239/92

Case Number 662/91

/al

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

THE JOCKEY CLUB OF SOUTH AFRICA Appellant

and

ALAN FORBES Respondent

CORAM: CORBETT CJ, VAN HEERDEN, E.M. GROSSKOPF, NIENABER JJA, et KRIEGLER AJA

DATE OF HEARING: 16 November 1992

DATE OF JUDGMENT: 1 December 1992

J U D G M E N T

KRIEGLER AJA/.....

KRIEGLER AJA:

The appellant is The Jockey Club of South Africa, a voluntary association that controls all organized horse racing in the country. This it does through a system of licensing, which requires all active participants in horse racing to be licensed in terms of its constitution and rules. The respondent, Mr Alan Forbes, is licensed with the appellant as a trainer of race horses. The parties are henceforth referred to as The Jockey Club and Forbes respectively. This appeal concerns a fine of R10 000,00 imposed on Forbes by The Jockey Club, acting through one of its organs, for an alleged infraction of its rules. Forbes paid the fine under protest but then successfully applied on notice of motion to the Witwatersrand Local Division for an order (a) voiding the imposition of the fine and (b) for its repayment. The Jockey Club now challenges that order and a

concomitant award of costs.

The Jockey Club's constitution affords it corporate capacity, declares its primary object to be the promotion and maintenance of honourable practice in horse racing in South Africa and invests it with executive, regulatory and disciplinary powers. Its principal executive organ - and the ultimate locus of its powers - is a body of nominated and elected members called the **Head Executive Stewards** ("the **HES**"). In each of five racing districts there is a local controlling body of elected and nominated members, entitled the **Local Executive Stewards**. This case concerns the Transvaal and Orange Free State **Local Executive Stewards** ("the LES"). In terms of the constitution the **HES** is empowered to appoint stipendiary stewards to officiate at any race meeting falling under the latter's jurisdiction. Acting in terms of that power the **HES** appointed a body called the

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Transvaal and Orange Free State Stipendiary Stewards Board ("the Board").

The relationship between the parties is contractual. When Forbes applied for a trainer's licence he acknowledged that, upon the grant thereof to him, he would be bound by the constitution and rules. In particular he accepted the provisions relating to disciplinary procedures and penalties for infractions of the rules. In essence the rules relating to suspected contraventions thereof provide for a four-stage procedure. In the event of a suspected infringement the Board, acting with authority delegated to it by the HES, conducts an enquiry. If appropriate the second stage then ensues where the Board adopts a quasi-judicial role: it formulates a charge based on its findings during the enquiry and notifies the person(s) concerned of the charge. The Board then conducts a hearing at

which it is both prosecutor and judge, there being no pro forma complainant. The person accused is afforded a right of audience, including the right to adduce oral and documentary evidence. If a conviction follows the **Board** may impose any one of a number of penalties, including the imposition of a fine. The accused is then entitled to appeal to the **LES** against both conviction and sentence. In effect the appeal amounts to a rehearing. If still dissatisfied, the accused can take the matter on appeal to the **HES** on the merits or the sentence and there, too, he is entitled to a rehearing.

It is common cause that the appellant, in exercising such disciplinary powers, is obliged (i) to act in accordance with its rules and constitution; (ii) to discharge its duties honestly and impartially; (iii) to afford persons charged a proper hearing, including the opportunity to adduce evidence and to contradict or correct

adverse statements or allegations; (iv) to listen fairly to both sides and to observe the principles of fair play; (v) to make fair and bona fide findings on the facts; and (vi) to conduct an active investigation into the truth of allegations made against the person charged. (See Turner v Jockey Club of South Africa 1974 (3) SA 633 (A) at 646F-H and 652H – 653A.)

In conformity with its primary object of maintaining honourable practice in horse racing, the appellant inter alia takes steps to prevent what is colloquially called "doping", i.e. the administration of drugs or other substances to race horses. To this end rule 78 of the appellant's rules makes detailed provision for a number of interrelated measures. It commences with a broad prohibition against the administration of any one of a compendious list of substances to a horse which has been entered for a race. The list of

prohibited substances includes anti-inflammatory drugs. The rest of rule 78 then establishes an elaborate system of inter-meshing measures designed to ensure enforcement of the primary prohibition. Basically it empowers the appellant's officials (i) to take biological samples from race horses; (ii) to analyse such samples for the presence of prohibited substances and (iii) to prosecute the owner or trainer of a horse found to have been "doped". The procedures to be followed will be detailed later. At this juncture it will suffice to say that rule 78 includes deeming provisions and presumptions that ease the burden of The Jockey Club's officials in a prosecution against those responsible for a horse suspected of having been "doped".

Forbes was first alleged to have fallen foul of rule 78 in 1985 when a urine specimen taken from a horse trained by him tested positive for the

presence of an anti-inflammatory drug (with some analgesic qualities) called **Naproxen**. The upshot on that occasion was an acquittal on appeal to the **LES** and, ultimately, a finding by the **HES** that the appellant's analyst had not done his work satisfactorily. In March 1988, after that chapter had ended (and quite possibly a case of post hoc propter hoc) the **HES** amended rule 78 in a number of respects. Principally the sampling procedure was tightened up by providing that a urine specimen taken from a horse is to be split in two there and then, the one specimen (called the "**initial specimen**") to be sent to the laboratory for analysis and the other (called the "**reference specimen**") to be kept under seal by other officials of The Jockey Club. If the **initial specimen** tests positive for a prohibited substance the horse's owner or trainer can demand that the sealed **reference specimen** be sent for analysis, at his

cost, by another laboratory selected by him from a panel compiled by The Jockey Club. Rule 78, prior to the amendment, also provided for a second analysis at the request and cost of the owner or trainer, but only one sample used to be taken from the horse and was sent to the local laboratory; if a specimen thereof proved positive, it was the analyst who sent a further specimen to a laboratory abroad for analysis.

The change in the sampling procedure occasioned a number of secondary amendments to rule 78. One amendment in particular was to prove crucial in subsequent disciplinary proceedings against Forbes. Rule 78.8, both before and after the amendment, rendered a trainer guilty of a contravention of the rules if a prohibited substance was found in a specimen taken from a horse trained by him. But whereas the rule previously referred to a single test and a single

specimen the rule as amended refers to "the analytical tests of the initial and reference specimens". Rule 78.7.a (which was also amended) is largely co-terminous with rule 78.8. However, where rule 78.8 has the phrase quoted, rule 78.7.a refers to "an analytical test of the specimen taken in terms of these rules." The significance of the amendments to rule 78 and more especially the difference between rules 78.7.a and 78.8 will become apparent in due course.

On 7 December 1988 a urine sample was taken from a horse named **Fastoll**, trained by Forbes, shortly after it had won a race. Some three weeks later the laboratory reported that analysis of the initial specimen had revealed the presence of **Naproxen**. The Jockey Club's disciplinary machinery was set in motion, commencing with an enquiry by the **Board**. Forbes, upon being notified of the analysis report,

demanded that the **reference specimen** be submitted for analysis by a laboratory of his choice. He also called for a sample from the residue of the **initial specimen** and for access to the laboratory working papers relating thereto. His demands were refused and the **reference specimen** was sent to a laboratory in England designated by The Jockey Club. In due course that laboratory also reported the presence of **Naproxen** and on 2 March 1989 Forbes was formally notified of a charge against him under rule 78.1.a, i.e. that he had been a party to the administration of **Naproxen** to the horse **Fastoll**. On 10 August 1989 he appeared at a hearing of the **Board** where he was advised that he was being charged in the alternative under rule 78.7.a . He not only put up a vigorous defence on the merits, contending that the **Naproxen** had been maliciously added to the urine sample after it had been drawn from the horse, but stoutly maintained

that the alternative against him should be framed under rule 78.8 and not under rule 78.7.a. The latter contention was not a mere technicality but was intimately related to his defence on the merits. He maintained that the presence of **Naproxen** had to be established not only in the **reference specimen** but also in the **initial specimen**. He also demanded the right to cross-examine The Jockey Club's analyst in order to challenge the correctness of his analysis of the initial specimen as also to advance his case that the **Naproxen** had been maliciously added to the urine sample. At the same time he handed in a substantial body of expert evidence in documentary form in support of his defence. The Board, rejecting Forbes' contentions in toto and relying on a provision in the rules rendering a certificate relating to the analysis of the **reference specimen** irrebuttably correct, brought in a conviction under

rule 78.7.a and imposed a fine of R5 000,00.

In the interim and while the **Fastoll** proceedings were in progress, the **initial specimen** drawn from another winning horse trained by Forbes, named **Northern Sheik**, allegedly tested positive for the presence of **Naproxen** in April 1989. Once again the disciplinary machinery was set in motion and, save in one respect to be mentioned in a moment, followed substantially the same course. The charge was once again framed under rule 78.1.a with an alternative under rule 78.7.a; once again Forbes raised the defence of malicious subsequent admixture of the offending drug and contended that the appropriate alternative charge should be framed under rule 78.8. In the preliminary correspondence preceding the **Northern Sheik** hearing Forbes, in advancing his defence of malicious admixture, made the same demands as in the **Fastoll** inquiry but added the specific demand that the reference

specimen be tested, not only for the presence of **Naproxen**, but also for its metabolites. This, he pointed out, was necessary as the absence of the metabolites of **Naproxen** in a urine specimen would establish that the offending substance had not passed through the horse's system, but had been added later. In addition he tendered a substantial body of documentary evidence in an attempt to raise a suspicion that the one or the other or both specimens had been tampered with. The result was the same: a conviction under rule 78.7.a and a fine of R5 000,00.

Forbes then took both cases to the **LES**, which heard them together. His notices of appeal incorporated by reference the voluminous documentation that had been submitted to the **Board** at its two hearings. The **LES** came to the conclusion that in both instances the respondent had been victimized and had played no part in the

administration of the **Naproxen**. Nevertheless it upheld the convictions under rule 78.7.a but reduced the fines to R5 000,00 in all. Forbes appealed to the **HES**, in the event with no success. His factual and legal contentions, submitted in writing, were rejected; his appeals were dismissed and, without advising the respondent that it was contemplating doing so, the **HES** reinstated the original fines. Forbes then paid the fines under protest. He had little choice: under the rules a failure to pay a fine within the time limit stipulated (28 days) would have rendered him liable to warning-off, an eventuality which would have deprived him of his living as a trainer.

But he was not content to leave matters there. In February 1990, barely a month after the payment under protest, he launched the motion proceedings which have culminated in this appeal. The notice

of motion sought an order setting aside the finding that rule 78.7.a had been contravened and for return of the fine. In the alternative there was a prayer for an order declaring that such finding had not been made in accordance with the rules nor with his contractual rights vis-à-vis The Jockey Club, and was not binding. This was followed by a substantive prayer for repayment of the fine of R10 000, together with interest from the date it was paid and costs.

Forbes's founding affidavit and annexures comprise 866 pages. They include the documents submitted to The Jockey Club's three tribunals and direct a multi-pronged attack at their procedures and conclusions. In substance his case amounts to this. In exercising its disciplinary powers in the two cases, The Jockey Club failed to comply with any one of the six contractual obligations admittedly resting upon it. All three tribunals

misconstrued the rules by holding rule 78.7.a to be applicable, instead of rule 78.8. In the result the nature and scope of the enquiries were misconstrued. In particular the Board, instead of actively investigating whether there had been subsequent tampering with the urine samples, which would have entailed enquiring into the reliability and integrity of The Jockey Club's internal procedures, directed its attention solely to the certificates relating to the analyses of the reference specimens. As a further result the Board failed to consider the evidence produced by the respondent fairly and impartially, if at all. Furthermore, inasmuch as the procedure in the local laboratory was a vital feature in both instances, the Board's refusal to afford Forbes and his experts access to the residue of the urine specimens retained in the laboratory, and to that institution's working papers, frustrated his

attempts to demonstrate that the **Naproxen** had been added to the specimens after they had been taken from the two horses. In effect, so Forbes contended, the **Board** had regarded the certificates issued by the English laboratory (which the rules irrebuttably deem to be correct) as the beginning and the end of their deliberations. The result, so he contended, was that it failed to bring its mind to bear on the real subject matter, namely whether the **Naproxen** had been administered to the horses or had been added to their urine samples.

The Jockey Club's initial response to that case was an application in terms of rule 30 of the Uniform Rules of Court to have it set aside as "irregular in that the relief sought in substance and in fact amounts to a review as contemplated in rule 53 ... and the applicant has not utilized the procedure prescribed by the said rule." Hartzenberg J. dismissed that application and

answering affidavits were then filed. The main deponent was the deputy general manager of The Jockey Club. He had no knowledge of either inquiry and confined himself in the main to an exposition of The Jockey Club's constitution, rules and sampling procedures. In dealing with the constitution he drew attention to clause 3(c) which provides that "(t)he decision of the Head Executive Stewards as to the interpretation, intention, meaning and effect of any of the clauses of this Constitution and rules shall be final and conclusive." In response to an allegation by Forbes that there would have been no point in administering **Naproxen** to either of the two horses as both were sound, the deponent suggested that the drug could have been administered in order to mask some performance enhancing substance. No such suggestion had been made in the course of the two sets of disciplinary proceedings and, predictably,

it elicited an indignant and vehement denial, supported by cogent scientific evidence. No more need be said about the point. The deponent proceeded to deny that the disciplinary bodies had in any way failed to act in due compliance with the rules or with The Jockey Club's obligation to act fairly. The only other deponent on behalf of The Jockey Club was the chairman of the HES, who confined himself to a terse and generalised statement that the HES had considered the records of its subsidiary bodies, had "considered and adjudicated" on Forbes's appeal and had found against him "on all the arguments advanced by him."

No one on behalf of The Jockey Club joined issue with Forbes on the substance of his case. In particular there was no pertinent denial of his contention that the Board had, in consequence of its misguided application of Rule 78.7.a instead of Rule 78.8, failed to apply its mind to the true

subject matter of its enquiries and deliberations. The line adopted by The Jockey Club was a technical/legal one. In the court a quo (and indeed in the Rule 30 proceedings) it adopted as its primary stance that an alleged non-compliance with the provisions of rule 53 of the Uniform Rules of Court, said to be peremptory, was fatal to Forbes's case. The argument, succinctly put, was that the relief sought in the notice of motion rendered the case in substance one for review of the proceedings before The Jockey Club tribunals. Therefore Forbes had to make out a case complying with both the substantive and procedural requirements of an application for review. Procedurally any application for review has to be brought under rule 53 whereas here the ordinary procedure prescribed by rule 6 had been used. The two procedures differ materially, the use of the wrong rule had prejudiced The Jockey Club, there

was no attempt at condonation and consequently the application fell to be dismissed. The court a quo (Van der Merwe J) rejected the argument but granted leave to appeal to this court. Here once again The Jockey Club raised the procedural argument as its main line of defence.

The conclusion to which I have come renders it superfluous to scrutinize the soundness of each of the steps leading to the ultimate submission that the application was fatally defective. For purposes of argument it can be accepted, albeit with some reservation, that the relief prayed constituted, whether in effect or at all, relief tantamount to that afforded by a superior court in the exercise of its so-called review jurisdiction. It can further be assumed, once again with reservations (as to which see Theron en Andere v Ring van Wellington van die NG Sendingkerk in Suid-Afrika en Andere 1976 (2) SA 1 (A) at 21D-G),

that rule 53 extends to decisions of domestic tribunals and does not apply only to breaches by officials of duties imposed on them by public law. Nevertheless the argument on behalf of The Jockey Club cannot prevail. The keystone of that argument is the contention that the provisions of rule 53 are peremptory. If that contention fails, the argument falls to the ground. I therefore proceed to examine its validity. Rule 53 reads as follows:

> "REVIEWS
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> 53(1) Save where any law otherwise provides, all proceedings to bring under review the decision or proceedings of any inferior court and of any tribunal, board or officer performing judicial, quasi-judicial or administrative functions shall be by way of notice of motion directed and delivered by the party seeking to review such decision or proceedings to the magistrate, presiding officer or chairman of the court, tribunal or board or to the officer, as the case may be, and to all other parties affected
>
> (a) calling upon such persons to show cause why such decision or proceedings should not be reviewed and corrected or set aside, and
>
> (b) calling upon the magistrate,

presiding officer, chairman or officer, as the case may be, to despatch, within 15 days after receipt of the notice of motion, to the registrar the record of such proceedings sought to be correcteed or set aside, together with such reasons as he is by law required or desires to give or make, and to notify the applicant that he has done so.

(2) The notice of motion shall set out the decision or proceedings sought to be reviewed and shall be supported by affidavit setting out the grounds and the facts and circumstances upon which the applicant relies to have the decision or proceedings set aside or corrected.

(3) The registrar shall make available to the applicant the record despatched to him as aforesaid upon such terms as the registrar thinks appropriate to ensure its safety, and the applicant shall thereupon cause copies of such portions of the record as may be necessary for the purposes of the review to be made and shall furnish the registrar with two copies and each of the other parties with one copy thereof, in each case certified by the applicant as true copies. The costs of transcription, if any, shall be borne by the applicant and shall be costs in the cause.

(4) The applicant may within 10 days after the registrar has made the record available to him, by delivery of a notice and accompanying affidavit, amend, add to or vary the terms of the notice of motion and supplement the supporting affidavit.

(5) Should the presiding officer, chairman or

officer, as the case may be, or any party affected, desire to oppose the granting of the order prayed in the notice of motion, he shall

(a) within 15 days after receipt by him of the notice of motion or any amendment thereof deliver notice to the applicant that he intends so to oppose and shall in such notice appoint an address within 8 kilometres of the office of the registrar at which he will accept notice and service of all process in such proceedings; and

(b) within 30 days after the expiry of the time referred to in sub-rule (4) hereof, deliver any affidavits he may desire in answer to the allegations made by the applicant.

(6) The applicant shall have the rights and obligations in regard to replying affidavits as set out in rule 6.

(7) The provisions of rule 6 as to set down of applications shall mutatis mutandis apply to the set down of review proceedings."

Not infrequently the private citizen is faced with an administrative or quasi-judicial decision adversely affecting his rights, but has no access to the record of the relevant proceedings nor any knowledge of the reasons founding such decision. Were it not for rule 53 he would be obliged to

launch review proceedings in the dark and, depending on the answering affidavit(s) of the respondent(s), he could then apply to amend his notice of motion and to supplement his founding affidavit. Manifestly the procedure created by the rule is to his advantage in that it obviates the delay and expense of an application to amend and provides him with access to the record. In terms of para (b) of subrule (1) the official concerned is obliged to forward the record to the registrar and to notify the applicant that he has done so. Subrule (3) then affords the applicant access to the record. (It also obliges him to make certified copies of the relevant part thereof available to the court and his opponents. The rule thus confers the benefit that all the parties have identical copies of the relevant documents on which to draft their affidavits and that they and the court have identical papers before them when the matter comes

to court.) More important in the present context is subrule (4), which enables the applicant, as of right and without the expense and delay of an interlocutory application, to "amend, add to or vary the terms of the notice of motion and supplement the supporting affidavit". Subrule (5) in turn regulates the procedure to be adopted by prospective opponents and the succeeding subrules import the usual procedure under rule 6 for the filing of the applicant's reply and for set down.

It is true, as counsel for The Jockey Club pointed out, that the time periods afforded a prospective opponent under subrule (5) are longer than those generally allowed a respondent under rule 6, viz. 15 days for his notice of intention to defend as against 5 days under rule 6(5)(b) and 30 days for delivery of answering affidavits as against 10 days under rule 6(5)(e). In substance however the draftsman of rule 53 has done no more

than to adapt the ordinary procedure under rule 6 to the special exigencies of a particular kind of application on notice of motion. An applicant is still obliged to proceed by notice of motion; the parties to be joined, cited and served in effect remain unchanged, save that the person officially in possession of the record is to be invited to (i) show cause why the relief sought should not be granted; and (ii) to transmit the record to the registrar. Having regard to the special purpose for which the rule was intended, those two deviations from the ordinary motion procedure are not only logical but minimal.

The relief sought is to be specified in the notice of motion and the supporting facts are to be embodied in the founding affidavit. Those requirements are in pari materia with those of rule 6(1). The time period afforded a respondent under rule 53(5)(a) for entry of appearance corresponds

with the time allowed under rule 6(13) to any officer of the State (the most likely if not the invariable target of an application under rule 53), namely 15 days. And it is not without significance that the time period under both subrules previously was 14 days and that they were amended identically. The circumstance that subrule 53(5)(b) allows a respondent a longer period to deliver his answering affidavit than is allowed under rule 6(5)(e) is of minimal significance and is in any event consistent with the latitude afforded public officials by rule 6(13). They, as has been mentioned above, are the usual (if not the invariable) respondents in review applications.

Counsel for The Jockey Club made much of the peremptory language in which rule 53 is couched, e.g. "all proceedings ... shall be ..." in subrule (1) and the repeated use of "shall" in the succeeding subrules. Clearly that use of language

cannot be overlooked, but equally clearly it is to be understood conceptually and contextually. The primary purpose of the rule is to facilitate and regulate applications for review. On the face of it the rule was designed to aid an applicant, not to shackle him. Nor could it have been intended that an applicant for review should be obliged, irrespective of the circumstances and whether or not there was any need to invoke the facilitative procedure of the rule, slavishly - and pointlessly - to adhere to its provisions. After all:

> "(R)ules are not an end in themselves to be observed for their own sake. They are provided to secure the inexpensive and expeditious completion of litigation before the courts ..."

(Per Van Winsen AJA in Federated Trust Ltd v Botha 1978 (3) SA 645 (A) at 654C-D).

I am in full agreement with the view expressed by Eloff DJP in S v Baleka and Others 1986 (1) SA 361 (T) at 397 in fin to 398A:

> "Rule 53 was designed to facilitate the review of administrative orders. It created procedural means whereby persons affected by administrative or quasi-judicial orders or decisions could get the relevant evidential material before the Supreme Court. It was not intended to be the sole method by which the validity of such decisions could be attacked."

I am also in agreement with the observation of the learned judge in the succeeding sentence:

> "There are numerous decisions in our own Courts in which the validity of administrative rulings was considered and adjudicated on in proceedings other than conventional review proceedings, ..."

(See also Motaung v Mukubela and Another NNO; Motaung v Mothiba NO 1975 (1) SA 618 (O) and Adfin (Pty) Ltd v Durable Engineering Works (Pty) Ltd 1991 (2) SA 355 (C) at 368E-H.) The most recent example is the case of Administrator, Natal and Another v Sibiya and Another 1992 (4) SA 532 (A) where an administrative decision to retrench provincial employees was successfully challenged without any resort to rule 53. See also Coin

Security Group (Pty) Ltd v Smit N.O. and Others 1992 (3) SA 333 (A) and Administrator, Transvaal, and Others v Tranb and Others 1989 (4) SA 731 (A), likewise cases where administrative decisions were set aside in proceedings initiated by notice of motion under rule 6.

Counsel for The Jockey Club argued that rule 53 "embodies a protection for the decision-maker" and that "(p)ublic policy demands that an attempt to avoid the protection ... should be regarded as an abuse of the process of the Court." The only authorities cited in support of the submission were two House of Lords judgments (O'Reilly and Others v Mackman and Others [1983] 2 AC 237 (HL) and Cocks v Thanet District Council [1983] 2 AC 286 (HL)). However, those cases make it plain that our rule 53 and our practice for the review of decisions by extra-judicial tribunals differ toto caelo from Order 53 of English practice. Indeed virtually all

they have in common is the number. But it is unnecessary to dwell on the topic. In England the procedure of Order 53 is not applicable to reviews of decisions by non-statutory bodies. It falls in the realm of public law and finds no application in a case such as this, where the decision under review was taken by a domestic tribunal purportedly acting under rights conferred by contract. That is made plain in all three judgments in Law v National Greyhound Racing Club Ltd [1983] All ER 300 (CA).

For the rest the argument is based on a literal and selective interpretation of rule 53 in which perceived benefits thereunder for a "decision-maker" are sought to be contrasted with relative disadvantages under rule 6. From the above analysis of the purpose and scope of rule 53 and its interrelationship with rule 6 it is apparent that the argument is misdirected. The purpose of rule 53 is not to protect the "decision-

maker" but to facilitate applications for review and to ensure their speedy and orderly presentation. Such benefits as it may confer on a respondent, in contradistinction to those ordinarily enjoyed by a respondent under rule 6, are incidental and minor. It confers real benefits on the applicant, benefits which he may employ if and to the extent needed in his particular circumstances.

This case is a good example of the stultification inherent in reading rule 53 as a law of the Medes and Persians, as counsel for The Jockey Club would have it. There was no need to cite any particular individual in any specific capacity: the party whose executive bodies had allegedly infringed Forbes's contractual rights - and was holding his money - was The Jockey Club as such. Forbes was in possession of the records of the hearings before each of the three tribunals and

needed production of no more to enable him to put his case fully before the court. He knew what had been submitted to those tribunals, what they had decided and could infer on what grounds they had done so. His founding affidavit set out his complaints in detail and indicated with precision what his basic legal contentions were. The nub of the case he advanced was straight-forward: he had been charged under the wrong rule and in the result there had been a consistent failure to consider the substance of his defence and a consistent avoidance of an enquiry into the real issue, namely whether the specimens, when taken from the horses, had contained **Naproxen**. By the time the application was launched in February 1990 The Jockey Club had in any event long since been fully apprised of every point made in the founding papers. After the papers were served The Jockey Club had every opportunity to join issue with Forbes on the facts,

to furnish reasons for the action taken and to indicate its stance on the law. The time constraints of rule 6 caused it no embarrassment: there were no documents to be traced, no investigations to be made and the affidavits eventually filed, after the abortive rule 30 proceedings, verged on the laconic. Clearly the provisions of rule 53 were inapposite and their invocation would merely have resulted in a fruitless exercise and the wastage of time and money.

In the circumstances the procedural argument advanced on behalf of The Jockey Club propounds no more than sterile formalism. The case was rightly considered on its merits in the court below and this court will do likewise.

And the only question of substance on the merits is whether the charges were correctly framed under rule 87.7.a. If they were, the Board and the

two appeal tribunals were correct in concluding that the English laboratory certificates were conclusive and Forbes must fail. If, on the other hand, Forbes is right in saying that the only rule under which he could have been charged is rule 78.8, The Jockey Club must fail. In saying that I am not overlooking two subsidiary points advanced on behalf of The Jockey Club. The first was that the decisions of the organs of The Jockey Club cannot be upset by a court of law as they relate to the merits of the charges which, in terms of the contractual regime binding the parties, were reserved for the exclusive and final determination by the HES. The point is still-born. If the appropriate rule was rule 78.8, the Board (and the succeeding tribunals) fundamentally misconceived the scope of the enquiries and hearings to be conducted. They would then have focused on the English certificates to the exclusion of any

evidence relating to the initial specimens or the vagaries of the samples after they had been taken from the horses but before the specimens were analysed. That would mean that they looked in the wrong place for the wrong evidence: a clear case of error as to jurisdiction. Counsel for The Jockey Club conceded, rightly, that such an error is indeed subject to judicial review. In the circumstances it is unnecessary to consider the interesting - and vexed - question whether and, if so, when a court of law is entitled to interfere on review with a decision "on the merits" by a domestic tribunal, so incisively discussed by Jansen JA in Theron en Andere v Ring van Wellington van die NG Sendingkerk in Suid-Afrika supra.

The second point is equally without merit. Relying on clause 3(c) of The Jockey Club's constitution it was argued that the right to interpret rule 78 vests exclusively in the HES,

ousting judicial interpretation. Inasmuch as the HES does not purport to have interpreted the rule in any particular way, but confined itself to terse generalities in the affidavit by its chairman, the point fails in initio for lack of a factual basis. I may add in parenthesis that the interpretation contended for on behalf of The Jockey Club in this court differed from that advanced in the court below and adopted yet another garb when argument in reply was presented.

In order to interpret rules 78.7.a and 78.8 it is necessary to place them in their context. Rule 78 as a whole deals with "doping", commencing with a blanket provision (rule 78.1.a) rendering it an offence for any person to administer, or cause or allow to be administered, or to attempt or connive at the administration of a prohibited substance to any horse entered for a race. Rule 78.1.b is irrelevant to the present discussion and can be

passed over. Rule 78.2 then lists, in sweeping and generic terms, a wide variety of substances and concludes with a hold-all reference to "any other substance which cannot be traced to the normal and ordinary feeding and which could by its nature affect or alter the racing performance of the horse." (Rule 78.3 renders The Jockey Club's decision whether a substance has such qualities conclusive.) Paragraphs a and b of rule 78.4 authorise The Jockey Club to take biological specimens from a horse within three days of its having run in a race (par a) or if it is brought on to a racecourse to take part in a race (par b), "for analysis in terms of these rules." Prior to the amendments introduced in March 1988 the rule referred to "analytical testing by an Analyst appointed by The Jockey Club." In addition to the authority granted by rule 78.4 and expressly nothwithstanding its provisions, rule 78.5

authorises The Jockey Club to take a specimen from any registered horse at any time (and presumably at any place) "for testing by an analyst appointed by The Jockey Club." The latter phrase, in contradistinction to the corresponding phrase in rule 78.4, was not amended.

Rule 78.6 then lays down the procedure to be followed when a specimen is taken. Paragraph a entitles an owner or trainer to be present, to rinse the receptacles and to witness their sealing and he is obliged to add his signature to the sealing documents. Whether or not he does so, "the signature of The Jockey Club official will be conclusive proof that the procedure to that point was correct and regular." In addition there is a presumption that the containers and equipment used were free from contamination. Paragraph b of rule 78.6 was extensively amended and now makes detailed provision for the splitting and handling of a

specimen as described earlier. If the trainer demands analysis of the **reference specimen** but fails to nominate an analyst from The **Jockey Club** panel (sub-par iv and vi), The Jockey Club nominates the laboratory (sub-par v). The specimen is then sent to the reference laboratory (sub-par vii), which is informed what substance was found in the **initial specimen** and requires confirmation (sub-par ix). In terms of sub-par viii a certificate signed by the reference analyst is conclusive proof of its result at any enquiry.

Then follows rule 78.7, which contains five paragraphs and a number of sub-paragraphs. Of these only par 7.a is directly relevant, although the respects in which par 7.b differs from it are of some importance. Rule 78.7.a reads as follows:

> "The person responsible for the care, treatment or training of a horse shall be guilty of a contravention of these rules if an analytical test of the specimen taken in terms of <u>these rules</u> discloses the presence in that specimen of any quantity of

a substance referred to in Rule 78.2."

The words "these rules", which I have underlined in the quotation, prior to the amendment referred to the specimen taken "in terms of Rule 78.4". Paragraph b of rule 78.7 applies to the owner of the horse but, unlike the absolute liability of the trainer created by par a, the owner can escape liability if it is found that he played no part in the "doping". Sub-pars c, d and e contain provisions which are not germane to the present discussion.

They are followed by rule 78.8. It is in identical terms with rule 78.7.a save that it contains the words "if the analytical tests for the initial and reference specimens of a specimen" where rule 78.7.a speaks of "an analytical test of the specimen". That distinction, to which I will return shortly, lies at the heart of the debate.

Rule 78.9 provides that the fact that a

prohibited substance was administered by or on the advice of a veterinary surgeon is no defence while sub-rules 10, 11 and 12 deal with matters that need not be considered. It should be mentioned though that sub-rule 10.a which deals with the disqualification of a horse found to have been "doped", was amended in March 1988 so as to refer to "analysis of the initial and reference specimens of a specimen" whereas previously it had merely mentioned "a specimen".

Clearly the drafting of rule 78 was done with great care and with intimate knowledge of the intricacies and pitfalls in trying to bring home a "doping" charge. Equally clearly the amendments introduced in March 1988 were specifically designed to ensure the integrity of the reference specimen and to put the result thereof beyond debate. The mechanism introduced under sub-rule 6.b and the irrebuttable presumption under sub-par viii makes

that plain. At the same time the amendments to rules 78.4.a and b, 78.7.a and b and 78.10.a, which deleted a reference to a single analysis and substituted either a general reference to analysis "in terms of these rules" or specific reference to both the initial and the reference analyses, highlight the importance of the new wording of rule 78.8.

Turning then to examine that rule, the first observation to be made is that its wording does not seem ambiguous. On the contrary, its meaning seems plain: a trainer is automatically guilty of a contravention of the rules if both the initial and the reference analyses disclose that the specimen taken from a horse trained by him contain a prohibited substance. Not only does the rule expressly mention both tests but, significantly, the offence is the presence of the substance in the specimen taken from the horse. Two incriminating

analyses do not in themselves constitute the offence, they are only evidence proof of the presence of the substance in the specimen. The rule thus both defines the essential component of the offence and identifies the requisite evidence. One then sees that rule 78.6.b.viii irrebuttably deems part of that evidence, viz the reference analysis, to be correct. By contrast there is no presumption relating to the analysis of the initial specimen. Whereas the rule contains several presumptions relating to the propriety of the drawing of the specimen from the horse and of the equipment used (subrule 6.a.i) there is nothing which relates to the actual analysis of the initial specimen. That analysis, of course, is the second component in the evidentiary chain required by rule 78.8.

It follows that rule 78.8, in its terms and more plainly in its context, envisages that the

correctness of the analysis of the initial specimen has to be proved. A fortiori it envisages that such correctness can be challenged or controverted. And such conclusion is by no means surprising. The very purpose of the splitting procedure introduced by the new subrule 6.b was to isolate the potential reference specimen from the outset so that, whatever challenge may supervene concerning the analysis of the initial specimen, the reference analysis would stand inviolable. Similarly the presumptions in subrule 6.a draw a distinction between the sampling, bottling and sealing procedures on the one hand and the handling of the initial specimen once it arrives in the laboratory.

That being the elaborate regime created by rule 78, is it conceivable that it can be put at nought by simply framing a charge under rule 78.7.a? On the face of it the answer must be "No".

Nor is there any warrant in the wording of rule 78.7.a, read as it stands, for such an interpretation. That subrule unequivocally refers to a single analysis ("an analytical test") and makes no provision for the case where there are two tests. If rule 78.7.a is then viewed in its context the conclusion is ineluctably that it simply does not apply where more than one test has been conducted. Rules 78.6.b.iii and iv are designed to afford the owner or trainer the right to demand a confirmatory analysis. If he does so but fails to designate a laboratory The Jockey Club is obliged by subrule 78.6.b.v itself to make the designation. Therefore, once the confirmatory analysis has been demanded it has to be performed. But the owner/trainer runs a risk: if the reference analysis is adverse to him he cannot challenge it. He must then face an enquiry knowing that, however much success he may have had in

challenging only the local analysis, he now has an infinitely more formidable case to meet, as the corroborative value of the reference analysis will be very substantial indeed. If he calls for a reference analysis and it, too, reveals the presence of the substance revealed by the initial analysis, he is charged under rule 78.8; if he does not he is charged under 78.7.a. In both cases he is at liberty to challenge The Jockey Club analysis, each with its own facta probanda - and hazards.

The interpretation sought to be put on rule 78 by The Jockey Club entails that, irrespective of the election by a trainer to demand a second analysis, he can be convicted on a single analysis only. What is more, that single analysis can be the reference analysis, which, by virtue of rule 78.6.b.viii, is not open to challenge, or it can be the initial analysis, whether or not it is borne

out by the reference analysis. Counsel for The Jockey Club was constrained to concede in argument that its interpretation thus meant that if the initial analysis found substance A and the reference analysis found substance B - but not A - The Jockey Club could prosecute under rule 78.7.a for the presence of either, or both. Such a startling conclusion serves to demonstrate the absurdity of the argument. But it is not only that absurdity that points away from the interpretation. There is the further absurdity that the whole elaborate and scrupulously constructed split specimen procedure would be rendered nugatory if, whatever the safety check provided by the reference analysis revealed, a trainer could simply be charged under rule 78.7.a for what was purportedly found in the initial specimen. Lastly there is the glaring absurdity that, as a prosecution under rule 78.7.a could be founded on the initial analysis

only, the trainer's right to call for a confirmatory analysis is wholly illusory. If the reference analysis is adverse, he is damned; if it is exculpatory he can be charged - and convicted - on the basis of the initial analysis.

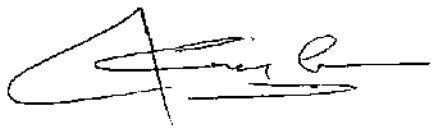
It follows that Forbes's contention is correct. He should not have been charged with a contravention of rule 78.7.a but with a contravention of rule 78.8. In that event he would have been entitled to challenge the correctness of the analysis of the initial specimen as also the integrity of the sampling and transmission procedures relating to both specimens. What the Board did in framing the charge under the inappropriate rule was fatal to its enquiry and disciplinary hearing. By like token it was fatal to the hearings conducted by the LES and the HES. The court a quo correctly interpreted rules 78.7.a and 78.8, and rightly held in favour of Forbes.

The contrary interpretation placed on those rules in the case of Roy Robert Magner v The Jockey Club of South Africa and Others (unreported, delivered in the Witwatersrand Local Division on 5 March 1992 under case no 30069/91) was wrong. The appeal therefore falls to be dismissed.

That leaves the question of costs. It is common cause that they are to follow the event and are to include the costs of two counsel. However, counsel for Forbes pressed for an order that the costs of appeal be paid on the scale as between attorney and client. Although there is much to be said for the contention that The Jockey Club's adherence to an erroneous view of its own rules and its adoption of a wrong approach to rule 53 have put Forbes to unnecessary expense, this is still not a case warranting a special award of costs. There is no suggestion of bad faith on the part of The Jockey Club, its attitude was by no means

frivolous; Forbes's circumstances and his complaints are not such as to call for extraordinary consideration.

The appeal is dismissed with costs, including the costs consequent upon the engagement of two counsel.



J.C. KRIEGLER

ACTING JUDGE OF APPEAL

CORBETT CJ]

VAN HEERDEN JA]

] CONCUR

E.M. GROSSKOPF JA]

NIENABER JA]