

In the matter between:

SA FAKIE N.O.

Appellant

and

CCII SYSTEMS (PTY) LIMITED

Respondent

RESPONDENT'S PRACTICE NOTE

1. The nature of the appeal

The appellant appeals against the whole of the judgment of De Vos J, in which she –

- 1.1 held that the appellant had failed to comply with an order of Hartzberg J to furnish certain documentation to the respondent;
- 1.2 directed the appellant to furnish the documentation to the respondent;

- 1.3 declared the appellant to be in contempt of court and imposed a sanction of suspended imprisonment on him, conditional on timeous compliance with her order;
- 1.4 directed the appellant to pay the respondent's costs.

2. The issues on appeal

The issues on appeal are the following:

- 2.1 whether the respondent was entitled to the directory relief in paragraph 1.2 above in respect of the draft reports mentioned in paragraph 1.1 of Hartzenberg J's order on the basis of the appellant's non-compliance with the order of Hartzenberg J;
- 2.2 whether the respondent had been entitled at the time of instituting its application to the said directory relief in respect also of the audit files mentioned in paragraph 1.2 of Hartzenberg J's order;
- 2.3 whether the appellant's non-compliance with the order of Hartzenberg J was wilful and *mala fide*;
- 2.4 the incidence and degree of the onus in contempt proceedings;

2.5 whether it is appropriate to use motion proceedings for contempt applications;

2.6 whether the contempt application was premature.

3. The estimated duration of the argument

One day.

4. The relevant parts of the record

The respondent agrees with the appellant (paragraph 5 of the appellant's practice note) that the following parts of the record need not be read:

4.1 vol 2 pp 103-126;

4.2 vol 3 pp 204-245;

4.3 vol 4 pp 305-347.

5. Summary of the argument

The respondent's arguments in respect of the six issues identified in paragraph 2 above are summarised in the same order as follows:

- 5.1 There was no ambiguity in the order of Hartzenberg J regarding the furnishing of the draft reports, and the order simply was not open to the interpretation advanced by the appellant.
- 5.2 There is no dispute about the fact that, at the time when the contempt application was instituted, the appellant had not yet furnished all the audit files to the respondent, notwithstanding the lapse of a lengthy period of time from the due date for the furnishing of those files.
- 5.3 The appellant failed to advance any rational explanation for his failure to comply with the order in respect of the draft reports. The only justifiable inference, given the plain language of the order, was that the appellant's non-compliance was wilful and *mala fide*. At the time the application was launched, there was similarly no doubt that the appellant was in contempt of the order to furnish the audit files. The appellant's own evidence indicates the manifest inadequacy of his initial efforts to comply with the order.

- 5.4 Irrespective of the incidence and degree of the onus, the submission is that the appellant was in contempt. It is however submitted that there is no reason to deviate from the established common-law approach to civil contempt proceedings, which are the primary method of enforcing orders *ad factum praestandum*. A respondent in a contempt application is not properly regarded as an accused person for the purposes of section 35 of the Constitution, and even if he is, the common-law limitation on his constitutional rights is reasonable and justifiable.
- 5.5 The respondent's purpose in instituting contempt proceedings was to coerce compliance with Hartzenberg J's order. The appropriate procedure is by way of motion. If there is a derogation from any constitutional rights by the use of such proceedings (which is disputed), the limitation is reasonable and justified. In any event, the appellant has raised the point about the inappropriateness of motion proceedings for the first time on appeal, which he cannot properly do.
- 5.6 The application was not premature: the appellant had failed, over a protracted period, to comply with Hartzenberg J's order.

6. Authorities to which particular reference will be made

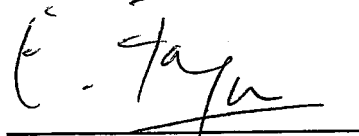
- 6.1 *Coetzee v Government of the Republic of South Africa; Matiso and Others v Commanding Officer, Port Elizabeth Prison and Others* 1995 (4) SA 631 (CC);
- 6.2 *Laubscher v Laubscher* 2004 (4) SA 350 (T);
- 6.3 *Putco Ltd v TV & Radio Guarantee Co (Pty) Ltd* 1985 (4) SA 809 (A)
- 6.4 *Videotron and Others v Industries Microlec Produits Electroniques Inc and Others* 96 DLR (4th) 376.

7. Rule 8(8) and (9)

There has been compliance with these subrules.



Owen Rogers S.C.



Eduard Fagan

Chambers
Cape Town
31 August 2005

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

SCA CASE NO.: 653/2004

In the matter between:

SA FAKIE N.O.

Appellant

and

CCII SYSTEMS (PTY) LIMITED

Respondent

RESPONDENT'S HEADS OF ARGUMENT

INTRODUCTION

1. We shall in due course deal more fully with the proper interpretation of Hartzenberg J's order of 15 November 2002 (record 1/45-46). In summary, the order required the appellant to do three things within 40 days of the court's order, namely:

- 1.1 to furnish to the respondent the draft reports (para 1.1 of order);

- 1.2 to furnish to the respondent the audit files to the disclosure of which he had no objection in terms of Chapter 4 (ss33-46) or s12 of the Promotion of Access to Information Act 2 of 2000 (paras 1.2 and 1.3 of order);
 - 1.3 to furnish to the respondent a list of the audit files to the disclosure of which he did have such an objection together with a statement of the grounds of objection (para 1.4 of order).
2. The appellant filed an application for leave to appeal, and 13 March 2003 was arranged as the date for its hearing. The application was withdrawn on 12 March 2003 after discussions between the legal representatives resulted in what was thought to be a common understanding of the meaning and effect of the order (paras 26-30 record 1/10-11).
 3. Notwithstanding the period of 40 days specified in the order, the respondent on 18 March 2003 and again on 27 March 2003 proposed that the appellant provide the documents according to a timetable extending to nine weeks from the dates of those letters (record 1/64-67). In a response dated 27 March 2003 but received by the respondent's attorneys on 17 April 2003, the appellant through his attorneys undertook that he would comply with the 40-day period specified in the order (record 1/68-69), even though by then the said period had already expired.

4. On 9 May 2003 the respondent's attorneys replied (record 1/70-71) by stating that the respondent would afford the appellant 40 days from the date on which the application for leave to appeal was to have been heard (13 March 2003). In terms of this indulgence the due date for compliance became 15 May 2003.
5. On 16 May 2003 the appellant delivered to the respondent (record 1/79-87):
 - 5.1 a list of 97 documents (running to 751 pages) to the disclosure of which the appellant did not object, and a list of five documents (running to 492 pages) to the disclosure of which the appellant did object;
 - 5.2 the 751 pages of documentation which the appellant was willing to disclose as aforesaid.
6. The documents thus furnished included extracts from two draft reports and some audit file documentation. Nothing more was furnished before the application was launched on 12 June 2003. It is common cause and apparent from the appellant's subsequent conduct that there was a great deal of additional documentation which should have been produced but was not.
7. The respondent's attorneys notified the appellant's attorneys in a letter dated 23 May 2003 that the appellant had manifestly not complied with the order, identified the respects in which he had not done so, and afforded him a "*final opportunity*" until 6 June 2003

to do so (record 1/88-91), an offer repeated on 4 June 2003 (record 1/97).

8. On 6 June 2003 the respondent gave the appellant an opportunity to motivate a request for yet a further extension of time (record 1/100). Remarkably, given all the time that has passed since the order had been made and given also the amount of documentation which (as subsequently became clear) remained outstanding, the appellant's response (in a letter from his attorneys of 9 June 2003 – record 1/101) was merely this:

“In an endeavour, therefore, to reach absolute certainty that he indeed has complied with the order and the agreement our client, as previously indicated, is focusing his efforts in this regard.”

9. Only then was the application launched on 12 June 2003.
10. The substantive prayers for relief in the notice of motion can be divided into two parts (to which we shall for convenience refer as the “*directory relief*” and the “*contempt relief*” respectively):
 - 10.1 Orders were sought declaring that the appellant had failed to comply with the order and directing him to do so within two weeks (paras 1 and 3).
 - 10.2 In addition, orders were sought declaring the appellant to be in contempt and imposing as a sanction suspended imprisonment conditional on timeous compliance (paras 2 and 4).

11. It is necessary at this stage to emphasise that the directory relief was not and is not dependent on a finding that the appellant was in contempt. The respondent's entitlement to that relief is unaffected by the appellant's submissions on the burden of proof in and constitutionality of civil contempt proceedings (cf *Noel Lancaster Sands (Edms) Bpk v Theron en Andere* 1974 (3) SA 688 (T) at 692H-693B and 694F-H; *Trencor Services (Pty) Ltd v Muller t/a SA Trucking* 1983 (4) SA 893 (C) at 894F-G and 903H-904E).
12. After the launching of the application the appellant on 11 July 2003 and 28 July 2003 provided a large amount of additional audit file documentation in further partial compliance with paragraph 1.2 of the order. The documents delivered on 28 July 2003 were contained in 28 lever-arch files (record 3/201).
13. In their covering letter of 28 July 2003 the appellant's attorneys invited the respondent to contact them in regard to any documents which the respondent believed were still outstanding. The respondent's attorneys did so on 2 September 2003 (record 4/278-282), setting out comprehensively all the documents to which the respondent was entitled which had either not been furnished or had been furnished but in incomplete or indecipherable form.
14. The appellant's attorneys replied by way of a letter dated 17 September 2003 (record 4/288-290). In a number of respects the appellant did not dispute the existence of the further documents or that they fell within the ambit of the order. The recurrent refrain

was that the appellant's attorneys would seek instructions or that locating the documents would take time.

15. Despite frequent further reminders spanning the period October 2003 to March 2004 (record 4/291-300; 4/350-351), nothing more was forthcoming. The respondent thus had no choice but to file its replying papers, which it did in March 2004 (the answering papers having been served at the end of July 2003). The replying papers dealt *inter alia* with the appellant's persistent failure to provide the further documents identified in the respondent's attorneys' letter of 2 September 2003.
16. The application was enrolled for hearing in the court *a quo* on 10 August 2004. At the time the respondent's heads of argument were prepared there had still been no substantive response to the respondent's attorneys' letter of 2 September 2003. The respondent's heads of argument thus addressed the appellant's non-compliance not only in respect of the draft reports but also in respect of the audit files.
17. On 27 July 2004 the appellant served a supplementary affidavit dated 12 July 2004 (record 4/354 ff). The appellant stated in this affidavit (para 8.2 record 4/357) that he had "*recently finalized*" his search for the outstanding documents identified in the respondent's attorneys' letter of 2 September 2003 (written more than ten months previously). Details of the further documents furnished at this late stage appear from annexure "JS2" to the supplementary affidavit (record 4/361-366).

18. It was only in consequence of this eleventh-hour affidavit that continuing non-compliance by the appellant in respect of the audit files fell away as an issue. This was after the heads of argument had already been finalised.

ISSUES IN THE COURT A QUO AND SUBSEQUENT EVENTS

19. It is necessary to distinguish between:
- 19.1 the position which prevailed when the application was launched on 12 June 2003;
 - 19.2 the position which prevailed when the application was argued on 10 August 2004; and
 - 19.3 the current position.
20. At the time the application was launched the questions were broadly:
- 20.1 whether the appellant had complied with the order insofar as it pertained to draft reports;
 - 20.2 whether the appellant had complied with the order insofar as it pertained to audit files;
 - 20.3 if not, whether in either of these respects the appellant was in contempt.

21. By the time the application was argued the second of these questions had ceased to be a live issue, and was thus relevant only to costs. (Although the appellant belatedly furnished the outstanding audit file documentation in July 2004, he did not tender to pay the respondent's costs to date.)
22. The court *a quo* found for the respondent on all issues, and thus granted the directory relief, the contempt relief, and costs (judgment record 5/385-386).
23. The appellant sought and was granted leave to appeal against the whole judgment (record 5/389-392). The appellant in its application for leave to appeal has attacked *inter alia* the directory relief on the basis that on a proper interpretation of Hartzenberg J's order the obligation to produce the draft reports was qualified by paragraph 1.2 of the order (application for leave para 3 record 5/390).
24. It is necessary to add that on 1 December 2004, and shortly after being granted leave to appeal, the appellant furnished to the respondent what he stated to be all the remaining draft reports in his possession, i.e. all those portions of the draft reports which he had previously withheld as supposedly not being covered by paragraph 1.1 of Hartzenberg J's order. The letter under cover of which these further documents were furnished stated that the documents were being made available without prejudice to the appellant's right to prosecute the appeal against the whole of De Vos

J's order and "*with the specific reservation to advance any argument ... irrespective of this release of documents*".

25. The respondent does not accept that the appellant has made complete disclosure of the draft reports contemplated in paragraph 1.1 of Hartzenberg J's order, and this has been the subject of further correspondence between the parties' attorneys. Accordingly, the proper interpretation of paragraph 1.1 of the order has not become moot.
26. Although, for purposes of the application argued before De Vos J, it was assumed that the documentation belatedly made available by the appellant in terms of his supplementary affidavit of July 2004 put an end to ongoing non-compliance with paragraph 1.2 of Hartzenberg J's order, the respondent subsequently identified further audit file documentation which in its view the appellant had failed to disclose. This has also been the subject of subsequent correspondence between the attorneys. Accordingly, ongoing non-compliance with paragraph 1.2 of the order remains in dispute between the parties, but for purposes of the present appeal such dispute is not germane. If the respondent wishes to pursue the further alleged non-compliance which it has identified, this would entail a further application in the Transvaal Provincial Division.
27. It is convenient to deal with the matters germane to this appeal in a somewhat different order from the one adopted by the appellant.

NON-COMPLIANCE WITH ORDER

28. The question whether the appellant complied with the order is the only issue relevant to the directory relief. It is also one of the issues relevant to the contempt relief (since there can be no contempt without non-compliance).

Draft reports

29. In respect of the draft reports, the issue in the court *a quo* was whether paragraph 1.1 of the order (record 1/45) was qualified by paragraph 1.2 of the order, with the consequence that the appellant only had to produce the draft reports insofar as they dealt with the topics identified in paragraphs 1.2.1 to 1.2.4 of the order.
30. In this Court the appellant has not in his heads made submissions to explain his interpretation and apparently does not seek to persuade this Court that his interpretation is correct. From paragraph 4.10 of his heads it would seem that he regards a determination of that question as irrelevant, since disputed questions of interpretation are not (so the argument goes) matters for contempt proceedings.
31. Since the respondent sought and was granted directory relief distinct from contempt relief, and since the appellant attacks the grant of such relief on appeal, the appellant's evasion of the issue is, it is submitted, misconceived.

32. It is submitted that the court *a quo*'s analysis of the issue was correct and unassailable (judgment para 12 record 5/376-378; para 22 record 5/383), and the respondent respectfully adopts it without repetition. The order is simply not capable of bearing the interpretation advanced by the appellant, nor was there anything in the way in which the proceedings before Hartzenberg J were conducted to support it. The limitation referred to as "*the reduced record*" (and which finds expression in paragraphs 1.2.1 to 1.2.4 of the order in relation only to the audit files and in a manner incapable structurally and linguistically of being read as qualifying paragraph 1.1 of the order) was a limitation which the respondent itself introduced in its replying papers in the proceedings before Hartzenberg J in an endeavour to meet the appellant's complaint in his answering papers concerning the allegedly enormous task of complying with the request in regard to the full bulk of the audit files.
33. The ambiguity which was the subject of discussion between the parties prior to the withdrawal of the application for leave to appeal had nothing to do with paragraph 1.1 of the order. In that regard, the aspect which apparently created uncertainty in the mind of the appellant was the inter-relationship between paragraphs 1.3 and 1.4 of the order on the one hand and paragraph 1.2 on the other. The separate numbering of those paragraphs might have suggested that they imposed three discrete and independent obligations on the first respondent. However, it is apparent that paragraph 1.2 is grammatically incomplete and that what was intended was that in respect of the audit files identified in paragraph 1.2 the appellant

should produce those portions to which he had no objection (paragraph 1.3) and a motivated list of documents withheld (paragraph 1.4).

34. It was this aspect of the order which was clarified in correspondence between the attorneys after an initial discussion between counsel. This is apparent from paragraph 4 of the appellant's attorneys' letter of 10 March 2003 (record 2/181-187). That letter was concerned with the appellant's right to withhold documents under paragraph 1.4 of the order. There was no suggestion that paragraph 1.1 of the order was limited by paragraph 1.2 of the order. The sum total of the "agreement" between the parties is to be found in this letter as read with the respondent's attorneys' reply of the same date (record 2/188-189).

Audit files

35. As at the date the application was launched the appellant had plainly not complied fully with his obligations under paragraph 1.2 of the order. As the court *a quo* found (judgment para 14 record 5/378), this is proved by the appellant's own subsequent conduct, particularly in furnishing a huge mass of further documentation on 28 July 2003 (about a month and a half after the application was instituted). The appellant's non-compliance was (as it was then thought) only eventually made good shortly before the hearing of the application in August 2004. The appellant at no stage alleged that he was not

obliged by the order to produce the further documents which he did in July 2003 and again shortly before the hearing.

36. In its founding papers the respondent sought to prove the appellant's non-compliance in respect of the audit files in two ways:

36.1 Firstly, inferences were drawn from the minimal quantity of documentation furnished or expressly withheld (1 243 pages in all) and the modest time taken by the appellant's staff in purportedly identifying these documents (36½ man-hours) as against the estimated volume of relevant documents and the time which the appellant himself had previously expected the processing of the respondent's original request to take (founding affidavit paras 73-86 record 1/21-25).

36.2 Secondly, the respondent's Dr Young made reference to certain specific documents, the existence of which he was aware of and which had neither been furnished nor expressly withheld under paragraph 1.4 of the order (founding affidavit paras 87-99 record 1/25-29).

37. It is submitted that the case thus advanced in the founding papers was compelling and was vindicated by the welter of further documents which the launching of the application elicited.

38. Despite a detailed letter from the respondent's attorneys dated 23 May 2003 (record 2/88-91) demonstrating that a great deal of further documentation remained to be furnished (an assertion

the truth of which was confirmed by subsequent events), the only response from the appellant prior to the launching of the application was:

38.1 in a letter of 30 May 2003, that he was "*in the process of investigating*" whether there were further documents which he was obliged to disclose (para 12 record 1/94) and that he would endeavour to provide any further documentation not already released "*if that be the case*" (para 25 record 1/96); and

38.2 in a letter of 9 June 2005, that "*to reach absolute certainty*" the appellant was "*focusing his efforts in this regard*" (record 1/101).

39. The 40-day period prescribed in the order had expired on 12 February 2003. A further 40-day period from the date on which the application for leave to appeal was to have been heard expired on 15 May 2003. The present application was launched just under a month later, on 12 June 2003. The appellant was disputing his obligation to produce further draft reports and had not made any concession that there were further audit file documents which he was obliged to produce. In these circumstances the respondent was, we submit, fully entitled to institute proceedings for a declaratory order that there had been non-compliance and for an order directing compliance within two weeks.

Conclusion on non-compliance

40. It is submitted, therefore, that the respondent established in the court *a quo* that it was entitled to the directory relief (both in respect of the draft reports and the audit files) at the time it launched the application, and that it remained entitled to such relief in respect of the draft reports at the time the matter was argued.
41. De Vos J thus correctly made the orders contained in paragraphs 1 and 3 at the end of her judgment (record 5/385-386), though she granted the appellant four weeks to produce the outstanding documentation rather than the two weeks sought by the notice of motion. Regardless of the outcome of the contempt relief, this represented substantial success entitling the respondent to costs in the court *a quo*.

CONTEMPT

42. We shall deal under separate headings with the incidence and standard of proof and with the supposed unconstitutionality of motion proceedings for civil contempt. The appellant's submissions on these issues are disputed. The purpose of the present section of these heads is to argue that there was a wilful and *mala fide* non-compliance with the order and that this was established even if the onus rested on the respondent and even if proof beyond reasonable doubt was required. A finding of wilful and *mala fide* non-compliance was *a fortiori* justified if – as we submit is the case – the common law still prevails, casting on the appellant the duty to

rebut on a balance of probabilities the presumption of wilfulness and *mala fides* to which the established non-compliance gave rise (*Putco Ltd v TV & Radio Guarantee Co (Pty) Ltd* 1985 (4) SA 809 (A) at 836D-E; *Frankel Max Pollak Vinderine Inc v Menell Jack Hyman Rosenberg & Co Inc and Others* 1996 (3) SA 355 (A) at 367H-368C; see also *Consolidated Fish Distributors (Pty) Ltd v Zive and Others* 1968 (2) SA 517 (C) at 522E-H; *Noel Lancaster Sands supra* at 691A-D; *Townsend-Turner and Ano v Morrow* 2004 (2) SA 32 (C) at 49A-E).

Draft reports

43. It has already been submitted that the order is not capable of being construed in such a way as to limit paragraph 1.1 with reference to paragraphs 1.2.1 to 1.2.4. Although the answering papers made reference to a settlement agreement, this was done in vague terms. There was no allegation that the parties ever agreed that paragraph 1.1 of the order would be limited by reference to paragraphs 1.2.1 to 1.2.4. Such an allegation would be untenable in the light of the correspondence recording the parties' common understanding (record 2/181-191).
44. The appellant nowhere attempted to advance a rational explanation for his limited and incomplete compliance with paragraph 1.1 of the order. He did not, with reference to the wording and structure of the order, explain how he might have come to the view that paragraph 1.1 was limited by paragraphs 1.2.1 to 1.2.4. He did not say that the order was ambiguous nor that he had received legal

advice in support of his supposed view. He did not refer to any specific portion of the correspondence between the attorneys to justify a modification of the plain language of the order. The order is so clear in this regard that a wilful and *mala fide* non-compliance was the only justifiable inference.

45. It is thus submitted that the appellant's contempt in respect of the draft reports was established both at the time of launching and at the time of the hearing.

Audit files

46. From his involvement in the joint investigation, the joint report and the previous application before Hartzenberg J, the appellant must have known the approximate magnitude of the documentation covered by the order and the effort that would be required to locate the documents and to divide them between documents to be released and those to be listed under paragraph 1.4 of the order.
47. Prior to the launching of the application the appellant identified only 1 243 pages of documents, and he and his staff spent only 36½ man-hours between them on the exercise. Almost all of the documents thus produced or listed were documents which the respondent itself had furnished to the appellant during the investigation (foundings affidavit paras 50 and 53 record 1/16).
48. The 31 lever-arch files delivered during July 2003 were assembled pursuant to the exercise described by the appellant

in paragraphs 11.4 to 11.20 of his answering affidavit (record 2/135-141). From paragraph 11.6 read with paragraph 11.10 one can deduce that the entire exercise there described began round about 16 June 2003, after the application had been launched, and took about six weeks (until 28 July 2003).

49. The nature of the exercise which the appellant undertook during June/July 2003 shows how inadequate his previous efforts were. At all times since Hartzenberg J delivered judgment in November 2002 the appellant had known that some such endeavour as he undertook in June/July 2003 would be needed to comply with the order. He offered no explanation as to why he did not embark on this process at an earlier time.
50. The appellant was not entitled to do nothing merely because he had filed an application for leave to appeal. He could not assume that leave would be granted. In any event, his main concern seems to have been with a perceived ambiguity in the order, since he withdrew his application for leave once this was resolved. He should thus have commenced the exercise of locating and assessing the relevant documents in the 40 days following Hartzenberg J's order of 15 November 2002.
51. However, even if he was entitled to sit on his hands until 12 March 2003 (the date on which he withdrew his application for leave to appeal), the exercise should at least have been initiated then. Had that been done, the exercise (which one knows eventually took about six weeks) could easily have been completed by 16 May 2003

(the date on which the appellant furnished his initial inadequate batch of documents). He did not say in his answering papers that he believed his initial efforts to have been adequate, nor could he have thought so.

52. It is thus submitted that even if the onus rested on the respondent, a finding (beyond reasonable doubt) of contempt at the date on which the application was launched was amply justified.
53. The appellant's contempt continued after the application was launched. Even if the appellant believed that the documents delivered in July 2003 constituted full compliance with paragraph 1.2 of the order, his misapprehension would have been removed by the respondent's attorneys' letter of 2 September 2003 (record 4/278-282). His failure to provide his attorneys with instructions in response to this letter for a period of more than ten months amply demonstrated his contemptuous attitude to the order.
54. Ongoing contempt in respect of the audit files thus continued to be a live issue until very shortly before the hearing in the court *a quo*.

Conclusion on contempt

55. We thus submit that the court *a quo* rightly granted the contempt relief (paras 2 and 4 of the order, record 5/385-386).

56. In paragraphs 7.1 to 7.3 and 7.21 of his heads the appellant draws a distinction between contempt proceedings which have as their object to compel performance and those which have as their object to punish, and it is said that even at common law an aggrieved party does not have *locus standi* to seek a contemnor's imprisonment merely as a punishment. The appellant argues that De Vos J invoked her contempt jurisdiction in relation to the audit files for purely punitive purposes, since there had already been compliance with the order by the time the application was argued.
57. The judgment of the full bench in *Cape Times Ltd v Union Trades Directories (Pty) Ltd and Others* 1956 (1) SA 105 (N), to which the appellant refers in paragraph 7.2 of his heads, dealt with a case where the contempt had been purged by the time the application was launched (at 117F-H), a fact which was, with respect, apparently overlooked by Alexander J when he purported to apply that decision in the other case cited in paragraph 7.2 (*Naidu v Naidoo* 1993 (4) SA 542 (D)). When the respondent launched the present application on 12 June 2003 there was ongoing and unpurged contempt in respect of both the draft reports and the audit files. The respondent thus had *locus standi* in the fullest sense, and the proceedings were instituted primarily with the object of compelling compliance (as is apparent from the conditional nature of the sanction sought in prayer 4 of the notice of motion).
58. In respect of the audit files, the contempt was purged (or so it was then thought) only shortly before the hearing, and only after heads of argument had been prepared. The question as to whether (other than

in respect of costs) the past contempt in respect of the audit files should be the subject of a sanction was not, to the best of counsel's recollection, ever raised or debated before De Vos J. However, her declaration in respect of contempt was phrased in the present tense (para 2 record 5/385), and thus could only have related to the continuing failure to furnish the draft reports. Against this background, and having regard to the fact that the condition on which the imprisonment was suspended related to the timeous production of what was then understood to be the only outstanding category of documents i.e. the draft reports, there is no reason to conclude that the sanction of suspended imprisonment in paragraph 4 of the order (record 5/386) was imposed for anything other than the ongoing contempt relating to the draft reports. The court *a quo*'s findings in respect of the purged contempt would have been relevant to costs.

INCIDENCE AND DEGREE OF ONUS

59. It will be necessary to decide the question of the incidence and degree of onus only if this Court finds that the respondent was entitled to succeed in the court *a quo* on the traditional basis but not on the revised regime for which the appellant argues.
60. The appellant's argument on the incidence and degree of onus is based mainly on s35(3) of the Constitution. That section accords certain fair trial guarantees to "*accused persons*". It is submitted that a respondent in civil contempt proceedings is not an "*accused person*" within the meaning of s35(3). The fair trial rights are

intended to apply only to persons who are prosecuted under the laws governing criminal proceedings, such prosecution being either at the instance of the State or (in rare instances) by a private prosecutor where the State has declined to prosecute.

61. Wilful and *male fide* non-compliance with an order obtained in civil proceedings is a criminal offence, and can thus be the subject of a criminal prosecution by the State. This is what was decided in *S v Beyers* 1968 (3) SA 70 (A). It does not follow that where an aggrieved civil litigant launches proceedings against the contemnor on notice of motion in accordance with the procedure recognised by our courts for many years, such proceedings are criminal proceedings and the respondent an “*accused person*”. Our courts have on several occasions confirmed the civil nature of such proceedings, holding for example that appeals from orders in such cases are not governed by the law relating to criminal appeals (see *Verkouteren v Savage* 1918 TPD 62 at 68 per De Villiers JP; *Afrikaanse Pers en Publikasie (Edms) Bpk en 'n Ander v Mbeki* 1964 (4) SA 618 (A) at 625H-626D). It has also been held that the applicant in civil contempt proceedings cannot be regarded as conducting a private prosecution: his purpose in instituting the proceedings is to procure enforcement of an order in his favour, not to punish (see *Naude en 'n Ander v Searle* 1970 (1) SA 388 (O) at 392A-E). (See also the decision of the High Court of Australia in the *Witham* case *supra*, where McHugh J in his concurring judgment stated that despite the heightened onus “*the proceedings were and remain civil and not criminal proceedings for contempt*” – at 421;

and see further on the same point *Microsoft Corporation and Another v Marks* (1996) 139 ALR 99 (FCA) at 115-116).

62. It is not unusual for one and the same act to constitute a civil wrong and a crime. Fraud is an obvious example as previously was adultery. If fraud or other criminal conduct is the subject of civil proceedings, the onus is proof on a balance of probabilities (see *Gates v Gates* 1939 AD 150 at 155; *Loomcraft Fabrics CC v Nedbank Ltd and Ano* 1996 (1) SA 812 (A) at 817G-H).
63. Admittedly in civil contempt proceedings the court may impose the sanction of imprisonment, which is not the case in civil proceedings involving criminal conduct such as fraud. However, it is submitted that this distinction is not sufficient to justify the conclusion that such proceedings are essentially criminal in nature with the respondent being "*the accused*". If the court makes an order against the respondent on notice of motion the finding would not, it is submitted, constitute a "*conviction*" as contemplated in the Criminal Procedure Act 51 of 1977 and would thus not – in later criminal proceedings – be able to be proved against the accused as a previous conviction in terms of s271 of the Criminal Procedure Act. And as noted, any appeal would be a civil rather than a criminal matter.
64. Coercive execution by way of attachment and sale of property is not available to the civil litigant who has obtained an order *ad factum praestandum*. Civil contempt proceedings constitute the primary and sometimes only method of enforcement of such orders. A contempt

application on notice of motion is “*a proceeding initiated in order to bring to its logical conclusion an order which had been given by a judge of this Court and which the Court finds has been deliberately disobeyed*” (per De Villiers JP in the *Verkouteren* case at 68). The efficacy of civil proceedings would be significantly impaired if the enforcement of orders *ad factum praestandum* were to be viewed as a criminal matter, requiring a civil litigant to prove the respondent’s wilful non-compliance beyond reasonable doubt.

65. It must be assumed that the legislature, in enacting the Constitution, was aware of the long-established practice relating to civil contempt proceedings. The legislature could not have intended that the fair trial guarantees conferred on “*accused persons*” would encompass respondents in such proceedings, thereby bringing about a fundamental change in the enforcement of orders granted in civil matters.

66. However, and to the extent that the common law rules on onus may be found to derogate either from s35(3) or from s12(1) of the Constitution (which guarantees the freedom and security of the person), it is submitted that the common law rules constitute a reasonable and justifiable limitation in terms of s36(1) of the Constitution. The respondent in civil contempt proceedings is not faced with the might of the State as his opponent, but with a private civil litigant. From the latter’s point of view, the procedure is one which is aimed at securing compliance with an order in civil proceedings rather than with punishment. The effective administration of justice in the civil sphere makes it entirely

reasonable to set the burden of proof at the level of a balance of probabilities, and to require of the respondent (within whose peculiar knowledge the relevant facts would generally be) to show that a proven non-compliance was not wilful and *mala fide*.

67. There is nothing to indicate that actual imprisonment pursuant to civil contempt proceedings is at all common. The period of imprisonment is generally short, and is almost always suspended as an inducement to compliance. In this respect, civil contempt stands on a very different footing from the statutory imprisonment for debt struck down in *Coetzee v Government of the Republic of South Africa; Matiso and Others v Commanding Officer, Port Elizabeth Prison and Others* 1995 (4) SA 631 (CC), a regime under which committals were widespread (cf 669C and footnote 85). There were many other unsatisfactory features of the statutory regime which are not replicated in civil contempt proceedings.
68. Indeed, in his concurring judgment in the *Coetzee* case, Sachs J was careful to draw a clear distinction between civil imprisonment for debt and contempt of court. The latter, he said, had “*an ancient and honourable, if at times abused, history*” and that if the impugned statutory provisions under consideration were in truth concerned with contempt, “*the need to keep [them] alive would be strong because the rule of law requires that the dignity and authority of the courts, as well as their capacity to carry out their functions, should always be maintained*” (at 665A-B). Later, Sachs J remarked that the long-standing distinction made in common law between orders *ad pecuniam solvendam* and those *ad factum praestandum*, with civil

contempt proceedings being confined to the latter, was “*founded on logic and principle*” (at 668F).

69. It is thus submitted that De Vos J correctly followed her earlier judgment in *Laubscher v Laubscher* 2004 (4) SA 350 (T). A similar view was reached by Jones J in his unreported judgment in *Kamma Park Properties (Pty) Ltd v Ngesi and Others* Case 1220/97 ECD, the relevant portion of which is quoted in *Uncedo Taxi Service Association v Maninjwa and Others* 1998 (3) SA 417 (E) at 426D-H. (It is thus incorrect for the appellant to argue, as he does in paragraph 6.10 of his heads, that De Vos J’s judgments in the present case and in *Laubscher* are the only decisions in which our courts have, in the constitutional era, upheld the common law rules relating to civil contempt.)
70. In the first *Uncedo* case (cited above) Pickering J expressed the view that an applicant in civil contempt proceedings should establish the respondent’s “*guilt*” beyond reasonable doubt (at 428A-B), disagreeing in this respect with Jones J’s earlier judgment in the same division. It is respectfully submitted that Pickering J erred. (It may be added that his opinion on this particular aspect was *obiter*. All he was called upon to decide was an *in limine* objection by the respondent that proceedings on notice of motion were *per se* unconstitutional. He dismissed the objection. For that limited purpose it was unnecessary for him to decide who would bear the onus or what the nature of the onus would be when the main application came to be heard.)

71. In the second *Uncedo* case which the appellant cites in his heads (*Uncedo Taxi Service Association v Mtwana and Others* 1999 (2) SA 495 (E)) Mbenenge AJ followed the earlier *Uncedo* judgment without significant further reasoning. (It may be added, once again, that a decision on the onus seems not to have been necessary in that case, since on either test the court found the onus to have been discharged.)
72. As to foreign authority, the English cases (appellant's heads para 6.4.1) are not based on any constitutional considerations but on the common law of that country. English law appears to be more tolerant of differing (or "*flexible*") degrees of proof in civil matters, allowing the onus to be determined by the severity of the allegation (see *Bater v Bater* [1950] 2 All ER 458 (CA) at 459B-F; *Thomas Bates & Son Ltd v Wyndham's (Lingerie) Ltd* [1981] 1 All ER 1077 (CA) at 1085b-d; *Khawaja v Secretary of State for the Home Department and Another Appeal* [1983] 1 All ER 765 (HL) at 784d and 792b-c; cf *Cross & Tappan on Evidence* 9th Ed at 140-143). By contrast, our courts have eschewed this approach, maintaining a single standard of proof in civil matters.
73. The Malaysian, Hong Kong and Sri Lankan cases mentioned in paragraph 6.5 of the appellant's heads are all based on the common law of those countries, and they cite principally the English case of *Re Bramblevale Ltd* [1969] 3 All ER 1062 (CA) as authority for the standard of proof required in civil contempt.

74. The same applies to the Australian cases (appellant's heads para 6.4.2), where – until the judgment of the High Court in *Witham v Holloway* (1995) 131 ALR 401 (HC) – judicial opinion was divided as to whether the *Bramblevale* decision should be followed (see *Witham* at 415-416).
75. As to Canadian law, the most recent decision is the *Videotron* case (cited by the appellant in paragraph 6.4.3 of his heads). The issue in that case was not whether an applicant in civil contempt proceedings has to prove the respondent's guilt beyond reasonable doubt, but whether the Quebec Code of Civil Procedure rendered a respondent in such proceedings a compellable witness (i.e. whether the applicant could insist on the respondent being subjected to cross-examination). The court split on this issue.
76. As appears from the judgment of Gonthier J (writing for the majority), the necessity for proof beyond reasonable doubt and the non-compellability of the respondent in contempt proceedings were both features of the Canadian common law (at 397b-d, 400b-c and 401d-h). All that the majority judgment decided was that this was not overridden by a particular provision of the Code.
77. Since our own common law on the subject is well-established, the mere fact that the common law of Canada (and of England, Australia and other Commonwealth countries) is different is no reason to introduce a change.

78. It is nevertheless of interest to note that in his dissenting judgment in *Videotron L'Heubreaux-Dubé J* repeatedly emphasised the need to recognise that contempt was a concept which existed in the private sphere as well as the sphere of public law (384e-f). He remarked that the “*dual nature of contempt and its ensuing adaptability to a wide range of situations is as I see it at the very foundation of the institution itself*” (at 385f). In the case under consideration in *Videotron*, the learned judge considered that it was the private element which was to the forefront. A civil injunction, he said, “*would be a dead letter if a contempt of court proceeding could not guarantee its enforcement*” (at 387f).
79. In contrasting criminal and civil contempt proceedings, L'Heubreaux-Dubé J observed as follows:

“Though it also aims to maintain respect for the authority of the court, the civil contempt proceeding does not on this account fall into the realm of public law. Like the injunction of which it is an adjunct, it is first and foremost a means by which private rights are enforced. The fact that the possibility of imprisonment is associated with it does not alter this primary function ...”

and

“The function of contempt arising from a civil injunction order is thus one of coercion. The function of contempt arising from a criminal matter is one of punishment and deterrence. This function clearly gives criminal contempt a public dimension. Civil contempt, on the other hand, continues to be of a private nature: the aim of the party seeking it is to ensure that the civil order made solely for his or her benefit is complied with. The powers of the court, first among which is imprisonment, are directed to a specific end: the protection of the applicant's

rights through compelling the respondent to act, or to refrain from committing given acts as defined in the injunction order. There is no punitive or deterrent purpose underlying these powers. In these circumstances, civil contempt arising from an injunction acts to some extent as a form of forced execution of judgment ...” (390c-e).

80. He thus concluded that civil contempt proceedings were ordinary civil proceedings governed by the procedures in the Code relating to civil cases. Significantly for the argument advanced earlier concerning the meaning of the word “*accused person*” in s35(3) of our Constitution, L’Heubreaux-Dubé J rejected the contention that the respondent in civil contempt proceedings could invoke the protection afforded to “*accused*” persons by s11 of the Canadian Charter:

“Since the focus of the contempt penalty arising from a civil injunction order is coercion rather than punishment and deterrence, I am of the view that the above considerations cannot apply in the present situation. Moreover, the word ‘accused’ contained in this section refers in my view to a prosecution, which necessarily goes beyond the purely private setting in which an action for an injunction and a civil contempt proceeding take place” (at 395c-d).

81. In the United States (to which the appellant does not refer) the standard of proof beyond reasonable doubt applies only to proceedings which have as their primary purpose to punish the disobedient party or to vindicate or maintain the authority of the court (see, generally, *American Jurisprudence* 2d Vol 17 paras 3, 4, 146 and 183). Where the object is to coerce compliance, incidental punitive effects do not result in the proceedings being

classified as criminal in nature. The standard of proof in such civil contempt proceedings is not proof beyond reasonable doubt. Some cases hold that the proof must be “*clear and convincing*” (*Oriel v Russell* (1929) 278 US 358), though other cases have ruled that contempt need only be proved on a preponderance of probabilities (for a recent example of the latter, see *Chrysczanavicz v Chrysczanavicz* 796 A.2d 366 (Pa. Super. 2002) at 369).

82. We thus respectfully submit that the common law rules concerning proof in civil contempt proceedings are constitutionally acceptable and should be retained.

USE OF MOTION PROCEEDINGS

83. In advancing his contention on this part of the case in section 7 of his heads, the appellant distinguishes between civil contempt proceedings brought to coerce compliance and those brought purely to punish. In the case of the latter, it is said, “*summary contempt proceedings*” cannot be justified (para 7.7), and an argument is then developed to the effect that this is also so when coercion is the object (paras 7.11-7.20).
84. The reference in section 7 of the appellant’s heads to a “*summary procedure*” and the apparent equating of motion proceedings to a “*summary procedure*” are not explained. The “*summary procedure*” dealt with by the Constitutional Court in *S v Mamabolo (ETV and Others Intervening)* 2001 (3) SA 409 (CC) – the case cited in paragraph 7.5 of the appellant’s heads – is one where the court itself

summarily deals with contempt *in facie curiae* or summarily summons a person to appear to explain conduct which the presiding judge regards as contemptuous and where the court in a sense acts as arbiter in its own cause. There is no similarity between that procedure and ordinary motion proceedings, where the respondent faces an adversary who has set out his case in founding papers and where the respondent is afforded the opportunity to answer by way of affidavit, to appear by counsel and to seek a referral to oral evidence if appropriate.

85. As regards the distinction drawn by the appellant between the two purposes for which a civil contempt application might be instituted, we have already sought to show that in the present case the respondent's purpose was in all respects to coerce compliance with Hartzberg J's order, there having been unpurged contempt both in regard to the draft reports and in regard to the audit files at the time the application was launched.
86. To the extent that the appellant's argument rests on s35(3) of the Constitution, we repeat our submission that a respondent in civil contempt proceedings does not fall within the ambit of that provision.
87. In any event, and to the extent that motion procedure might be viewed as derogating from guaranteed constitutional rights, we submit the derogation is justified. Non-compliance with civil orders *ad factum praestandum* by its nature calls for a prompt remedy. The remedy must be one which the civil litigant who has the

greatest interest in enforcement should be entitled to initiate. The use of motion proceedings meets these justifiable imperatives while at the same time ensuring that the respondent is fully informed of the case he has to meet and is afforded a property opportunity of answering it. It is submitted that the common law procedure (which is admittedly *sui generis*) evolved and has been sanctioned by our courts for many years precisely because it fairly accommodates the needs of both litigants.

88. We thus submit that Pickering J in the first *Uncedo* case reached a correct conclusion on the only issue he was called upon in that case to decide, namely that motion proceedings for civil contempt are not a violation of any guaranteed rights.

89. The appellant argues that motion proceedings violate an “*accused*” person’s right to remain silent and his right to require that a *prima facie* case be made out before he is called upon to present his defence (paras 7.13 and 7.14). The argument is premised, incorrectly we submit, on the applicability of s35(3) of the Constitution. However, and even if that section were applicable to a respondent in a civil contempt application, the contention that motion proceedings *per se* violate the respondent’s constitutional rights is, we submit, unjustified:

89.1 The applicant does indeed have to make out a case against the respondent in his founding papers.

- 89.2 The appellant's argument ignores the inherent flexibility of motion proceedings. For example, a respondent can raise as an *in limine* objection that the applicant has not made out a *prima facie* case, and for purposes of adjudicating such an objection the court disregards anything contained in the answering and replying papers (see *Bowman NO v De Souza Roldao* 1988 (4) SA 326 (T) at 327B-328B and the cases there collected).
- 89.3 The respondent is, of course, not obliged by rule 6 to file an answering affidavit at all. He can simply file a notice under rule 6(5)(d)(iii) and argue that no case has been made out.
- 89.4 Although it is usual for a respondent who wishes to raise a preliminary objection to plead over on the facts, there is no immutable rule to this effect, and our courts have the power in appropriate circumstances to direct that the preliminary objection be disposed of first (cf *Bader and Another v Weston and Another* 1967 (1) SA 134 (C) at 136B-137C; *Standard Bank of South Africa Ltd v RTS Techniques and Planning (Pty) Ltd and Others* 1992 (1) SA 432 (T) at 442D-E and cf at 1992 (1) SA 532 (T) for the judgment of De Villiers J in the same case).
- 89.5 If there is reason to doubt what the applicant's deponents say, or if the respondent is concerned that the balance of probabilities on the papers is against him, he can in terms of rule 6(5)(g) apply for a referral to oral evidence or for leave to

cross-examine the applicant's deponents. The court's powers under rule 6(5)(g) with a view to a just and expeditious determination are very wide.

90. Even if ordinary motion proceedings were thought to require some adjustment in order to pass constitutional muster (which we dispute), it does not follow that it would be appropriate to decree that the rule 6 procedure is unconstitutional with immediate effect. A court can suspend a decree of unconstitutionality (s172(1)(b)(ii) of the Constitution). The appellant refers in paragraph 7.17 of his heads to procedures which have been adopted in other countries. However, no such special procedures exist in South Africa. If rule 6 were held to be inapplicable with immediate effect, there would be no way in which a civil litigant armed with an order *ad factum praestandum* could enforce it. The administration of justice would be seriously impaired. Motion proceedings remain sufficiently flexible to regulate civil contempt until the legislature or the rule makers have been afforded sufficient time to devise alternative procedures.

91. Finally, and although we have addressed the merits of the appellant's attack on the use of motion proceedings, we respectfully submit that the point is simply not open to the appellant. The proper time for the objection was when the application was launched. No such objection was raised. The appellant filed his answering papers in the ordinary way. The point was not even taken in argument before De Vos J. (The only constitutionally-based contention was that the applicant in civil contempt proceedings had to prove the respondent's contempt

beyond reasonable doubt.) The point has thus been raised for the first time on appeal.

92. It is submitted that there are several reasons why the point cannot be raised for the first time on appeal:

92.1 Firstly, the objection concerns a point of procedure. If an applicant follows an irregular course, the respondent's remedy is to object in terms of rule 30. If the respondent raises no such objection but instead takes further steps in the conduct of the proceedings (as happened here), he cannot later complain of the irregularity.

92.2 Secondly, and because the attack concerns a question of procedure, the failure by a respondent to raise it at the proper time places it beyond the applicant's power timeously to adjust the course he has followed.

92.3 Thirdly, in constitutional matters questions of justification can arise which may require evidence. Because the objection was not raised in the court *a quo*, neither party was afforded the opportunity of placing evidence before De Vos J concerning the justifiability of the use of motion proceedings in civil contempt.

PREMATURITY

93. It is respectfully submitted that the appellant's contention that the application was premature is misconceived.
94. To describe an application as "*premature*" may mean nothing more than that a necessary element to complete the cause of action was not present at the time the proceedings were instituted. There is no particular value in using the word "*premature*" in this context. One simply has to determine the elements of the cause of action and assess whether they were or were not present.
95. In this regard, we have already made our submissions on the respondent's entitlement to the directory relief and the contempt relief respectfully. It is submitted that as at 12 June 2003 (when the application in the court *a quo* was instituted) the respondent was entitled to both sets of relief.
96. Alternatively, a contention that an application or action was "*premature*" may mean that the applicant or plaintiff was over-hasty. This would not bear on the litigant's entitlement to relief but might affect costs. It is submitted, once again, that the respondent was not obliged to wait longer before instituting the proceedings. We must emphasise, moreover, that contempt was not the only question in the court *a quo*. Indeed, one of the primary points was whether the appellant was obliged to produce all the draft reports, and that is something which the appellant throughout disputed.

97. Finally, a contention of prematurity may presage an attack that the application is an abuse of the court's process. That was not alleged in the answering papers, and the appellant does not appear to put his argument on that basis. A contention that the respondent's application was an abuse would in any event, in our submission, be completely unfounded.

CONCLUSION

98. It is respectfully submitted, in all the circumstances, that the appeal should be dismissed with costs, including those attendant on the employment of two counsel.

OWEN ROGERS S.C.

EDUARD FAGAN

Respondent's Counsel

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

SCA CASE NO.: 653/2004

In the matter between:

SA FAKIE N.O.

Appellant

and

CCII SYSTEMS (PTY) LIMITED

Respondent

RESPONDENT'S LIST OF AUTHORITIES

1. *Noel Lancaster Sands (Edms) Bpk v Theron* 1974 (3) SA 688 (T)
2. *Trencor Services (Pty) Ltd v Muller t/a SA Trucking* 1983 (4) SA 893 (C)
3. *Putco Ltd v TV & Radio Guarantee Co (Pty) Ltd* 1985 (4) SA 809 (A)
4. *Frankel Max Pollak Vinderine Inc v Menell Jack Hyman Rosenberg & Co Inc and Others* 1996 (3) SA 355 (A)
5. *Consolidated Fish Distributors (Pty) Ltd v Zive and Others* 1968 (2) SA 517 (C)
6. *Townsend-Turner and Ano v Morrow* 2004 (2) SA 32 (C)

7. *Cape Times Ltd v Union Trades Directories (Pty) Ltd and Others* 1956 (1) SA 105 (N)
8. *Naidu v Naidoo* 1993 (4) SA 542 (D)
9. *Verkouteren v Savage* 1918 TPD 62 and 68
10. *Afrikaanse Pers en Publikasie (Edms) Bpk en Andere v Mbeki* 1964 (4) SA 618 (A)
11. *Naude en 'n Ander v Searle* 1970 (1) SA 388 (O)
12. *Microsoft Corporation and Another v Marks* (1996) 139 ALR 99 (FCA)
13. *Gates v Gates* 1939 AD 150
14. *Loomcraft Fabrics CC v Nedbank Ltd and Ano* 1996 (1) SA 812 (A)
15. *Coetzee v Government of the Republic of South Africa; Matiso and Others v Commanding Officer, Port Elizabeth Prison and Others;* 1995 (4) SA 631 (CC)
16. *Laubscher v Laubscher* 2004 (4) SA 350 (T)
17. *Kamma Park Properties (Pty) Ltd v Ngesi and Others* Case 1220/97 EDC
18. *Uncedo Taxi Service Association v Maninjwa and Others* 1998 (3) SA 417 (E)
19. *Uncedo Taxi Service Association v Mtwana and Others* 1999 (2) SA 495 (E)
20. *Bater v Bater* [1950] 2 All ER 458 (CA)
21. *Thomas Bates & Son Ltd v Wyndham's (Lingerie) Ltd* [1981] 1 All ER 1077 (CA)
22. *Khawaja v Secretary of State for the Home Department and Another Appeal* [1983] 1 All ER 765 (HL)

23. *Re Bramblevale Ltd* [1969] 3 All ER 1062 (CA)
24. *Witham v Holloway* (1995) 131 ALR 401 (HC)
25. *Oriel v Russell* (1929) 278 US
26. *Chryszanavicz v Chryszanavicz* 796 A.2d 366 (Pa. Super. 2002)
27. *S v Mamabolo (ETV and Others Intervening)* 2001 (3) SA 409 (CC)
28. *Bowman NO v De Souza Roldao* 1988 (4) SA 326 (T)
29. *Bader and Another v Weston and Another* 1967 (1) SA 134 (C)
30. *Standard Bank of South Africa Ltd v RTS Techniques and Planning (Pty) Ltd and Others* 1992 (1) SA 432 (T) and 1992 (1) SA 532 (T)