standard Bank of SA Ltd & another v Malefane & another: In re Malefane v Standard Bank of SA Ltd & another*** **[2007] 4 All SA 1059 (Tk)** was previously reported in 2007 (4) SA 461, and was surveyed in **Civil Procedure Sibergramme 18 of 2007** (8 December 2008) 10—11.

5. LIS ALIBI PENDENS

See ***Janse van Rensburg & others NNO v Myburgh and two other cases*** **2007 (6) SA 287 (T)**, which is surveyed under '**RES JUDICATA**' immediately below.

6. RES JUDICATA

In ***Janse van Rensburg & others NNO v Myburgh and two other cases*** **2007 (6) SA 287 (T)** Murphy J remarked, in relation to the topic of issue estoppel, that the most lucid exposition of the doctrine of res judicata within our system of Roman-Dutch law was that propounded by Greenberg J in *Boshoff v Union Government* 1932 TPD 345. The dicta in that case had in essence introduced issue estoppel into our law, and 'involved a notable modification of our law' in that they had relaxed the requirement of the doctrine of res judicata that the (earlier) judgment must relate to the eadem petendi causa (the same cause of action) as the later claim in order for the later claim to be precluded from being heard. This was because the rule of estoppel by judgment was said to be supported by public policy, it being in the interest of the state that there should be an end of litigation, and that the defendant should not be vexed twice for the same cause (para 29 at 297I and para 30 at 298E—G, quoting from the judgment in *Boshoff* at 350). In *Horowitz v Brock & others* 1988 (2) SA 160 (A) Smalberger JA had stated (at 179A) that **the difference between issue estoppel and res judicata was that the former did not require that the same thing (eadem res) or the same relief be demanded. If that indeed was the only variance, then the decision in *Boshoff* clearly accommodated the issue-estoppel principle** (para 31 at 298G—I).

The question for determination in *Janse van Rensburg*, continued Murphy J, was whether the so-called once-and-for-all rule was of application so as to prevent the plaintiff from instituting an action to recover certain moneys on the ground that the dispositions of those moneys amounted to voidable preferences in terms of s 29(1) of the

Insolvency Act 24 of 1936. (Earlier proceedings aimed at recovering those moneys under ss 26(1) and 30(1) of the Insolvency Act had already been instituted and determined.) The starting point was to recognize that such a rule found support in the modification to the doctrine of res judicata introduced by Greenberg J in *Boshoff*, particularly in his understanding of Voet's interpretation of the eadem petendi causa requirement and the public-policy imperative that there should be an end to litigation and that a defendant should not be vexed twice for the same cause of action, in the broad sense of that term (para 33 at 299B—D). The Appellate Division had also understood as much in *Kommissaris van Binnelandse Inkomste v Absa Bank Bpk* 1995 (1) SA 653 (A) at 669F—H, and had gone on (at 670J—671C) to express 'the compelling sentiment that it is unnecessary to import into our law English terminology in relation to issue estoppel in light of the doctrinal modification introduced in *Boshoff v Union Government*', but at the same time that it was acceptable to make use of the expression 'issue estoppel' in our own legal system (paras 33—4 at 299D—I). The dicta in *Absa Bank Bpk* allowed for a form of the once-and-for-all rule to be termed as issue estoppel. Whatever the terminological niceties, however, the point remained that since *Boshoff* a flexible approach to the requirements of res judicata had been permitted on public-policy grounds to provide for the requirements of new factual situations. Each case had to be decided in accordance with its own facts (para 36 at 299I—300A).

In *Consol Ltd t/a Consol Glass v Twee Jonge Gezellen (Pty) Ltd & another (2)* 2005 (6) SA 23 (C) para 50 at 46H Blignault J had pointed out that the English courts had for many years recognized the principle that res judicata covered not only the express judicial declaration in the earlier proceedings but also points that should have been raised but were not raised in the earlier proceedings. The decision generally recognized as first expressing that principle was *Henderson v Henderson* (1843) 3 Hare 100 (67 ER 313) at 114—15 (Hare), where it was said that the court requires the parties to litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because the parties had from negligence, inadvertence or even accident omitted part of their case. **The plea of res judicata applied, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time** (para 38 at 300C—G; see also Mervyn Dendy *Civil Procedure Sibergramme Yearbook 2005* (2006) 73—4 in relation to the *Consol Glass* case). The *Henderson* principle was not in conflict with the approach in *Absa Bank*, and logic and equity would justify its application in appropriate cases (para 39 at 300G).

Applying these principles, Murphy J held that when the plaintiffs brought forward their case in earlier proceedings in which they had invoked their remedies under ss 26 and 30 of the Insolvency Act, they should have invoked all of their remedies, including those under s 29 of that Act. Although a suit under s 26 (to set aside dispositions without value) might be a different cause of action from one instituted under s 29 (to set aside voidable preferences) in the narrow pleading sense, they were nevertheless eadem petendi causa for purposes of issue estoppel as confirmed in *Boshoff v Union Government*. In terms of

the *Henderson* principle the plaintiffs had been required to bring forward their whole case in the earlier proceedings (para 40 at 300H—301B). The conclusions reached in the earlier proceedings were determinations of issues which formed part of the essential foundation of the judgment, admitting a plea of issue estoppel (para 41 at 301D—E). The present action therefore related to the eadem res (same thing) and the eadem petendi causa determined by the judgment in the earlier proceedings (para 42 at 301E—F). Since the earlier order was final and binding upon the defendants, and thus constituted a final judgment (para 46 at 303D—G), the defendants' plea of res judicata had to succeed (para 47 at 303G; see also para 50 at 304A—B).

In the light of the court's conclusion, it was strictly speaking unnecessary to determine the merits of the special plea of lis pendens that was also raised. Nevertheless, Murphy J remarked in relation to that plea that a recovery procedure had earlier been established, and the plea of lis pendens was to the effect that the later action unnecessarily duplicated that procedure. The appropriate course of conduct would be to proceed by means of the special recovery procedure laid down earlier (para 48 at 303G—J). The means of recovering dispositions made in breach of the Insolvency Act would thus be the procedure mandated in the order granted in the prior proceedings (para 49 at 304A).

7. JUDGMENTS AND ORDERS

Judgment on confession

Uniform rule 31(1)*(a)* provides that save in actions for relief in terms of the Divorce Act 70 of 1979 or nullity of marriage, a defendant may at any time confess in whole or in part the claim contained in the summons. In terms of rule 1, 'civil summons' means a civil summons as defined in the Supreme Court Act 59 of 1959, and in terms of s 1(1) of the Act, a civil summons includes a notice of motion. After drawing attention to these provisions, Scott JA (Nugent, Heher and Maya JJA and Hancke AJA concurring) in ***Citibank NA v Thandroyen Fruit Wholesalers CC & others*** **2007 (6) SA 110 (SCA)** remarked that in motion proceedings the confession, in order to comply with rule 31(1), must be to the claim contained in the notice of motion. **If the claim is founded, not on the relief claimed in the summons or notice of motion, but on a settlement agreement, rule 31(1) cannot be applied**. The position is different if the settlement provides that its breach entitles the plaintiff or applicant to take judgment in terms of the original cause of action contained in the summons or notice of motion. In *Thandroyen*, however, the judgment sought was founded on the cause of action contained in the settlement agreement, sc an acknowledgement of debt, not the cause of action contained in the notice of motion commencing proceedings which resulted in the settlement agreement. The judgment, having been erroneously granted in terms of rule 31(1), had therefore been correctly rescinded by the court a quo (para 8 at 113H—114B).

Rescission

Uniform rule 42(1)*(a)* provides that the court may, in addition to any other powers it may have, mero motu or upon the application of any party affected, rescind or vary an order or judgment erroneously sought or erroneously granted in the absence of any party affected by it.

In ***Lodhi 2 Properties Investments CC & another v Bondev Developments (Pty) Ltd*** **2007 (6) SA 87 (SCA)** the applicants sought leave to appeal against the dismissal by the High Court of an application for the rescission of two judgments by default granted in favour of the respondent. The rescission was sought on the basis that the judgments had been 'erroneously sought or erroneously granted' because, so it was argued, certain contractual defences existed to the claims on which the judgments were based and had not been upheld by the High Court. After finding that neither of the alleged defences was foreshadowed in the affidavits filed in support of the application for rescission and that there was in any event no merit in either defence (para 9 at 90E), Streicher JA (Lewis, Ponnan and Maya JJA and Snyders AJA concurring) concluded that the applicants had not made out a case that the judgments had been granted erroneously, however wide a meaning was given to the word 'erroneously' as used in rule 42(1)*(a)* (para 16 at 91G—H). The application for leave to appeal was accordingly dismissed (para 28 at 95G).

Streicher JA proceeded to state (apparently obiter) that in any event, **a judgment granted against a party in his absence could not be considered to have been granted erroneously because of the existence of a defence on the merits which had not been disclosed to the judge who had granted the judgment** (para 17 at 91H—I). Disagreeing with the view of Erasmus J in *Bakoven Ltd v G J Howes (Pty) Ltd* 1992 (2) SA 466 (E) that a court, in deciding whether a judgment was 'erroneously granted', was confined to the record of the proceedings, Streicher JA held that where notice of proceedings to a party was required and judgment was granted against that party in his absence without notice of the proceedings having been given to him, the judgment was granted erroneously. That was so not only if the absence of proper notice appeared from the record of the proceedings as it existed when judgment was granted but also if, contrary to what appeared from the record, proper notice of the proceedings had not in fact been given. That would be the case if the sheriff's return of service wrongly indicated that the relevant document had been served as required by the rules whereas there had for some or other reason not been service of the document. In such a case, the party in whose favour the judgment was given was not entitled to judgment because of an error in the proceedings. If, in those circumstances, judgment was granted in the absence of the party concerned, the judgment was granted erroneously (para 24 at 93H—94E, with reference to *Fraind v Nothmann* 1991 (3) SA 837 (W) at 839H, where judgment by default was rescinded on the basis that the summons had not been served on the defendant at his residential address as indicated by the sheriff's return of service because the address at which service had been effected was no longer his residential address at the relevant time; see also para 26 at 94H—95C, with reference to *Theron NO v United Democratic Front (Western Cape Region) & others* 1984 (2) SA 532 (C)).

A judgment to which a party was procedurally entitled, said Streicher JA, could not be considered to have been granted erroneously by reason of facts of which the judge who

granted the judgment, as he was entitled to do, was unaware (para 25 at 94E—F, with reference to *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)* 2003 (6) SA 1 (SCA), [2003] 2 All SA 113 para 9 at 8G—H (SA), 118*b—d* (All SA)). **In a case where a plaintiff was procedurally entitled to judgment in the absence of the defendant, the judgment if granted could not be said to have been granted erroneously in the light of a subsequently disclosed defence**. A court which granted a judgment by default did not grant the judgment on the basis that the defendant did not have a defence**:** it granted the judgment on the basis that the defendant had been notified of the plaintiff's claim as required by the rules, that the defendant (not having given notice of an intention to defend) was not defending the matter, and that the plaintiff was in terms of the rules entitled to the order sought. The existence or non-existence of a defence on the merits was an irrelevant consideration and, if subsequently disclosed, could not transform a validly obtained judgment into an erroneous judgment (para 27 at 95D—G).

8. APPEALS

Practice Directions

New ***Practice Directions*** **2007 (6) SA 1 (SCA)** were published for the Supreme Court of Appeal on 17 August 2007 by the (then) President of that Court. Changes from the practice directions previously published are the following**:**

- Annexures to heads of argument, such as authorities or subsidiary legislation, must be separately bound from the heads themselves (para 10 at 3I—J).
- If any party to a pending appeal is of the view that the appeal warrants preferent enrolment, whether by reason of urgency or other good cause, that view must be conveyed immediately by letter to the Registrar for the attention of the President (para 11 at 3J—4A).
- Where a pending appeal is awaiting enrolment, the Registrar must be informed *(a)* if counsel for either party is due to be unavailable in the next ensuing term; or *(b)* if enrolment may clash with religious holidays which any of the legal representatives or parties in the case wish to observe (para 12 at 4A—C).
- If the heads of argument of any party to an appeal are not filed after due time for lodging and after written reminder from the Registrar, the appeal will be enrolled and the Court may at the hearing in the absence of the defaulting party, and after hearing argument, make such order as it deems fit (para 13 at 4C—D).

9. COSTS

Attorney-and-client costs

In ***Alton Coach Africa CC v Datcentre Motors (Pty) Ltd t/a CMH Commercial*** **2007 (6) SA 154 (D)** Ndlovu J, relying on *Kalley Flooring Co (Pty) Ltd v President Carpeting Manufacturers Ltd* 1982 (4) SA 681 (C), awarded the applicant its costs on the attorney-and-client scale where **the respondent had instituted proceedings for the liquidation of the applicant in order to bring improper pressure to bear upon the applicant to pay a disputed, unliquidated debt**. The respondent's conduct in doing so, said Ndlovu J, was 'only a tactical device to compel the applicant, willy-nilly, to pay the alleged debt' (para 38 at 166A—B). Despite having been warned of the bringing of an application to interdict the respondent from instituting proceedings for the winding-up of the applicant pending a determination by a court of competent jurisdiction as to whether (inter alia) the alleged debt was due, owing and payable, the respondent had neither withdrawn a bond of security which had been prematurely issued for purposes of the liquidation application nor paid heed to a demand that the applicant's creditors be advised by the respondent that the respondent was not proceeding with the liquidation application. When the application for an interdict was launched, the respondent still did not consider it appropriate to withdraw the bond of security and advise the applicant's creditors that the liquidation application would no longer be proceeded with. Instead, the respondent filed an opposing affidavit which, together with annexures, ran to a length of 100 pages. This was 'an absolute abuse of the Court process', warranting punitive costs against the respondent (paras 40—1 at 168C—F).

Court's discretion

In ***SACCAWU v Master of the Supreme Court*** **[2007] 4 All SA 1034 (T)** at 1039*b*—*c* the principle that a costs order is in the discretion of the court, which discretion must be exercised judicially, having regard to what is fair to both parties, was reiterated by Legodi J, who added that in general, a successful party should be entitled to costs unless there are circumstances which should disentitle such a party to a costs order in its favour.

10. EXECUTION

Stay of execution pending review of taxation

The decision in ***Standard Bank of SA Ltd & another v Malefane & another: In re Malefane v Standard Bank of SA Ltd & another*** **[2007] 4 All SA 1059 (Tk)** was previously reported in 2007 (4) SA 461, and was surveyed in **Civil Procedure Sibergramme 18 of 2007** (8 December 2008) 23.

11. CONSTITUTIONAL PRACTICE

Application for leave to appeal to Constitutional Court

The decision in ***Prophet v National Director of Public Prosecutions*** **2007 (6) SA 169 (CC)** was previously reported in 2006 (2) SACR 525 and 2007 (2) BCLR 140, and was surveyed in **Civil Procedure Sibergramme 1 of 2007** (20 June 2007) 5—6.

Costs

The decision in ***Prophet v National Director of Public Prosecutions*** **2007 (6) SA 169 (CC)** was previously reported in 2006 (2) SACR 525 and 2007 (2) BCLR 140, and was surveyed in **Civil Procedure Sibergramme 1 of 2007** (20 June 2007) 6.

Further evidence on appeal

The decision in ***Prophet v National Director of Public Prosecutions*** **2007 (6) SA 169 (CC)** was previously reported in 2006 (2) SACR 525 and 2007 (2) BCLR 140, and was discussed in **Civil Procedure Sibergramme 1 of 2007** (20 June 2007) 16.

Joinder where constitutionality of Act of Parliament challenged

The decision in ***Prophet v National Director of Public Prosecutions*** **2007 (6) SA 169 (CC)** was previously reported in 2006 (2) SACR 525 and 2007 (2) BCLR 140, and was surveyed in **Civil Procedure Sibergramme 1 of 2007** (20 June 2007) 5—6.

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