

slightly less than a month later, on 1 June. No doubt, all of the judges had to deal too with other matters during that term, and so they must have had to labour under very great pressure. I, in writing this article, and academic writers, do not have to do so. Academic writers have an important function to fulfil: their task includes examining judgments carefully and critically to assist busy judges at the coalface to do the vital work of dispensing justice ever more effectively.

Of course, in arbitrations the parties in a contractual dispute can by agreement provide for the arbitrator's entitlement to order apportionment – an agreement which would avoid the unfairness and injustice of not doing so.

To its limited credit the legislature did, with effect from 1 April 2005, attempt to ameliorate the position of auditors in section 58(2) of the Auditing Profession Act 26 of 2005. The question whether it has succeeded in doing so is a subject for another day. What is unfortunate is that the effect of its attempt, to the extent that it may be successful, discriminates between auditors and other contracting parties in breach of section 9 of the Constitution and the spirit of fairness which permeates it.

It is not difficult to envisage how the SCA judgment can be assailed. A defending contracting party can plead apportionment. If this is followed by an exception which has to be upheld, the decision in question can be taken on appeal to the SCA. If no exception materialises the defendant can, at the end of the trial ask for apportionment, but concede that the court is bound to refuse it and can thereafter take the matter on appeal. In *Normkowitz Administrators (Pty) Ltd v Fedsure Health Medical Scheme* 2005 (1) SA 80 (W) I had to deal with a case where there was a reasonable prospect that the SCA would reconsider one of its decisions. I said the following at 83C without thought, as far as I can recall, of *Thoroughbred*, but the passage now appears to me to be apposite:

“At the end of the day, an appeal has a reasonable prospect of success, even if such prospect arises only from the consideration that there is a reasonable prospect that the Supreme Court of Appeal may reconsider one of its previous decisions. All Judges privileged to hold this high office, and governed only by the dictates of the law and truth, should not be constrained from expressing doubt as to the soundness of any rule of law, stated by whatever Court, as long as they do so courteously, and where a higher Court is involved, apply the law so laid down.”

According to my Jutastat Online no court has after 20 years yet fallen into the error of criticising a single word! And getting the SCA to reconsider where the judgment concerned was not unanimous on the point in issue ought not to prove difficult at all.

I look forward to the SCA reversing its current position on the important issue, the absence of the resolution of which, no doubt, inflicts injustice on many contracting parties. Given my statistically limited future time on this earth, I hope that happens soon, since, if I first hear of it in Heaven, where I undoubtedly will end up, schadenfreude there may be frowned upon. **A**

Note

- 1 I had the privilege of being a colleague of his at the Bar. He was a brilliant jurist, a professor of law at 29, and a prolific legal writer. I once had a junior brief with him involving answering numerous questions of law. He masterfully not only reworded them, but in effect, produced a mini textbook of an opinion which I was happy to countersign. We had only one disagreement, a serious one. I strongly felt that two thirds of the fee he insisted on charging was much too little for me.
- 2 *Thoroughbred Breeders' Association v Price Waterhouse* 2001 (4) 551 (SCA).
- 3 *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012(4) 593 (SCA) at 605B-606C para 20.
- 4 *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In Re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* 2001 SA 545(CC) at 558E-F.

LESSER KNOWN STRUGGLES OF BEING AN ADVOCATE

