Case No 52/94

IN THE SUPREME COURT OF SOUTH AFRICA
(APPELLATE DIVISION)

In the appeal of:

FRANKEL MAX POLLAK VINDERINE INC Appellant

and

MENELL JACK HYMAN ROSENBERG

& CO INC First Respondent

GERALD LEE ROSENBERG Second Respondent

WAYNE ROSENBERG Third Respondent

MENBLACK NOMINEES
(PROPRIETARY) LIMITED Fourth Respondent

CORAM: CORBETT CJ, HEFER, VIVIER, NIENABER et SCOTT JJA.

DATE OF HEARING: 22 February 1996

DATE OF JUDGMENT: 25 March 1996

JUDGMENT

/CORBETT CJ:...

CORBETT CJ:

This matter has a long and tortuous history, but in the end the appeal turns on the interpretation of portion of an arbitrator's award. This history may be summed up as follows:

Prior to 28 May 1988 the appellant, Frankel Max Pollak Vinderine Inc (whose name was then Frankel Kruger Vinderine Inc and whom I shall call "Frankel") and the first respondent, Menell Jack Hyman Rosenberg & Co Inc ("Menell"), each carried on business independently as stockbrokers operating on the Johannesburg Stock Exchange ("JSE"). During May 1988 Frankel and Menell and certain other interested parties entered into a written agreement ("the merger agreement") in terms of which, and with effect from 28 May 1988, the business of Menell was incorporated into the business of Frankel upon various terms and conditions; and, with effect from 1 June 1988, the name of the business conducted by Frankel was to bear the qualification "inc Menell Jack Hyman Rosenberg & Co Inc". Clause

6 of the merger agreement provided that it was to remain in force unless and until terminated by six months' written notice given by either party to the other, but that no such notice should be given before 31 August 1990 and that such notice would be given only on the last business day in February and August of each year. In terms of clause 20 of the agreement any disputes arising out of the provisions of the agreement were to be referred to arbitration.

On or about 21 August 1990 and acting in terms of clause 6 Menell gave notice of termination of the merger agreement, such termination to take effect on 28 February 1991. The notice was slightly premature in that clause 6 required it to be given on the last business day of August, but no point is made of this. After the notice had been given various disputes between the parties arose and in terms of clause 20 of the merger agreement these were referred to arbitration; and by agreement between Frankel and Menell Adv C Z Cohen SC ("the arbitrator") was appointed to act as arbitrator.

The arbitration proceedings took place in Johannesburg on 29, 30 and 31 January and 20 February 1991. On 25 February 1991 the arbitrator handed down his award in writing. Thereafter Frankel applied to the Witwatersrand Local Division to have the award made an order of court. At the same time Menell applied, in the same Court, for an order setting aside the award on the ground that in making the award the arbitrator had exceeded his powers. On 21 June 1991 the two applications were heard together by Eloff JP. The learned Judge President granted Frankel's application and made the award an order of court; and he dismissed Menell's application. In each application costs were awarded against Menell.

Menell then applied for leave to appeal against the judgment of Eloff JP. This was refused with costs on 17 October 1991. Menell then indicated that it intended to petition the Chief Justice for leave to appeal and it filed an application in the Witwatersrand Local Division asking for an order that the order

granted by Eloff JP on 21 June 1991 be stayed pending the outcome of Menell's petition. The matter again came before Eloff JP on 14 November 1991. Three days prior to this hearing Menell had withdrawn its application, tendering costs, but Frankel was not content with this tender and pressed for a hearing on the question whether costs should not be awarded on the attorney and client scale. Eloff JP held that the conduct of Menell had been "grossly unreasonable, frivolous and vexatious" and ordered attorney and client costs.

On 5 November 1991 Menell filed its application to the Chief Justice for leave to appeal. This was subsequently dismissed with costs.

All this time Menell had, according to Frankel, failed to comply with the terms of the arbitrator's award (as incorporated in the order of court). In February 1992 Frankel filed an application (in the Witwatersrand Local Division) for a declaration that Menell was in contempt of the order. Before this application came to court, however,

it was settled. Menell complied with portion (para 3.1) of the award and on 5 March 1992 Frankel withdrew the contempt application ("the first contempt proceedings"). I shall later deal in more detail with para 3.1 and other relevant paragraphs of the award.

Thereafter further exchanges took place between the parties with regard to Menell's compliance with another portion of the award (para 4). These revealed fundamental differences between them. Eventually, in October 1992, Frankel launched another application in the Witwatersrand Local Division for a finding that Menell and two of its directors, Gerald Rosenberg (second respondent) and Wayne Rosenberg (third respondent) were in contempt of the order of court of 21 June 1991 and for consequential orders ("the second contempt proceedings"). This application came before Van der Merwe J, who for reasons which I shall later recount dismissed the application with costs. It is against this decision that, with the leave of the Judge a quo, the present appeal lies. Together with the appeal

there is before us an application for leave to amend Frankel's notice of motion by the insertion of an alternative prayer for a declaratory order in terms which I shall detail later. This application to amend is opposed by the respondents.

The essential dispute between the parties relates to what are termed "managed accounts". Here a word of explanation is necessary. A client may request a broking firm to manage his account. In such a case he is required to execute a written mandate in favour of the broking firm. Managed accounts, which may take different forms, and the mandates which authorize them are regulated by the Rules and Directives of the JSE ("the JSE Rules"). In the papers is a mandate in a standard form ("the specimen mandate") given by a client to Frankel during the currency of the merger agreement. It is in conformity with the JSE Rules. In terms thereof the client requests and authorizes Frankel (incorporating Menell) to operate a managed account as defined in the JSE Rules and subject to

the terms and conditions of certain JSE Rules and upon the following further conditions (I refer to the relevant ones):-

(1) Frankel is authorized to buy and sell securities for the account of the client on the instructions of either the client or a named director of the firm (in this case G L Rosenberg, the second respondent) or his nominee and to act for the client in connection with his securities and cash without prior consultation.

(2) Frankel is required to deposit for the client's account and in his name with JSE Trustees (Pty) Limited, apparently a corporation established in terms of the JSE Rules ("JSE Trustees"), all cash which is received by Frankel in respect of or arising from the operation of the account on the client's behalf and which is not paid over by Frankel to the client upon receipt of such cash.

(3) Frankel is authorized to withdraw from the client's account with JSE Trustees such amounts as are necessary from time to time

to pay for securities purchased for the client and to effect such other payments as are necessary in the operation of the managed account.

(4) Frankel is required to hold for the client in safekeeping all securities arising from the operation of this account in terms of Rules 5.260 and 5.270 of the JSE Rules, such securities to be registered in the name of Frankers nominee company, Menblack Nominees (Pty) Ltd ("Menblack"), the fourth respondent.

(5) Frankel is authorized to withdraw any securities held in terms of (4) for the purpose only of either delivering the securities to the client or his order or of dealing with the securities when necessary in terms of the operation of the managed account.

Rule 5.270.2 of the JSE Rules decrees that a client shall indicate in his mandate whether the securities shall be registered in his own name or in the name of a nominee company of the broking firm or in the name of any other person. In the case of the specimen

mandate the securities in question are, as I have indicated, required to

be registered in the name of Menblack, a wholly-owned subsidiary of Menell. Menblack was used by Menell prior to the merger as its nominee company in respect of managed accounts. At that stage, and subsequently, Frankel had its own nominee company, Stockshare Nominees (Pty) Limited ("Stockshare"). During the currency of the merger agreement Frankel regarded and used Menblack as one of its nominee companies and thus certain securities which were the subject-matter of mandates given by clients in favour of Frankel were registered in the name of Menblack, others in the name of Stockshare. The specimen mandate, which was given on 10 October 1989, is an illustration of the former arrangement. In the founding affidavit (deposed to by Mr S L Frankel) it is explained (and this is common cause) that because of this the Menblack board granted the directors of Frankel certain signing powers in order to deal with securities relating to managed accounts and registered in the name of Menblack,

It is further stated that this was "an adequate workable arrangement" between Frankel and Menell, notwithstanding the fact that in terms of the merger agreement either Menblack itself or its business should have been incorporated into the business of Frankel. Moreover, Rule 4.90.1 of the JSE Rules, which permits a broking firm to establish a nominee company with the main object of being "the registered holder" of securities exclusively on behalf of the firm or its clients, lays down that only broking members in the same broking firm or the corporate member may hold shares in that firm's nominee company. Consequently Erankel's use of Menblack (the shares in which were held by Menell) was also in conflict with the JSE Rules. This fact, as appellant's counsel put it, was "a recipe for conflict".

The role of Menblack as a nominee company in terms of the JSE Rules was simply to act as a vehicle for the registration of securities held on behalf of clients under managed accounts. Menblack did not have a bank account; it did not have books of

account; all dividends received by it as registered shareholder were paid into Menell's bank account and all records and books of account in regard to such dividends were kept by Menell. This was the position both prior to and during the course of the merger.

Rule 5.290.2 of the JSE Rules requires all securities received in respect of the operation of a managed account and which are retained by the broking firm concerned to be held in safekeeping and dealt with in the manner set forth in Rules 5.260 and 5.270. These Rules contain detailed provisions as to the maintenance of a register of each mandate and a safe-custody register of securities held in terms of each mandate; as to the auditing of such registers; as to the marking of the securities with the client's name; the deposit of the securities in a safe-custody account with a banking institution or other approved organization; as to the procedures regulating the withdrawal of securities so deposited; the preparation of transfer deeds; and so on.

One of the problems in the operation of a managed account relates to what are termed "unclaimed dividends". Generally, dividends due by a company in respect of shares held under managed accounts in the name of the broking member's nominee company are paid to the nominee company in a lump sum amount on all the shares registered in the name of the nominee company. This amount is then appropriately allocated and the individual clients' accounts credited; and the funds are placed on deposit with JSE Trustees. A problem arises, however, in cases where shares held under a managed account are sold (on behalf of the client) before the date fixed by the dividend declaration for determining the registered holder entitled to the dividend (often referred to as "the last day to register for the dividend") and the purchaser fails to procure registration of the shares in his name prior to such date. Pursuant to the sale the shares are delivered to the clearing house for onward settlement to the purchaser's broker and generally neither the seller's broking firm nor its nominee

company has any knowledge of the identity of the purchaser. As between the purchaser and the seller (i e the client whose account is being managed) it is the former who is entitled to the dividend (see Shackell v Lippert (1889) 7 SC 75), but the company discharges its obligations by paying it to the registered holder of the shares, in the case postulated the nominee company. The broking firm, not knowing the identity of the purchaser entitled to the dividend, credits it to a "dividend surplus/unclaimed dividends account" in its books, pending a claim by the person entitled thereto. These are the so-called "unclaimed dividends". For convenience I shall refer to these as "unclaimed dividends arising from sales cum dividend".

Unclaimed dividends may also come about in other ways. One example given in the founding affidavit is the case of a client, with a managed account, instructing his broker to deliver shares to his bank for the purpose of providing security for an overdraft. If the bank does not procure the registration of the shares in the name of its

own nominee company "or some other vehicle", the shares will remain registered in the name of the broker's nominee company. Because upon delivery of the share scrip to the bank, the client's account is cleared, as far as those shares are concerned, in the books of the broker, a dividend paid on the shares will be received by the broker and paid to a surplus unclaimed dividends account in the broker's books pending a claim. (This example postulates, of course, that the bank and not the client is entitled to the dividends on the shares.) For convenience I shall refer to these as "unclaimed dividends arising from providing security".

I now come to the arbitrator's award. In terms of para 1 of the award the merger agreement is terminated at the end of February 1991. Para 2 deals with the use of names. Paras 3 and 4 read as follows ("the claimant" being Menell and "the respondent" being Frankel):

"3. 3.1 The claimant is ordered to procure the transfer from Menblack Nominees (Pty) Limited to Stockshare Nominees (Pty) Limited of all securities (as defined in the Rules and Directives of Johannesburg Stock Exchange) held by Menblack Nominees pursuant to current written mandates given by clients to Frankel Kruger Vinderine Inc. (incorporating Menell Jack Hyman Rosenberg & Company Inc), authorising it to operate for such client a managed account (as defined in the Rules and Directives of the Johannesburg Stock Exchange) and to do all things necessary and take all steps required to procure such transfer of securities.

3.2 Should the respondent fail to procure the transfer of any security as referred to in 3.1 hereof by 18 March 1991, the Sheriff or his deputy is authorised and directed to do all things necessary and to take all steps including the completion of documents required to effect such transfer.

4. The claimant is ordered -

4.1 To render an account to respondent of all dividends received by Menblack Nominees (Pty) Limited

during the period 28 May 1988 to 28 February 1991 in respect of securities held by Menblack Nominees pursuant to current written mandates given by clients to Frankel, Kruger, Vinderine Inc. (incorporating Menell Jack Hyman Rosenberg & Co Inc.) authorising it to operate managed accounts for such clients;

(6) To provide respondent with such financial records and documents as are relevant and necessary to support such accounts;

(7) To render the account and provide the supporting records and documents by 18 March 1991;

(8) To debate the account with the respondent for the purpose of reaching agreement on the dividends received by Menblack Nominees in respect of the securities referred to in 4.1 hereof, the amounts paid by Menblack Nominees or the claimant to the respondent in respect of such dividends and the amount of the dividends unpaid. Should agreement not be reached between claimant and respondent, either party shall be entitled to require debatement of the account before me on a date which I shall determine;

4.5 To pay the respondent the dividends referred to in 4.1 hereof which remain owing."

Para 5 deals with costs and para 6 provides as follows:

"6. This award is an interim award pending compliance with 4.4 hereof. Should agreement between claimant and respondent obviate debatement before me and determine the amount to be paid in terms of 4.5 hereof, then this award is my final award."

As 1 have indicated, the settlement of the first contempt proceedings resulted in Menell's compliance with para 3 of the award and the securities referred to therein were duly transferred by Menblack to Stockshare. The case turns on whether or not Menell has duly complied with para 4 of the award. Frankel alleges that it has not: Menell claims that it has.

On or about 20 March 1992 and by a letter of that date, together with extensive annexures, Menell purported to account to Frankel for the dividends referred to in para 4.1 of the award. This

accounting included a schedule marked "F", which consisted of a detailed list of unclaimed dividends held by Menell as at 28 February 1991. These dividends totalled R144 691,53. Another schedule marked 'G" and described as a "Reconciliation" sought to reconcile the figure reflected in schedule F with the total amount of all dividends received by Menell (through Menblack) during the period in question, less certain amounts not disputed by Frankel and certain further amounts claimed by and paid to Frankel from time to time. This reconciliation produced a figure of R145 761,51. (Nothing apparently turns on the difference of Rl 050 between these two figures.) Frankel notified Menell that it was prepared to accept the account without debatement thereof before the arbitrator (cf. paras 4.4 and 6 of the award) and demanded payment of the sum of R145 761,51, together with interest. Menell, however, contended that no amount was payable by Menell to Frankel. After a certain amount of prevarication on Menell's part it eventually transpired that Menell's

contention was that these unclaimed dividends did not fall within the ambit of para 4.1 of the award. Frankel's contention was that they did. And in the second contempt proceedings the case turned partly upon this dispute as to the meaning and effect of para 4.1. Van der Merwe J, for reasons which I shall elaborate later, found in favour of Menell's interpretation. Accordingly the contempt proceedings failed.

The general approach to the interpretation of a judgment or order of court was stated in Firestone South Africa (Pty) Ltd v Gentiruco AG 1977 (4) SA 298 (A) as follows (at 304 D-H):

> "The basic principles applicable to construing documents also apply to the construction of a court's judgment or order: the court's intention is to be ascertained primarily from the language of the judgment or order as construed according to the usual, well-known rules . . . Thus, as in the case of a document, the judgment or order and the court's reasons for giving it must be read as a whole in order to ascertain its intention. If, on such a reading, the meaning of the judgment or order is clear and unambiguous, no extrinsic fact or

> evidence is admissible to contradict, vary, qualify, or supplement it. Indeed, it was common cause that in such a case not even the court that gave the judgment or order can be asked to state what its subjective intention was in giving it. . .
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> ... Of course, different considerations apply when, not the construction, but the correction of a judgment or order is sought by way of an appeal against it or otherwise - see infra. But if any uncertainty in meaning does emerge, the extrinsic circumstances surrounding or leading up to the court's granting the judgment or order may be investigated and regarded in order to clarify it; for example, if the meaning of a judgment or order granted on an appeal is uncertain, the judgment or order of the court a quo and its reasons therefor, can be used to elucidate it. If, despite that, the uncertainty still persists, other relevant extrinsic facts or evidence are admissible to resolve it." (fer Trollip JA.)

(See also Administrator. Cape and Another v Ntshwaqela and Others 1990 (1) SA 705 (A), at 715 F-716 C; Weber-Stephen Products Co v Alrite Engineering (Ptv) Ltd and Others 1992 (2) SA 489 (A), at 494 E-H.) The correction of a judgment is dealt with more fully by

Trollip JA in the Firestone case at 306 F - 307 E. It is to this passage that the notation "see infra" refers. (See also Friedman v Mendes 1976 (4) SA 734 (W), at 736 C - F; S v Wells 1990 (1) SA 816 (A), at 819 J - 820 G.) I am of the view that in general the same principles apply to the interpretation of an arbitrator's award, particularly where, as in this case, the award has been made an order of court (cf Friedman v Mendes. swpro).

In the present case the arbitrator did not give any reasons for the orders which he made in his award. Consequently the interpreter is initially confined to the language of the orders. If, however, uncertainty as to the meaning of the orders, or one of them, emerges from a consideration of the language used, then recourse may be had to extrinsic circumstances. There is a dearth of authority as to what extrinsic circumstances may be referred to in a situation such as this. No relevant authority was quoted to us; and I have not found any. On general principles and as a matter of logic, however,

it seems to me that such extrinsic circumstances include the issues which were submitted to the arbitrator for adjudication and the evidence placed before him, in so far as such evidence throws light upon what the canvassed issues were.

I return to para 4.1 of the award. This order requires the claimant (Menell) to render an account to the respondent (Frankel) of all dividends received by Menblack during the period of the merger (i e from 28 May 1988 to 28 February 1991) in respect of securities held by Menblack -

"pursuant to current written mandates" given by clients to the merged firm

authorising it to operate managed accounts for such clients.

It is common cause that where the order speaks of securities "held" by Menblack it means securities registered n the name of Menblack. It is clear also that the order refers only to securities which are so held on behalf of clients under managed accounts. It is

the words quoted, "pursuant to current written mandates", however, which have given rise to the dispute between the parties. As I have indicated, the Judge a quo came to the conclusion that these words excluded dividends on shares held by Menblack on behalf of clients under mandates authorizing managed accounts where the dividends were unclaimed. The line of reasoning which led to this conclusion may be summed up as follows:

(a) In the case of an unclaimed dividend arising from a sale cum dividend, the shares are sold prior to the last day to register for dividends and they are delivered to the clearing house for onward settlement to the purchaser's broker. The selling broker (in this case Frankel) thus removes the shares from safekeeping and loses possession and control of the shares at the same time. The appropriate transfer form has been signed and has accompanied the scrip. Thereafter there is no further duty on

the broker or its nominee company in connection with these shares. Its mandate in regard thereto is exhausted. When the dividend is subsequently received by the broker and/or the nominee company the mandate, being exhausted, is no longer "current" within the meaning of para 4.1 of the award. Consequently such an unclaimed dividend falls outside the ambit of para 4.1.

(b) In the case of an unclaimed dividend arising from providing security, once the broker (Frankel) parts with possession of the shares to the bank (or other creditor), it clears the client's account from its books. This amounts to an unequivocal assertion that there is no longer a relationship of mandate between client and applicant. In this case, too, the mandate was revoked and could not be regarded as "current" when the dividend is received by Frankel or is nominee company. At that stage there is no duty owed to the client to account for the

dividend. Therefore this unclaimed dividend falls outside the ambit of par 4.1.

(9) Menblack had paid to Frankel all dividends claimed in respect of securities in Frankel's possession or under its control, i e where the mandates were "current".

(10) Accordingly Menell had not disobeyed the order contained in para 4.1 of the award. (Nor, I might add, had there been any disobedience of paras 4.2, 4.3, 4.4 or 4.5 since these were dependent on there being an obligation to render an account in terms of para 4.1.)

(11) It followed that Menell and the other respondents were not guilty of contempt of court and that the application was therefore ill-founded.

As I understood it, the argument on appeal presented by respondents' counsel followed the same line of reasoning.

In considering the validity of this reasoning I shall focus

mainly on what appears to be the main source of unclaimed dividends, viz where such a dividend arises from a sale cum dividend.

In order to understand para 4.1 and to determine its applicability to the unclaimed dividends of this type, it is helpful to break up the paragraph into its constituent elements. It requires Menell to render to Frankel an account of -

(12) all dividends received by Menblack during the period 28 May 1988 to 28 February 1991

(13) in respect of securities held by Menblack

(14) pursuant to current written mandates given by clients to Frankel

(d) authorising it to operate managed accounts for such clients.

To test the position let us take a hypothetical case which postulates that company X declares a dividend in favour of persons registered as holders of shares in company X on 15 March 1990, such dividend to be paid on 25 March 1990; that Frankel has been authorized by client Y by means of a written mandate, to manage Y's portfolio of shares,

which includes 500 shares in company X; that, in accordance with the usual practice, these shares are registered in the name of Menblack; that, acting in terms of the mandate, Frankel on 10 March 1990 sells 100 of these shares on the JSE and delivers the shares with completed transfer forms two days later; that on 15 March Menblack is still the registered holder of the shares; and that on 28 March Menblack receives a dividend on the 100 shares. This is a typical example of an unclaimed dividend arising from a sale cum dividend.

The question which now arises is whether such a dividend satisfies the requirements listed (a) to (d) above. It unquestionably satisfies (a). It is a dividend received by Menblack during the period in question. Accepting, as was common cause, that "held"means "registered in the name of", it also satisfies (b). The dividend is in respect of securities (the 100 shares in company X) held by Menblack.

Next, does it comply with (c)? This is the critical question. "Pursuant to" means "following upon, consequent and

conformable to; in accordance with" (Oxford English Dictionary sv "pursuant", meaning 2.a). "Current", used adjectivally, bears the meaning, inter alia, of "running in time; in course of passing; in progress" (Oxford English Dictionary, sv "current", meaning 3.a).

But, as an American Judge once remarked -

> "The word 'current', when used as an adjective, has many and diverse meanings, and its definition depends largely upon the word which it modifies or the subject-matter with which it is associated."

(fer Sparks J in Commissioner of Internal Revenue v Keller 59 F (2d) 499, at 501.)

In my view, "current written mandate" has reference to a written mandate which is in operation at a particular point in time or during a particular period. The problem is what point of time or period? Appellant's counsel contended that "current" means in operation during the currency of the merger agreement. Respondents'

counsel urged us to hold that it means in operation as at the date of the receipt of the dividends. It seems to me that there is a third possibility: in operation during the period that the shares in question are held by Menblack. It is by no means clear what the arbitrator intended by this phrase, or indeed by para 4.1 as a whole; and in the circumstances recourse may be had to extrinsic circumstances. I will revert to this later.

In the meantime I will assume in respondents' favour that "current" means in operation as at the date of the receipt of the dividends and on that basis I will return to my hypothetical case. The position must accordingly be tested by what the situation was on 28 March 1990. As at that date the 100 shares in company X were still "held" by Menblack; the written mandate still existed and was in operation; and there is no doubt that the shares were held by Menblack pursuant to this written mandate. Moreover, this written mandate had been given by the client to Frankel and it authorized

Frankel to operate a managed account on behalf of client Y. On this basis requirements (c) and (d) are also satisfied. With respect, it seems to me that the fallacy underlying the reasoning of the Court a quo (and the argument of respondents' counsel) is the finding that where shares are sold on behalf of a client under a managed account, provided for by a written mandate, this mandate comes to an end when the share scrip in question is delivered to the clearing house for onward settlement and, as it were, disappears into the blue. It is true that in these circumstances the shares would no longer be part of the portfolio administered under the mandate, but this does not bring the mandate to an end. Nor does it controvert the proposition that as at the date of the receipt of the dividend the shares in question were held by Menblack pursuant to this written mandate. Moreover, we are dealing with the case of an unclaimed dividend and it seems to me that even as regards the 100 shares the broker (Frankel) would still be mandated, after the receipt of the dividend, to hold the dividend in a

special account pending a possible claim by the purchaser of the

shares and, in the event of such a claim materializing, to pay the dividend to the purchaser.

In my opinion, the extrinsic circumstances point to the conclusion that the arbitrator did not intend to exclude unclaimed dividends from the ambit of para 4.1 of the award. On the contrary they tend to show that para 4.1 was intended to include unclaimed dividends received during the merger in respect of shares held by Menblack under managed accounts.

The main extrinsic circumstance consists of the issues which the arbitrator was asked to adjudicate. Neither the reference nor the pleadings in the arbitration have been placed before us. In the founding affidavit, however, the issues are defined as including the following ("first respondent" being Menell and "applicant" being Frankel):

33 "(a) whether the first respondent was required to take all such steps as might be necessary and sign all such documents as might be required to procure the transfer of all securities held by Menblack to Stockshare, the applicant's nominee company;

(b) whether or not the first respondent was required to render a full account of dividends received in respect of securities held by Menblack for clients who had managed accounts for the period 28 May 1988 to 28 February 1991 supported by vouchers, to debate such account and to pay such amounts found to be owing by it to the applicant."

This is admitted in Menell's answering affidavit. The reference and the pleadings were before Eloff J P and he gives a similar formulation of the issues in his judgment of 21 June 1991, as does the Judge in the Court a quo. In passing it is of some interest to note that Eloff J P expressed the view that in substance the award (and here he must have had paras 3 and 4 in mind) appeared to constitute an acceptance of Frankel's claims and prayers as formulated in the pleadings.

Further insight into what was actually in issue at the

arbitration is to be gained from the evidence given at the arbitration proceedings by one of the witnesses, Gerald Rosenberg (the second respondent). An extract from his evidence was annexed (and marked "SLF 33") to the replying affidavit filed on behalf of Frankel in the present proceedings. In this extract, running to some 27 pages, the question of the entitlement to unclaimed dividends was fully canvassed. Under cross-examination Rosenberg explained that the practice was for the broking firm to regard unclaimed dividends as income after holding them for three years, since by then the claims of the purchasers entitled thereto would have become prescribed. (Cf Meskin, Henochsberg on the Companies Act, vol 1, at 1054-5. Whether this reliance on prescription was well-founded need not be decided.) The witness further explained that in the meanwhile the broker was exposed to claims for the unclaimed dividends. During the merger and until May 1990 all unclaimed dividends received by Menblack were handed over to Frankel. After May 1990, however,

such dividends were retained by Menell, apparently because of the "complication" arising from the facts that Menblack remained the nominee of Menell and that share scrip remained registered in the name of Menblack. In addition, Menell sought to recover unclaimed dividends paid over to Frankel prior to May 1990 and in one instance (in the case of a dividend from Gencor Ltd payable to a known client) set off the amount of such unclaimed dividends against this Gencor dividend which it was otherwise obliged to hand over to Frankel. Mr Rosenberg agreed with the proposition put to him by Frankel's counsel to the effect that "at the end of the day" Menell had "effectively retained all the unclaimed dividends received during the period of the merger". Early on in this cross-examination Frankel's counsel, when asked by the arbitrator what its relevance was, explained that it related to Frankel's counterclaim for unclaimed dividends in the hands of Menell.

It is clear, therefore, that one of the main issues before the

arbitrator was whether or not Frankel was entitled to unclaimed dividends in the hands of Menell. And this would have encompassed the subsidiary issue as to whether Menell was entitled to retain other dividends (e g the Gencor dividend) by way of set off against a claim to recover unclaimed dividends paid over prior to May 1990. Para 4 of the award clearly has reference to this issue. As I read it, the paragraph awards all these dividends to Frankel and, in my view, this was the arbitrator's intention. It is true that the phrase "current written mandates" introduces an unfortunate measure of obscurity, but I cannot believe that had the arbitrator intended to deny Frankel this aspect of its counterclaim, he would have worded para 4.1 as he did. It would have been so simple to have dismissed Frankel's counterclaim; or to have declared in terms that it was not entitled to unclaimed dividends. It appears to be common cause that, if Menell's interpretation of para 4.1 is correct, there are no dividends in respect of which account must be rendered. Yet the arbitrator's award

appears to contemplate that there are dividends which must be accounted for. This tends to refute Menell's interpreation.

During the debate at the Bar concerning the meaning of the words "current written mandates" reference was made to para 3.1 of the award, in which the same words appear. This paragraph deals with different subject-matter, viz Menell's obligation to procure the transfer of securities from Menblack to Stockshare. Moreover, I do not find the meaning to be attributed to these words in para 3.1 so clear as to constitute para 3.1 a helpful aid in the interpretation of para 4.1.

For these reasons I have come to the conclusion that in terms of para 4 of the award Menell was obliged to render account, and to comply with the further requirements of the paragraph, in respect of unclaimed dividends received by Menblack and in all other respects falling within the ambit of para 4.1.

The next question is whether Menell's admitted failure to

comply with para 4 of the award in respect of unclaimed dividends amounted to contempt of the decree issued by Eloff J P making the award an order of court. One of the requirements of contempt of court arising from the failure to comply with an order of court is that the non-compliance should have been wilful and mala fide (see Clement v Clement 1961 (3) SA 861 (T), at 866 A; Noel Lancaster Sands (Edms) Bpk v Theron en Andere 1974 (3) SA 688 (T), at 691 A-D). Once the applicant for relief based upon this form of contempt of court has established that the order of the court has been brought to the knowledge of the respondent and that the respondent has failed to comply with it, wilfulness and mala fides on the part of the respondent will normally be inferred and the onus will be on the respondent to rebut this inference on a balance of probabilities (see Consolidated Fish Distributors (Pty) Ltd v Zive and Others 1968 (2) SA 517 (C), at 522 E-H; Putco Ltd v TV & Radio Guarantee Co (Pty) Ltd and Other Related Cases 1985 (4) SA 809 (A), at 836

D-E).

In the answering affidavit deposed to by Gerald Rosenberg (second respondent) it is claimed that Menell refused to pay to Frankel the unclaimed dividends because, in its view, it was not obliged in terms of the award to do so. This view of the meaning and effect of the award is, as I have shown, erroneous; but if, as a matter of probability this view was held bona fide by Menell, then it seems to me that Menell (and the other respondents for that matter) were not guilty of contempt of court. I have no reason to doubt that this was Menell's view, that this view was held bona fide, and that it actuated Menell's non-compliance with para 4 of the award. Moreover, having regard to the problems surrounding the interpretation of para 4.1 and the fact that Menell's interpretation found favour with the Court a quo, I cannot even condemn Menell's attitude as being unreasonable - to the extent to which that might be relevant (cf Noel Lancaster Sands case, supra, at 692 B - G).

Counsel for Frankel emphasized the history of the matter, which he said smacked of delaying tactics on the part of Menell. He also pointed to the facts that in the past Menell had raised no fewer than (so it was contended) seven ill-founded defences to the implementation of the award; and that the defence which succeeded in the Court a quo was raised for the first time at a late stage of the litigation between the parties. This may all be true, but it does not meet the essential point that there is no reason to deny the bona fides of Menell's belief in the soundness of this current defence.

In the circumstances I hold that Frankel failed to make out a case of contempt of court.

This brings me to the application to amend the notice of motion. The alternative prayer (to be numbered 4, the existing prayers 4 and 5 to be renumbered) for a declaratory order is worded as follows:

"An order declaring that in paragraph 4.1 of the Order of

Court dated 21 June 1991 in consolidated case numbers 7821/91 and 93835/91 (Witwatersrand Local Division), the words 'securities held Menblack Nominees pursuant to current written mandates given by clients to (the applicant) authorising it to operate managed accounts for such clients' means securities or shares which had been registered in the name of the fourth respondent, on the last day to register for dividends, pursuant to current written mandates given by clients to the applicant authorising it to operate managed accounts for such clients, whether or not the certificates evidencing the securities or shares were in the possession or under the control of the applicant on that day or on the day when the dividends were paid."

The respondents opposed the application to amend. Their counsel contended that respondents would be prejudiced thereby. The ground of prejudice, as I understood the argument, was that, had there been a prayer for a declarator from the beginning, respondents would have placed additional evidence before the Court. As 1 see it, the case really turns on a matter of law, viz the correct interpretation of certain words and phrases in para 4.1 of the award. I have difficulty

in visualizing what further relevant evidence the respondents could have placed before the Court; and when pressed on the point respondent's counsel appeared to labour under a similar difficulty. In my view, no good reason has been advanced for refusing the application to amend. It should be granted as prayed, the costs thereof to be costs in the appeal.

Having regard to the conclusion to which I have come as to the interpretation of clause 4.1 of the award, it is clear that Frankel is entitled to the declarator claimed in the new alternative prayer.

Finally, there is the question of costs. Frankel has been substantially successful in that its interpretation of para 4.1 of the award has been vindicated. On the other hand, it failed to establish contempt of court as a basis for the relief which it claimed and it had to remedy the situation by a last-minute amendment. Because the Court a quo dealt with the matter while the notice of motion was in its unamended state and because the claim for contempt of court could

in any event not succeed, the order dismissing the application with costs was the correct one, even though this Court may differ with the Court a quo in regard to the interpretation of para 4.1 of the award.

In view of the amendment and the relief granted by this Court the order of the Court a quo dismissing the application must be formally set aside, but the order of costs against Frankel must stand. As to the costs of appeal I am of the view that in all the circumstances it would be fair and equitable to make no order as to costs. The costs of the application for leave to appeal were ordered by the Judge a quo to be costs in the appeal.

It is accordingly ordered:-

(15) The application to amend appellant's notice of motion by the insertion of a new, alternative prayer (to be numbered 4) in the terms set forth in this judgment is granted, the costs of the application to be costs in the appeal.

(16) The appeal is allowed, the order of the Court a quo dismissing the application is set aside and in substitution

therefor an order is made in terms of prayer 4 of the amended notice of motion. The order of costs made by the Court a quo stands.

(3) No order is made as to the costs of appeal.

M M CORBETT HEFER

JA)

VIVIER JA)

NIENEBER JA) CONCUR

SCOTT JA)