THE SUPREME COURT OF APPEAL

REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case number: 474/08

In the matter between:

ROAD ACCIDENT FUND **Appellant**

and

PIERRE FRANCOIS CLOETE N O **First Respondent**

ROGER RENÈ JULIA THOMAS **Second Respondent**

ADV H M CARSTENS SC (ARBITRATOR) **Third Respondent**

Neutral citation:	*Road Accident Fund v P F Cloete NO* (474/2008) [2009] ZASCA 126 (29 September 2009)
Coram:	Harms DP, Heher, Maya JJA and Griesel and Tshiqi AJJA
Heard:	11 September 2009
Delivered:	29 September 2009
Summary:	Arbitration – question of law for opinion of the court stated by arbitrator in terms of s 20(1) of Arbitration Act 42 of 1965 – whether High Court had jurisdiction to hear matter – nature of discretion of arbitrator and of court.

ORDER

On appeal from: the High Court, Cape Town (Cleaver J).

Order:

1. The appeal is dismissed with costs.

2. The cross-appeal is upheld with costs.

3. The costs shall include the costs of two counsel.

4. The order of the court below is set aside and substituted with the following:

   'The application is dismissed with costs, including the costs of two counsel, where so employed.'

JUDGMENT

GRIESEL AJA:

[1] This is an appeal and cross-appeal against a judgment of the High Court, Cape Town (Cleaver J), which comes before us with leave of that court. The matter arises from an arbitration between the parties in the course of which the arbitrator stated a question of law for the opinion of the court in terms of s 20(1) of the Arbitration Act 42 of 1965 ('the Act').[1]

[2] The appellant, the Road Accident Fund ('the Fund'), established in terms of the Road Accident Fund Act 56 of 1996, is the defendant in the

[1] Section 20(1) of the Act provides:
'An arbitration tribunal may, on the application of any party to the reference and shall, if the court, on the application of any such party, so directs, or if the parties to the reference so agree, at any stage before making a final award state any question of law arising in the course of the reference in the form of a special case for the opinion of the court or for the opinion of counsel.'

arbitration. The first respondent (the first claimant in the arbitration) is the curator *ad litem* for Dr Els Thomas, a young medical practitioner from Belgium, who was seriously injured in a motor collision near Cape Town on 8 October 1996 while on vacation in South Africa. The second respondent (the second claimant in the arbitration) is her father, Mr R R J Thomas, acting as her duly appointed 'bewindvoerder' (equivalent of a curator *bonis*) in Belgium. (In what follows, I refer to the respondents individually by name and collectively as 'the claimants'.) The arbitrator, senior counsel at the Cape Bar, has been joined as the third respondent. He abides the decision of the court and has played no active role in these proceedings.

Factual background

[3] Dr Thomas had commenced her own practice near Antwerp in Belgium not long before the accident happened. As a result of the injuries sustained in the collision, she suffers from mental, physical and psychological handicaps which prevent her from practising as a medical doctor and from being gainfully employed at all. After the appointment of a curator *ad litem* to represent her, action was instituted in the Cape Town High Court against the Fund to recover damages, *inter alia*, in respect of the cost of medical care, the cost of accommodation and loss of earning capacity in respect of Dr Thomas. That litigation was in due course settled on the basis that the Fund admitted liability for 70 per cent of the damages suffered by Dr Thomas due to her injuries. By agreement between the parties, the quantum of her claim was thereupon referred for determination by way of arbitration in terms of the Act.

[4] The hearings relating to the quantum of the claim took place before the arbitrator in Belgium over three sessions, during February 2003, August/ September 2003 and September 2005, before final argument was addressed to the arbitrator during March 2006. He made an interim award on 15 June 2006, as well as a further (final) award on 19 September 2006.

[5] At the heart of the dispute between the parties lies the entitlement of Dr Thomas to certain benefits in terms of the Belgian social security system and the question whether any such benefits should be deducted from the damages

payable by the Fund. According to Prof Guido van Limberghen, professor in Social Security Law at the Vrije Universiteit Brussel who submitted an expert report on behalf of the claimants, self-employed persons in the position of Dr Thomas qualify for social security benefits consisting of medical and 'invalidity' (disability) insurance; a family benefit insurance; pension insurance; and insolvency insurance. The social security system was established by legislation and administered by the state. It is compulsory and regulated by public legislation, not by private contract.

[6] The social security scheme for medical insurance is administered through insurance institutions, of which the *Onafhankelijk Ziekenfonds* is one. Dr Thomas is a member of the *Onafhankelijk Ziekenfonds* and has received benefits from it arising from the injuries sustained in the collision. Part of those benefits relate to compulsory cover, and the remainder to optional cover she enjoyed under those schemes.

[7] The fact that the accident occurred in South Africa does not deprive Dr Thomas of the right to the assistance of the Belgian medical cost insurance for the self-employed. This entails a right to compensation for the treatment she received in a South African nursing institution and the treatment she subsequently received after her return to Belgium.

[8] She is also entitled to employment disability benefits for the period that she was treated in South Africa and for the period after her return to Belgium. Under Belgian law the statutory insurance (or social security) institutions are obliged to pay compensation to Dr Thomas in anticipation of recovery of damages from any accountable third party or its insurer involved. The Belgian insurance institution (in this case the *Onafhankelijk Ziekenfonds*) is entitled to recover such compensation from the wrongdoer if the accident occurred in Belgium or in a country that recognises its right to recover, of which South Africa is not one.

[9] It appeared, further, that there is no entitlement to benefits once actual compensation has been received from an accountable third party. Thus Dr

Thomas's right of recovery against the Belgian scheme will fall away once she receives compensation from the Fund. There is a statutory duty on a claimant to keep the relevant insurance institution fully informed as to the existence of claims against wrongdoers and diligently to pursue such claims. In this regard, Prof van Limberghen expressed the following view regarding the possibility of Dr Thomas recovering double compensation in respect of her injuries:

'To enable the [Belgian] insurance institution to recuperate the compensation of the medical and invalidity insurance, to prevent doctor Thomas from being compensated twice and to prevent the Road Accident Fund from escaping its obligations towards doctor Thomas, the only solution is an agreement entered into between doctor Thomas and the Belgian insurance institution. In that agreement doctor Thomas has to undertake to repay the compensation she receives from the Road Accident Fund to the insurance institution insofar as it covers the compensation that she had already received from the insurance institution.'

[10] The evidence further revealed that Mr Thomas, on behalf of himself and his daughter, had in fact furnished an undertaking to refund to the Belgian insurance institutions such benefits as Dr Thomas may receive from the Fund for the self-same loss.

[11] Based on the above evidence the Fund took the view, notwithstanding the undertaking mentioned above, that the benefits received and to be received by the claimants from the various social security funds fall to be deducted from the damages to be awarded to the claimants.

[12] The Fund's view was resisted by the claimants, relying *inter alia* on the judgment of Scott J in *Zysset & others v Santam Limited*.[2] In that case, the four plaintiffs, all Swiss citizens domiciled and resident there, were injured in a motor collision in Namibia. They received financial benefits from one or other of two legislatively constituted compulsory social insurance schemes in Switzerland, whose object was the protection of the entire population of Switzerland against certain consequences of disease and accident. They sued the defendant for

[2] 1996 (1) SA 273 (C).

damages as the insurer under the Compulsory Motor Vehicle Insurance Act 56 of 1972 of the other motor vehicle involved in the collision. The defendant admitted the negligence of the driver of the insured vehicle but claimed that the financial benefits received from the two social insurance schemes had to be deducted from the damages they had sustained. It appeared that the plaintiffs had entered into an agreement with the Swiss insurance schemes that, in the event of the plaintiffs receiving the full amount of their damages, they would repay to the schemes the compensation received from those schemes. The issue before the court was whether or not the financial benefits from the Swiss schemes were to be deducted from the damages to be awarded by the court in the actions against the defendant.

[13] The court held that there could be no question of a deduction if the plaintiffs were not doubly compensated and the effect of the agreement was that the plaintiffs would not be doubly compensated if they were awarded their full damages, since they would then have to repay to the Swiss schemes whatever they had received from them in benefits in respect of their patrimonial loss; further, that it was irrelevant that the plaintiffs had not been legally bound to enter into the agreement.[3]

[14] The court accordingly issued an order declaring that, with regard to the claim of each plaintiff, no deduction from the damages as finally determined by the court was to be made in respect of any amount or any portion thereof which was or is to be received from the Swiss schemes and which in terms of the agreement fell to be repaid to the Swiss schemes.[4]

The application in terms of s 20(1)

[15] It is apparent from the above synopsis that the same, or similar, questions that arose in *Zysset* also arose in the present case. On the face of it, therefore, *Zysset* would constitute binding authority in respect of the issues to be decided in the present arbitration. However, it was contended on behalf of

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[3] At 281G–282B.
[4] At 282E.

the Fund that *Zysset* had been wrongly decided. For this reason, the Fund sought an opportunity of persuading the court of its view. It accordingly asked the arbitrator in terms of s 20(1) of the Act to state the following questions of law for the opinion of the court in the form of a special case:

'1.1 Whether the value of any of the benefits referred to below received or to be received by the First and/or Second Claimants, or anyone appointed as curator *bonis* or "bewindvoerder" on behalf of Dr Els Thomas, should be excluded or deducted from any damages to be awarded to the Claimants or not:

1.1.1 any benefits received or receivable from the Belgian *Onafhankelijk Ziekenfonds* pursuant to compulsory cover she enjoyed from that fund; and/or

1.1.2 any medical and/or disability benefits received or receivable pursuant to compulsory cover she enjoyed under the Belgian Medical and Invalidity Insurance Act of 1994 ("ZIV-Wet 1994"); and/or

1.1.3 any benefits received or receivable pursuant to compulsory cover she enjoyed under the Royal Decree of 3 July 1996 (Belgium); and/or

1.1.4 any benefits received or receivable pursuant to compulsory cover she enjoyed under the Belgian medical Cost Decree for the Self-employed of 1997; and/or

1.1.5 any benefits received or receivable pursuant to compulsory cover she enjoyed under the Royal Decree of 3 July 1996 and/or the Employment Disability Decree for the Self-employed (*Arbeidsongeschiktheidsbesluit voor Zelf-standigen*); and/or

1.1.6 any benefits received or receivable from the *Vlaams Fonds voor Sociale Integratie van Personen met een Handicap*.'

[16] The arbitrator was not prepared to state a question in the terms requested by the Fund. In his 'Ruling', handed down on 15 June 2006, the arbitrator referred to the test laid down by Lord Denning MR in *Halfdan Grieg &*

Co A/S v Sterling Coal and Navigation Corporation and another[5] and adopted in several subsequent South African decisions,[6] where it was held as follows with regard to comparable provisions in the English Arbitration Act of 1959:

'The point of law should be real and substantial and such as to be open to serious argument and appropriate for decision by a court of law as distinct from a point which is dependent on the special expertise of the arbitrator or umpire. The point of law should be clear cut and capable of being accurately stated as a point of law – as distinct from the dressing up of a fact as if it were a point of law. The point of law should be of such importance that the resolution of it is necessary for the proper determination of the case – as distinct from a side issue of little importance.
If those three requisites are satisfied, the arbitrator or umpire should state a case.'

[17] Having quoted the above passage, the arbitrator proceeded as follows:

'The questions posed [by the Fund] will *inter alia* involve the construction of the statutory enactments dealt with by Prof van Limberghen in his report. That part of the report has been admitted and is no longer open to debate. Secondly, on Prof Van Limberghen's interpretation (as I read it) the obligation under the Belgian medical– and invalidity insurance schemes to pay Dr Els Thomas will fall away once she receives compensation from the defendant. The issue of double compensation then does not arise. Thirdly, an argument that the value of benefits "receivable" (as opposed to "received" or "to be received") is deductible is in my view without merit and does not meet the first of the criteria referred to above.'

[18] The arbitrator noted, however, that the solution proposed by Prof van Limberghen accorded with the judgment in the *Zysset* matter and, since it was contended on behalf of the Fund that this case had been wrongly decided and an opportunity had been sought to persuade a court to re-examine the judgment and the issues raised therein, he was prepared to grant the Fund such an opportunity – *inter alia* in view of the fact that 'a large amount of money is

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[5] [1973] 2 All ER 1073 (CA) at 1077*c-g* (other case references omitted).
[6] Cf *Administrator, Transvaal v Kildrummy Holdings (Pty) Ltd & another* 1978 (2) SA 124 (T) at 127H–128A; *Dorman Long Swan Hunter (Pty) Ltd v Karibib Visserye Ltd* 1984 (2) SA 462 (C) at 472G–H; *Government of the Republic of South Africa v Midkon (Pty) Ltd & another* 1984 (3) SA 552 (T) at 560E.

involved here'.[7] He accordingly directed that a special case in the following terms be referred to the court for an opinion in terms of s 20(1) of the Act:

'1. In the matter of *Zysset & others v Santam Limited* 1996 (1) SA 273 (C) this Honourable Court made the following order (at 282D–E):

"With regard to the claim of each plaintiff no deduction from the damages as finally determined by this Court is to be made in respect of the amount, or any portion thereof, which was, or is to be, received from IV, SUVA, or Berner and which in terms of the agreement of 7 December 1992 falls to be repaid to IV, SUVA or Berner. Any portion of the amount received from IV, SUVA or Berner in respect of patrimonial loss which in terms of the agreement is not repayable shall be deducted from the damages so determined."

2. The issues which arose from the *Zysset* matter have also arisen in the present arbitration.

3. The defendant questions the correctness of the decision in the *Zysset* matter; the claimant contends that it was correctly decided.

4. This Honourable Court is accordingly in terms of s 20 of the Arbitration Act 42 of 1965 requested to determine the following issue: *Whether on the facts stated therein the order in the* Zysset *matter was correctly made or not. If not, the court is requested to state what the order should have been***.**'

The high court

[19] The Fund was not satisfied with the arbitrator's formulation of the issue and applied to the high court for an order (1) compelling the arbitrator to state the questions of law in the form as initially formulated on behalf of the Fund;[8] alternatively, and in any event, (2) to determine the issue as formulated by the arbitrator in the special case. The claimants opposed the application and sought to persuade the court that it should decline to hear the matter.

[20] The learned judge, like the arbitrator, felt obliged, *inter alia* in the light of the test laid down in *Halfdan Grieg* and 'in view of the amount involved and the

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[7] The eventual award in favour of the claimants exceeded R25 million.
[8] As quoted in para 15 above.

importance of the issue', to deal with the question of law stated by the arbitrator. Having heard argument, the high court upheld the Fund's argument that the *Zysset* case had been wrongly decided. The court, however, did not consider it 'necessary or appropriate to redraft the order', as requested by the arbitrator. (The correctness or otherwise of the high court's opinion as such is not in issue before us by reason of s 20(2) of the Act, which provides that '(a)n opinion referred to in subsection (1) shall be final and not subject to appeal and shall be binding on the arbitration tribunal and on the parties to the reference.')

[21] The learned judge thereafter dealt with the relief claimed in para 1 and stated as follows (at paras 29–31):

'Counsel were in agreement that it would not be appropriate at this stage either to direct the arbitrator to refer the questions to this court, or for me to decide the questions myself. The reason is that it will be necessary to establish what the objects of the Belgian scheme are in order to come to a decision as to whether payments received under this scheme are payments which are to be deducted from the amount of damages awarded.

I accordingly direct that in respect of the questions raised, the arbitrator may receive such further evidence as the parties may wish to present concerning the objects of the Belgian scheme and he may then state the questions as points of law (together with his findings of fact) if he concludes on such further evidence that the objects of the Belgian scheme are materially different from those of the Swiss scheme considered in *Zysset.*

The authority to refer the matter back to the arbitrator relates only to the question of benefits already received from the Belgian scheme and not to any future benefits which Dr Thomas may receive. …'

[22] The order issued by the registrar pursuant to the judgment did not reflect the directives contained in paras 30 and 31 quoted above and read as follows:

'1. The court concluded that the decision in *Zysset & others v Santam Ltd* 1996 (1) SA 273 (C) is incorrect and that in that case the amount or any portion thereof

which was received by any of the plaintiffs from IV, SUVA or Berner should have been deducted from the amount of damages awarded to him or her.

2. First and second respondents [claimants] are to pay the applicant's [Fund's] costs.'

[23] Both sides were dissatisfied with the judgment as well as the form of the order of the high court and sought leave to appeal and to cross-appeal against it. In his judgment granting the necessary leave, the learned judge clarified the original order by explaining that 'what [he] had intended to convey, was that in respect of past benefits [he] neither granted nor refused the application, but in respect of future benefits the application was refused'. In terms of the provisions of uniform rule 42(1)(b), the original order was accordingly amended by insertion of the following new para 2 (and consequential renumbering of the existing para 2):

'2. The relief sought in para 1 of the notice of motion is refused insofar as it pertains to benefits 'to be received' / 'receivable' by or for the benefit of Dr Thomas. Save as aforesaid no order is made on para 1 of the notice of motion.'

On appeal

[24] In its appeal to this court, the Fund took issue, mainly, with the rider added in the new para 2 of the order (based on the first sentence in para 31 of the judgment quoted above) to the effect that future benefits were to be excluded from the scope of any further enquiry before the arbitrator. The Fund contended that there was no distinction in principle or in law between past and future benefits and asked that para 2 of the order (as amended) should be set aside.

[25] In their cross-appeal, on the other hand, the claimants argued that the high court should have declined to deal with the *Zysset* question at all and should have dismissed the application. The cross-appeal is based on two alternative grounds: first, that the high court had no jurisdiction to furnish its opinion on the question as stated by the arbitrator; second, that the court erred

in exercising its discretion to furnish its opinion. In the light of the issues raised, I find it convenient to deal with the cross-appeal first.

Jurisdiction

[26] Regarding the question of jurisdiction, the claimants argued that in terms of s 20(1) of the Act an arbitrator is not entitled *mero motu* to refer a question of law to a court.[9] In this case, the question as formulated by the arbitrator was one which neither party had asked him to state. A comparison of the questions raised in para 1 of the notice of motion and the question actually stated by the arbitrator reveals that they are materially different questions. The questions which the appellant asked to be stated did not in their formulation mention *Zysset* at all. In effect, therefore, the arbitrator decided *mero motu* to state the question – something which he was not legally empowered to do.

[27] The claimants submitted, further, that although *Zysset* would no doubt have been raised in argument before a court had the arbitrator reserved the questions requested by the Fund, it is by no means obvious that the court would have had to determine whether *Zysset* was right or wrong or that a finding on that question (if made) would have been decisive of the questions of law which the Fund actually asked the arbitrator to state.

[28] I doubt whether it would be correct, on these facts, to hold that the high court had no jurisdiction to hear the matter. In my view, the argument amounts to no more than this, that the high court erroneously exercised the powers it enjoyed in terms of s 20(1); not that it did not have the necessary power at all.[10]

[29] There was also some debate before us as to whether the question stated by the arbitrator meets the jurisdictional threshold of being a 'question of law'. In the form that the question has been framed, it requires the court to examine the *facts* in *Zysset* in order to determine whether or not the court, on

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[9] See *Midkon,* n 6 above, at 559I.
[10] Cf in this regard the *dictum* by Lord Steyn in *Lesotho Highlands Development Authority v Impregilo SpA* [2005] UKHL 43 para [24], quoted with approval in this court in *Telcordia Technologies Inc v Telkom SA Ltd* 2007 (3) SA 266 (SCA) para 52.

those facts, came to the correct conclusion; it does not require examination of the correctness or otherwise of any underlying legal principle as to which benefits are collateral and which are deductible from the patrimonial damages suffered by a plaintiff. In any event, with regard to the latter aspect, this court has held that questions regarding the deductibility of collateral benefits cannot be answered by reference to a single juridical test; instead, 'it is acknowledged that policy considerations of fairness ultimately play a determinative role'.[11] Moreover,

'[p]erceptions of fairness may differ from country to country and from time to time; the task of Courts is to articulate the contemporary perceptions of fairness in their respective areas of jurisdiction.'[12]

[30] More recently, this court, after quoting the above extract from *Dug-more's* case, expressed agreement with the statement that 'questions regarding collateral benefits are normative in nature; they have to be approached and solved in terms of policy principles and equity' and that, in doing so, 'there should always be a weighing-up of the interests of the plaintiff, the defendant, the source of the benefit as well as the community in establishing how benefits resulting from a damage-causing event should be treated'. [13]

[31] Although this argument is not without merit, I do not find it necessary, in the light of my views regarding the alternative argument, to come to a final conclusion on this aspect of the case. I accordingly turn to consider the question whether the high court erred in the exercise of its discretion in furnishing its opinion.

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[11] *Standard General Insurance Company Ltd v Dugmore NO* 1997 (1) SA 33 (A) at 42B.
[12] At 42B–C.
[13] *Erasmus, Ferreira and Ackermann & others v Francis* [2009] 3 All SA 500 (SCA) para 17, quoting with approval from Neethling, Potgieter and Visser *Law of Delict* 5ed (2006) pp 215–216.

Discretion

[32] Counsel for the claimants referred to English authority[14] in support of the proposition that the court enjoys a discretion whether or not to deal with the question of law stated by an arbitrator. It is correct, as pointed out by counsel for the Fund, that the cases relied on were decided on the wording of the English Act, which is materially different from s 20 of our Act.[15] Nonetheless, I have no doubt that the position in our law is similar; in other words, the mere fact that an arbitrator has seen fit to state a question of law for the opinion of the court does not oblige the high court to furnish such opinion. If the court should consider, for example, that on proper analysis the question of law posed is irrelevant to the issues in the arbitration or that the facts recorded in the special case do not enable the law point to be sensibly adjudicated, the court would be justified in declining to decide the point. This must be so, as otherwise the courts could theoretically be swamped with irrelevant and unnecessary questions of law arising from arbitrations.

[33] As for the factors influencing the exercise of an arbitrator's discretion in terms of s 20(1), it has until recently been accepted by our courts that, when the three requisites as laid down by Lord Denning in the *Halfdan Grieg* matter are satisfied, an arbitrator should be obliged to state a case.[16] In *Telcordia*,[17] however, this court firmly rejected that approach. In a unanimous judgment, Harms JA re-examined the scope of s 20 of the Act and *inter alia* said the following:

'The first matter I wish to address is the nature of the arbitrator's discretion. Eloff J, in *Kildrummy*, sought to curtail the general and unrestricted discretion the section gives to the arbitrator. There is no reason, having regard to the wording of the section, for such an approach. Rules circumscribing the way any discretion has to be exercised are

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[14] See *Babanaft International Co SA v Avant Petroleum Inc* [1982] 3 All ER 244 (CA) at 252*h–i*; *Taylor Woodrow Holdings Ltd & another v Barnes & Elliott Ltd* [2006] EWHC 1693 (TCC) paras 55–56.
[15] See *Midkon*, n 6 above, at 526G–I; *Telcordia*, n 10 above, para 152; Butler & Finsen *Arbitration in South Africa – Law and Practice* (1993) p 207.
[16] See para 16 above.
[17] Note 10 above.

generally unacceptable. Eloff J sought to justify his approach with reference to a *dictum* by Denning MR in *Halfdan Grieg.*'[18]

[34] After quoting the *dictum* from *Halfdan Grieg* on which the arbitrator relied, Harms JA pointed out that Lord Denning was 'a proponent of the view that all matters of law should fall within the sole domain of courts' and that the other two members of the court, Scarman and Megaw LJJ, did not associate themselves with the limitation placed on the discretion of an arbitrator by Lord Denning. Harms JA thereupon proceeded to hold that 'there is no obligation on an arbitrator to state a case if the requirements set out by Denning MR are present. They are important factors to consider but they are not definitive'.[19]

[35] In the light of this judgment, it is clear, to the extent that both the arbitrator and the high court regarded themselves as bound by the test laid down in *Halfdan Grieg*, that they had unduly fettered their respective discretions and had exercised it on the basis of an incorrect principle. It follows from the foregoing that this court is at large to consider the matter afresh.

[36] Further factors relevant to the exercise of the court's discretion become evident when one has regard to the purpose of s 20. It has been stated that the purpose of s 20 is 'to ensure that the ultimate control over legal issues arising in the course of an arbitration is left to the Court'.[20] This can no longer be regarded as good law. The fact is that when parties agree to refer their disputes to arbitration, they select an arbitrator as the judge of fact and law. Ordinarily, the award of the arbitrator is final and conclusive, irrespective of how erroneous, factually or legally, the decision was.[21] Section 20, therefore, constitutes an exception to the general principle that it is the function of the arbitrator to decide finally *all* matters referred to him, including questions of law.[22] For this reason, and out of deference to the principle of party autonomy,[23] the court's powers in terms of s 20 should in my view be sparingly exercised. As it was put by

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[18] Para 151.
[19] Para 152.
[20] *Dorman Long,* n 6 above at 472H; *Kildrummy's* case, note 6 above at 129A; 130D–E.
[21] *Telcordia* para 55.
[22] Butler & Finsen *op cit* p 206.
[23] Cf *Telcordia* para 4.

Donaldson LJ in *Babanaft's* case,[24] with reference to the (now repealed) s 2 of the English Arbitration Act of 1979:

'Section 2 is the successor in title to the old consultative case, which more aptly describes its nature. Put colloquially, the arbitrator or the parties nip down the road to pick the brains of one of Her Majesty's judges and, thus enlightened, resume the arbitration. *It is essentially a speedy procedure designed to interrupt the arbitration to the minimum possible extent and it is an exception to the general rule that the courts do not intervene in the course of an arbitration.*'

[37] Further guidance as to the factors that should be taken into account by a court before exercising its powers in terms of s 20(1) can be found, I suggest, in the provisions of s 45(1) and (2) of the current English Arbitration Act of 1996, under the heading 'Determination of preliminary point of law'.[25] Sub-section (1) provides that the court may 'determine any question of law arising in the course of the proceedings which the court is satisfied substantially affects the rights of one or more of the parties'. Sub-section (2)(b) *inter alia* provides further that an application under this section shall not be considered unless '… the court is satisfied – (i) that the determination of the question is likely to produce substantial savings in costs, and (ii) that the application was made without delay'.

[38] Applying the above principles to the question posed by the arbitrator in this case, the high court rightly expressed reservations with regard to the form of the question, pointing out that '(i)t is of course unusual for the validity of an existing judgment to be called in question in the course of arbitration proceedings'. In my respectful opinion, however, it is not only 'unusual', but also inappropriate, where the very issue stated by the arbitrator has already been decided by a single judge in the same Division and where there are no conflict-

[24] Note 14 above, at 252*i*–253*a* (emphasis added).
[25] Section 45 of the 1996 Act is comparable with s 2 of the repealed 1979 Act.

ing judgments on the point,[26] to state that same point yet again for the opinion of another court.

[39] The mere fact that the Fund sought an opportunity to persuade a court to re-examine the judgment and the issues raised in *Zysset* should not have persuaded the arbitrator to state a question of law for the opinion of the court, nor should it have persuaded the court to answer the question so stated. When the parties agreed to have their dispute resolved by arbitration instead of litigation they must be assumed to have agreed that it would be decided on the basis of prevailing South African law, *inter alia* as laid down in *Zysset*.[27] If either of them had wished for an opportunity to ask the court to review or change the substantive law, eg by reversing a binding precedent, then arbitration was the incorrect procedure to achieve that result. I accordingly agree with the submission on behalf of the claimants that it is neither appropriate nor just to use the court's jurisdiction under s 20(1) to reverse, in a way which is not subject to an appeal, an existing and otherwise binding precedent.

[40] Furthermore, far from being of decisive importance to the dispute between the parties, the relevance of the question stated in relation to the arbitration, is questionable. As pointed out above,[28] the principal dispute between the parties in this case related to the question whether certain benefits in terms of the Belgian social security system to which Dr Thomas is entitled should be deducted from the damages payable by the Fund. The question stated by the arbitrator, however, does not seek an answer to this issue. As matters now stand, it is not known whether the high court's finding that *Zysset* was wrong will have any practical effect on the determination of the dispute: the court simply does not know whether the result of its finding will be that any past benefits received by Dr Thomas are deductible from her damages. Were the order of the high court to be implemented, the matter will first have to go back

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[26] To the contrary, *Zysset's* case has been referred to on several occasions with approval, including by this court: see *Van Wyk v Santam Bpk* 1998 (4) SA 731 (C) at 737C–738G; *Ongevallekommissaris v Santam Bpk* 1999 (1) SA 251 (SCA) at 261H; *D'Ambrosi v Bane & others* 2006 (5) SA 121 (C) paras 27–28.

[27] The arbitrator, it may be noted, was eminently qualified to deal with the issues in dispute, having been counsel for the defendant in *Zysset.*

[28] Para 5 above.

before the arbitrator (whose final award has in the meantime been made) so as to reopen the arbitration in order to 'receive such further evidence as the parties may wish to present concerning the objects of the Belgian scheme', after which 'he may then state the questions as points of law (together with his findings of fact) if he concludes on such further evidence that the objects of the Belgian scheme are materially different from those of the Swiss scheme considered in *Zysset*'.[29] Thus it may appear, once the new evidence has been led, that the Belgian schemes are different and distinguishable from the Swiss schemes considered in *Zysset*, in which event the whole process in terms of s 20 – including the present appeal – would prove to have been a protracted and expensive exercise in futility. In that case, an opinion by the court as to whether or not *Zysset* had been correctly decided would be completely academic and hence irrelevant. This would be contrary to the principle that the court does not ordinarily in terms of s 20(1) give opinions on assumptions or on academic or hypothetical questions.[30] It would also be contrary to the principle that it would normally be premature to state a question of law for an opinion until such time as the primary facts relevant to the decision have been determined by the arbitral tribunal.[31]

[41] Finally, it has been argued on behalf of the claimants that the matter has become moot. In this regard, it appeared that since the Fund launched its application in terms of s 20, the arbitrator handed down his award on 15 June 2006, laying down certain parameters for the quantification of the award. Thereafter, the parties and their respective actuaries collaborated, debated and agreed on the final amount due to the claimants. A final award was subsequently made in September 2006 after certain further disputes had arisen. Such award has been quantified by the parties and payment in full has been made by the Fund pursuant to such award during October 2006. In making the payment, the Fund did not reserve any of its rights pertaining to the reduction of the amount paid or repayment of any portion thereof. The Fund also did not request that finalisation of the matter be held in abeyance pending finalisation of this

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[29] Para 30 of the judgment of the high court, quoted in para 21 above.
[30] *Dorman Long,* n 6 above, at 478D; *Telcordia*, n 10 above, para 155.
[31] Butler & Finsen *op cit* p 208 and the authorities cited in footnote 256.

application. No amount was held back to cover the contingency that the award might be reduced in consequence of a favourable decision on the points of law. Furthermore, the Fund failed to exercise the right conferred by the arbitration agreement to appeal against the arbitrator's award. In the circumstances, so it was argued, the *lis* referred to arbitration had been finally adjudicated and there was no further scope for the court's opinion as contemplated in s 20. Moreover, the arbitrator would not have been entitled to amend his award of 19 September 2006 and in any event the respondents would be under no obligation to repay anything to the appellant. Accordingly, so it was argued, the Fund's payment was akin to a payment made after an appealable judgment has been granted, which payment – in the absence of a reservation of rights or protest – is unequivocal and inconsistent with an intention to challenge the correctness of the judgment and amounts to peremption.[32]

[42] Again, it is not necessary to make a definite finding with regard to this issue. It is sufficient, in this context, to refer to the overarching requirement of public policy that the principle of finality in litigation should generally be preserved rather than eroded – *interest rei publicae ut sit finis litium*.[33] In this instance, it is clear that the high court's answer to the question in terms of s 20 will not assist, but will rather hamper, finality. The fact of the matter is that the collision resulting in the damages suffered by Dr Thomas occurred almost *thirteen* years ago and yet no finality has been reached. If the procedure ordered by the high court were now to be followed, the whole process is likely to be prolonged and the finalisation of the claim will be delayed indefinitely.

[43] In the circumstances, I am satisfied that the high court, in the exercise of its discretion, should have dismissed the Fund's application. It follows that the cross-appeal should succeed. This conclusion renders the appeal on behalf of the Fund academic. In the instance of both the appeal and the cross-appeal, costs must follow the result, which should include the costs of two counsel.

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[32] *Dabner v SAR & H* 1920 AD 583 at 594.
[33] *Firestone SA (Pty) Ltd v Genticuro AG* 1977 (4) SA 298 (A) at 309A.

Conclusion

[44] In the circumstances, the following order is granted:

1. The appeal is dismissed with costs.

2. The cross-appeal is upheld with costs.

3. The costs shall include the costs of two counsel.

4. The order of the court below is set aside and substituted with the following:

   'The application is dismissed with costs, including the costs of two counsel, where so employed.'

B M GRIESEL
Acting Judge of Appeal

HARMS DP (HEHER JA, MAYA JA and TSHIQI AJA concurring):

[45] I have read the judgment of Griesel AJA and I agree with his conclusion. My approach differs somewhat from his and, accordingly, I prefer to state my reasons separately. Since he has stated the facts fully it is not necessary to mention them in any detail.

[46] I first deal with the arbitrator's stated case, which is quoted in Griesel AJA's judgment (at para 18). The question put was whether *Zysset*[34] was correctly decided on its facts. That, as put, was not a question of law. What the arbitrator apparently had in mind was to ask the court whether a party, who claims compensation, can avoid the application of the rule against double compensation by voluntarily entering into an agreement with the 'insurer' to repay the latter once compensation is received from the wrongdoer. (The arbitrator did not intend to refer any question about future benefits because, as he said, he had found as a fact that Dr Thomas's right of recovery for future benefits will fall away once she receives compensation from the RAF.)

[47] The first question that springs to mind is whether this is a question of law because, unless it is such a question it could not be stated. Griesel AJA has dealt with the question but chose to leave it open (at paras 29-30). I prefer to answer the question with reference to the authorities quoted by him: it is a value judgment.[35] In addition, Scott J, in *Zysset*, in finding that the plaintiff could use such an agreement, based his conclusion on the facts of the case. He did not purport to lay down a generally applicable rule that applies in isolation and divorced from the facts (at 281F–282B). Also, in 'overturning' Scott J's judgment, the learned judge below invoked 'considerations of public policy, reasonableness and justice'.

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[34] *Zysset & others v Santam Limited* 1996 (1) SA 273 (C).
[35] *Media Workers Association of SA v Press Corporation of SA Ltd ('Perskor')* 1992 (4) SA 791 (A).

[48] It is accordingly not surprising that the arbitrator formulated the stated case with reference to the particular facts of that case. The answer given by the high court involved a referral back to the arbitrator to enable him to determine whether the facts in this case (which dealt with Belgian law and social insurance schemes) differed from the facts in *Zysset* (which dealt with those of Switzerland).

[49] Since precedents are quoted for their principles and not for their facts the arbitrator erred in asking that question. The question and answer were not 'legal'. I accordingly conclude that the high court had no jurisdiction to consider the arbitrator's stated case.

[50] The next issue relates to the RAF's prayer compelling the arbitrator to state a question of law for the opinion of the court. The high court dismissed the application as far as future benefits are concerned because, as mentioned, the arbitrator had found as a fact that Dr Thomas's benefits will fall away once the RAF compensates her. That leaves the question relating to past benefits: can Dr Thomas avoid the application of the rule against double compensation by voluntarily entering into an agreement with the 'insurer' to repay the latter once compensation is received from the RAF? I have already held that this is not a question of law and this means that the high court did not have the jurisdiction to consider the application.

[51] There is a further reason why the high court did not have jurisdiction. It is common cause that before the hearing in the court below the arbitrator issued a final award; the RAF did not use its right of appeal; it did not seek to set aside the award by way of review; and it paid the award in full without any conditions attached. A court cannot order an arbitrator to state a question of law that has no bearing on the arbitration. The question of law must, in terms of s 20(1) of the Arbitration Act 42 of 1965, be stated before the making of the final award. This was no longer possible.

[52] It follows from this that matters that Griesel AJA considers to relate to discretion in my view have a more profound effect – they go to jurisdiction.

L T C HARMS
Deputy President

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