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IN THIS ISSUE:

1. .. INTRODUCTION 3

2. .. LEGISLATION 3

3. .. PARTIES 4

Curator bonis 4

Person of unsound mind 5

4. .. JURISDICTION 6

'Specific performance' in s 46(2)(c) of Act 32 of 1944 6

5. .. APPLICATIONS 8

Dispute of fact 8

6. .. TRIAL ACTIONS 8
Amendment of pleadings 8
Exception 9
7. .. RES JUDICATA 10
8. .. INTERDICTS 11
Final interdict 11
9. .. JUDGMENTS AND ORDERS 11
Anton Piller 11
Rule 43 order 11
10. APPEALS 11
Appealability 11
Application for leave to appeal 13
Equality court 13
Further evidence 14
11. COSTS 14
De bonis propriis 14
12. CONSTITUTIONAL PRACTICE 14
Application for leave to appeal to Constitutional Court 14
Costs 15
Direct appeal to Constitutional Court 15
Further evidence on appeal 15
Jurisdiction of Constitutional Court 16

Cases

High School Ermelo & another v The Head of Department & others **[2008] 1 All SA 139 (T)** 13
Hopf v The Spar Group (Build It Division) & another **2008 (1) BCLR 72 (D)** 13, 14
Malkiewicz v Van Niekerk and Fourouclas Investments CC **[2008] 1 All SA 57 (T)** 6
Masetlha v The President of the Republic of South Africa & another **2008 (1) BCLR 1 (CC), 2008 (1) SA 566** 15
Minister of Safety and Security v Van Niekerk **2008 (1) SACR 56 (CC)** 14, 16
Molefe v Regent Insurance Company (Pty) Ltd **[2008] 1 All SA 158 (W)** 10, 14
S v Shaik & others **2008 (1) SACR 1 (CC)** 14, 15
Spangenberg & another v De Waal **[2008] 1 All SA 162 (T)** 4, 5, 11
The Trustees for the Time Being of the Bus Industry Restructuring Fund v Break Through Investments CC & others **[2008] 1 All SA 23 (SCA)** 9
Thekweni Properties v Picardi Hotels Ltd & another **[2008] 1 All SA 172 (D)** 8, 10

Traut v Fiorine & another **2008 (1) BCLR 84 (C)**..... 8, 11
Trustees, Bus Industry Restructuring Fund v Break Through Investments CC & others **2008 (1) SA 67**) 9
Van Niekerk & another v Van Niekerk & another **[2008] 1 All SA 96 (SCA), 2008 (1) SA 76**..... 11

Legislation

Traditional Health Practitioners Act 22 of 2007 3
GN 47 *GG* 30680 of 25 January 2008 3
GN 52 *GG* 30680 of 25 January 2008 3

Literature

None

1. INTRODUCTION

In this Sibergramme cases on civil procedure published in the **January 2008** issues of ***The All South African Law Reports***, ***Butterworths Constitutional Law Reports*** and ***The South African Criminal Law Reports*** are considered.

Legislation on civil procedure published in **January 2008** is also considered.

No literature of relevance to civil procedure was published during January 2008. Cases on civil procedure reported in the January 2008 issue of *The South African Law Reports* will be considered in **Civil Procedure Sibergramme 4 of 2008**.

2. LEGISLATION

A right of appeal to the Interim Traditional Health Practitioners Council of South Africa against decisions of the registrar of the Council is created by s 27(1) of the **Traditional Health Practitioners Act 22 of 2007**, promulgated in *GG* 30660 of 10 January 2008. A **right of appeal to the High Court against a decision of the Council** is created by s 27(2).

A **small claims court for the area of Naphuno** was established by **GN 47 *GG* 30680 of 25 January 2008**.

A **small claims court for the area of Sekhukhune** was established by **GN 52 *GG* 30680 of 25 January 2008**.

3. PARTIES

Curator bonis

The husband of the respondent in ***Spangenberg & another v De Waal*** **[2008] 1 All SA 162 (T)** had sustained head injuries in a motor collision, for which he had received substantial damages. As a result of his injuries, the husband was declared by the Witwatersrand Local Division to be of unsound mind and incapable of managing his affairs. The second applicant had been appointed as curator bonis to him. Some years later, the husband relocated to the Western Cape in order to live his mother, and decided not to return to the common home he shared with the respondent. He indicated that he no longer wished to be married to the respondent, and that he intended to divorce her and to stay with his mother. No divorce action was, however, instituted, although the respondent, believing such an action to be imminent, applied for, and obtained by default, an order in terms of uniform rule 43 directing the second applicant to pay maintenance to the respondent out of the husband's assets, as well as a contribution towards the respondent's costs in the proposed divorce proceedings. In an application by the second applicant and a curator ad litem who was appointed to represent the husband at the instance of the second applicant, the question arose whether the curator bonis, in the period prior to the appointment of a curator ad litem, had the locus standi to institute divorce proceedings on the husband's behalf.

After quoting extensively from the judgment in *Ex parte AB* 1910 TPD 1332, to the effect that **a curator bonis lacks locus standi to institute such proceedings**, Conradie AJ held that the fact that fault is no longer a requirement for a divorce to be granted does not justify a deviation from the decision in *AB* and does not allow a curator bonis to have locus standi in divorce proceedings. The curator bonis, if he were to have had locus standi, would have alleged that the husband's marriage with the respondent had broken down irretrievably. And it would most probably have been more difficult for the curator to prove irretrievable breakdown of the marriage than it would have been to prove fault as required formerly (sc before the coming into operation of the Divorce Act 70 of 1979) (at 167*h*—*i*). More often than not, evidence of the irretrievable breakdown of a marriage was emotional rather than factual in nature. When a spouse stated that his or her marriage had irretrievably broken down, he or she was making 'a statement of the heart' rather than a statement of fact. While there were certainly facts like adultery and violence which could be proved in order to demonstrate that a marriage had broken down irretrievably, **it was very difficult for an outsider to prove that an individual no longer loved or respected his or her spouse**. It was not possible for an outsider to be able to gauge whether a spouse was prepared to forgive his marriage partner despite whatever offence his partner had committed. What appeared to be unforgivable for one person was tolerable for another, given his particular circumstances. The fabric that kept a marriage from breaking down was no doubt unique to every marriage (at 167*i*—168*b*). Even though marriage, as an institution, was today much more secular in nature than at the time of *AB's* case, and even though divorce was much more prevalent and certainly more socially acceptable than then, the deep personal nature of marriage had not changed,

and it remained the most intimate of all human relationships recognized by law (at 168*b*—*c*).

The fact that fault no longer needed to be proved in divorce proceedings made the decision to institute divorce proceedings rather more personal than less personal in nature. There was thus no reason to depart from the judgment in *AB* in so far as it found that a curator bonis does not have locus standi to institute divorce proceedings on behalf of a person declared to be of unsound mind. In the case before the court, it could therefore not be said that there was a pending or contemplated matrimonial action which was about to be instituted by the curator bonis (at 168*c*—*e*).

Further on *Spangenberg's* case, see under '***Person of unsound mind***' immediately below.

Person of unsound mind

In ***Spangenberg & another v De Waal*** **[2008] 1 All SA 162 (T)** Conradie AJ gave consideration to the question whether a person who has been declared by a court to be of unsound mind and incapable of managing his affairs is legally capable of instituting divorce proceedings. After referring to *Prinsloo's Curators Bonis v Crafford and Prinsloo* 1905 TS 669 at 673, *Pienaar v Pienaar's Curator* 1930 OPD 171 at 174—5 and *Boberg's Law of Persons and the Family* 2 ed (1999) by Belinda van Heerden et al 106, the court held that **in order to ascertain whether a person** (the husband in *Spangenberg's* case) **possessed the mental capacity to institute a matrimonial action on his own behalf, it would not be enough simply to state that he was incapable of doing so because the court had declared him to be of unsound mind** (at 169*c*—*d*). The court which had declared the husband in *Spangenberg* to be of unsound mind and as such incapable of managing his own affairs had (presumably) considered his mental capacity to handle his own financial affairs and not necessarily his ability to make unrelated personal decisions (at 169*e*). The husband might have had the mental capacity to assess the state of his own marriage and to make a decision in accordance with his assessment (at 169*h*). It was not impossible that his mental condition had by that stage (ten years since he had sustained head injuries in a motor collision, resulting in his being declared to be of unsound mind) improved to the extent that he understood exactly what he intended to do (at 169*i*). It was, however, difficult for the court to assess on the evidence before it whether the husband, when informing the respondent (his wife) that he wanted to divorce her, had the mental ability to assess the state of his marriage or the ability to decide whether he wanted to remain married (at 170*b*). The court could not determine with certainty that the husband possessed the mental capacity to institute a matrimonial action without the assistance of a curator ad litem at the time when an order in terms of uniform rule 43 for maintenance pendente lite, and for a contribution towards costs, was made by default in favour of the respondent pursuant to statements made by her husband to the effect that he wanted to divorce her and live with his mother. In the absence of the appointment at that time of a curator ad litem, the husband could not be held to have been about to institute an action for divorce, and since his curator bonis had no locus standi to institute such an action (as to which, see under '***Curator bonis***' immediately above), the order in terms of rule 43 should be set aside**:** there was no matrimonial action pending, as

contemplated in rule 43(1)*(b)*, since the respondent herself had made it clear that she had no intention whatsoever of instituting divorce proceedings against her husband (at 170*c*—*d*, read with 165*h*—*i* and 171*b*—*c*).

4. JURISDICTION

'Specific performance' in s 46(2)(c) of Act 32 of 1944

In ***Malkiewicz v Van Niekerk and Fourouclas Investments CC*** **[2008] 1 All SA 57 (T)** the respondents had each issued summons out of a magistrate's court against the appellant, claiming an order directing the appellant to remove a boundary wall erected by the appellant which allegedly encroached on one of the properties of the respondents. The appellant had raised, in opposition to both claims, identical special pleas relating to jurisdiction, contending that the court had no jurisdiction because there were no alternative claims for damages. The special pleas were clearly based on s 46(2)*(c)* of the Magistrates' Courts Act 32 of 1944, which provides as follows**:**

> 'A court shall have no jurisdiction in matters –
> *(a)* . . .;
> *(b)* . . .;
> *(c)* in which is sought specific performance without an alternative of payment of damages except in –
> (i) the rendering of an account in respect of which the claim does not exceed the amount determined by the Minister from time to time by notice in the *Gazette*;
> (ii) the delivery or transfer of property, movable or immovable, not exceeding in value the amount determined by the Minister from time to time by notice in the *Gazette*; and
> (iii) the delivery or transfer of property, movable or immovable, exceeding in value the amount determined by the Minister from time to time by notice in the *Gazette*, where the consent of the parties has been obtained in terms of section 45;
> *(d)* . . . .'

The presiding magistrate dismissed the special pleas, holding that the claims were not claims for the specific performance of a contractual obligation, that s 46 was not applicable, and that the court could entertain the matter by virtue of s 30(1) of the Magistrates' Courts Act (which empowers magistrates' courts to grant interdicts) (at 58*h*—*j*). The defendant appealed, contending that the respondents' claims were claims for specific performance without alternative claims for damages and that s 46(2)*(c)* precluded the magistrate's court from hearing both matters.

Since the claims in *Malkiewicz* clearly did not fall within the ambit of any of the three exceptional situations adumbrated in subparagraphs (i), (ii) and (iii) of s 46(2)*(c)*, the validity or otherwise of the appellant's special pleas turned on the proper meaning of the expression 'specific performance' in that provision. **If 'specific performance' meant no more than 'specific performance' due in terms of a contract, then the claims**

instituted by the respondents were not excluded from the jurisdiction of the magistrates' courts because they were not hit by the prohibition against the hearing of claims for 'specific performance', and could thus be entertained by a magistrate under s 30(1). If, on the other hand, the expression 'specific performance' in s 46(2)*(c)* meant any claim ad factum praestandum (for the performance of an act), in contrast to a claim ad pecuniam solvendam (for the payment of money), then the claims instituted by the respondents were indeed excluded from the jurisdiction of the magistrates' courts because they were clearly claims ad factum praestandum with no alternative of payment of damages.

Determining the matter on appeal, Botha J (Poswa J concurring) was thus forced to choose between two conflicting lines of authority as to the proper meaning of the expression 'specific performance' appearing in s 46. The first line of authority springs from the decision in *Sydney Clow & Co Ltd v Herzberg* 1938 TPD 201, in which it was held that a claim for specific performance which fell beyond the jurisdiction of the magistrates' courts could arise from any obligation, and not only from a contractual obligation (see *Malkiewicz* at 59*b*—*c*). Usually regarded as falling in the same line of authority as *Sydney Clow* is *Zinman v Miller* 1956 (3) SA 8 (T), in which Rumpff J stated (at 12D) that the reference to 'specific performance' in s 46(2)*(c)* was a reference to claims in which a plaintiff sought ordinary relief of a final nature based on an obligation in terms of which the defendant was bound to render specific performance. And in *Carpet Contracts (Pty) Ltd v Grobler* 1975 (2) SA 436 (T) at 439G—H the court remarked that *Zinman v Miller* had decided that the term 'specific performance' used in s 46(2)*(c)* had a wider connotation than specific performance as that term was usually accepted in relation to the law of contract. In other words, any obligation (including an obligation arising, for example, from delict) could give rise to a claim for specific performance (at 439H—in fine).

The *Sydney Clow* case, however, was decided under the provisions of the Magistrates' Courts Act 32 of 1917, in which the corresponding provision to the present s 46 referred to 'specific performance of an act' (in the Dutch version 'daadwerklike vervulling van een verbintenis'). **The 1944 Act currently in force omits the words 'of an act' and the corresponding Dutch phrase 'van een verbintenis' from s 46(2)*(c)*, and this has led courts in cases decided under the 1944 Act** (for example *Wiles v Praeg* 1952 (1) SA 87 (T) at 90F—G and *Maisel v Camberleigh Court (Pty) Ltd* 1953 (4) SA 371 (C) at 379C—in fine) **to doubt whether *Sydney Clow* can still be regarded as good law** on the point (see *Malkiewicz* at 59*e*—60*c*, *Jones & Buckle The Civil Practice of the Magistrates' Courts in South Africa* I *The Act* 9 ed (1996) by H J Erasmus & D E van Loggerenberg ('Jones & Buckle') 191). And in *Zinman v Miller* Rumpff J went on to say that it was immaterial for the purposes of that case whether the obligation arose from contract, delict or statute, and it was therefore unnecessary to decide whether the words 'specific performance' in s 46(2)*(c)* were restricted to specific performance of a contract (1956 (3) SA at 12D—E; see also *Malkiewicz* at 59*d*—*e*). In the *Carpet Contracts* case also it was pointed out that the court had to deal with a claim arising ex contractu (1975 (2) SA at 439 in fine). Accordingly, the views of both Rumpff J in *Zinman v Miller* and the court in *Carpet Contracts* were obiter, and therefore not binding upon courts in later cases (see Jones & Buckle 191).

The principal opposing authority is *Olivier v Stoop* 1978 (1) SA 196 (T), in which the court held (at 202C—D), after referring to *Wiles v Praeg* and *Maisel v Camberleigh Court (Pty) Ltd*, that 'specific performance' in s 46(2)*(c)* meant the specific performance of a contractual obligation (see *Malkiewicz* at 60*d*—*e*). That approach is supported by Jones & Buckle 192, on the ground that the qualifications of judicial officers have improved since the days when the 1917 Act was still in force, and legal representation (including representation by counsel) in the magistrates' courts is now more readily available, resulting in the danger of magistrates falling into error in the making of orders ad factum praestandum being 'considerably reduced'. It is therefore no longer necessary (the authors of Jones & Buckle argue) to reserve for superior courts the making of orders the non-fulfilment of which involves committal for contempt of court (ibid).

In *Malkiewicz* Botha J chose to support the view adopted in *Olivier v Stoop*, which is supported also by H Daniels *Burgerlike Prosesreg in die Landdroshowe* (2006) II—142. It was 'undeniably so' that the normal context of the concept of specific performance was the field of contract. **Where s 30 conferred jurisdiction in respect of interdicts on magistrates' courts, it would largely nullify that jurisdiction if it would be subject to the restriction that an interdict could be sought only if there was an alternative prayer for damages**. Interdicts in the High Court were rarely, if ever, sought on that basis (at 60*f*—*g*). Section 30 empowered a magistrate's court to grant interdicts, and it was accepted nowadays that jurisdiction in respect of interdicts extends to prohibitory and mandatory interdicts. If, however, the interdict was aimed at the enforcement of a contractual obligation, the court would have no jurisdiction unless there was an alternative prayer for damages (at 60*g*—*i*, with reference to *Badenhorst v Theophanous* 1988 (1) SA 793 (C) at 801G—H (noted by Mervyn Dendy 'Enforcing Restraint-of-Trade Agreements in the Magistrates' Courts' (1988) 105 *SALJ* 664)).

The appeal therefore failed, and the magistrate in *Malkiewicz* was held to have correctly dismissed the special pleas in both actions instituted by the respondents (at 61*a*).

The reasoning of Botha J is respectfully supported by the present writer.

5. APPLICATIONS

Dispute of fact

The decision in ***Traut v Fiorine & another*** **2008 (1) BCLR 84 (C)** was previously reported in [2007] 4 All SA 1317, and was surveyed in **Civil Procedure Sibergramme 2 of 2008** (8 April 2008) 4.

6. TRIAL ACTIONS

Amendment of pleadings

In ***Thekweni Properties v Picardi Hotels Ltd & another*** **[2008] 1 All SA 172 (D)** the court had to determine an opposed application for leave to amend a plea. The court, said

Levinsohn DJP, had a wide discretion to grant amendments. In *Trans-Drakensberg Bank Ltd (Under Judicial Management) v Combined Engineering (Pty) Ltd & another* 1967 (3) SA 632 (D) at 640G—in fine and 642 in fine it had been held that **the aim in allowing amendments to pleadings should be to do justice between the parties by deciding the real issues between them**. The mistake or neglect of one of them in the process of placing the issues on record was not to stand in the way of this; his punishment was being mulcted in the wasted costs. The amendment would be refused only if to allow it would cause prejudice to the other party not remediable by an order for costs and, where appropriate, a postponement. It was only in this relation that the applicant for an amendment was required to show that it was bona fide and to explain any delay that there might have been in making the application, for he had to show that his opponent would not suffer prejudice. If a litigant had delayed in bringing forward his amendment, that in itself (there being no irremediable prejudice to his opponent) was no ground for refusing the amendment (para 9 at 174*d—g*).

The plaintiff in *Thekweni Properties* sued for the payment of arrear rentals, and the defendant wished to amend its plea so as to add a defence to the effect that the plaintiff had deprived itself of locus standi to sue by ceding its right to the rentals to a financial institution which had lent the plaintiff money in terms of a mortgage bond. The plaintiff alleged that it would suffer irremediable prejudice if this defence could be raised because it was no longer possible, by virtue of prescription, for the plaintiff to obtain a re-cession of its rights from the financial institution. Had the defendant taken the point before the onset of prescription, the plaintiff could have obtained a re-cession. Even if it were to be assumed that such a re-cession could have been obtained, however, the plaintiff (said Levinsohn DJP) should have ensured when it instituted action that it possessed the necessary locus standi to sue. It was the plaintiff and not the defendant who ought to have been aware of the existence of a cession in the mortgage bond. In the nature of things, the defendant would become aware of such matters only when it obtained discovery of the plaintiff's documents and that would happen during the course of preparation for trial. There had been a substantial delay in obtaining trial dates, which had to be laid solely at the door of the plaintiff, and **the defendant had taken the point timeously when it first became aware of it**. No fault whatsoever could be attributed to the defendant. It was a somewhat novel suggestion to assert, in regard to the concept of prejudice**:** 'When I issued summons I did not take care to ensure that I had the necessary *locus* to sue. I rely on you, my opponent, to timeously apprise me of any difficulty whereupon I would be able to rectify the defect, and re-issue summons before my claim prescribes' (para 13 at 175*b—e*). Leave to amend was accordingly granted, in the interests of properly defining the issues before the court, as there was no point in deferring the decision until all the evidence had been adduced (para 14 at 175*e—f*).

Exception

In ***The Trustees for the Time Being of the Bus Industry Restructuring Fund v Break Through Investments CC & others*** **[2008] 1 All SA 23 (SCA)** (also reported sub nom ***Trustees, Bus Industry Restructuring Fund v Break Through Investments CC & others*** **2008 (1) SA 67**) Brand JA (for the court) reaffirmed that the nature of exception

proceedings requires the court to look at the allegations in the particulars of claim for the facts of the matter, where exception is taken to those particulars of claim (para 4 at 25*c* (All SA), 69A (SA)). Where defendants have chosen the exception procedure instead of having the matter decided after the hearing of evidence at a trial, they have to show that the claim is (not may be) bad in law. Accordingly, **where the dispute centres around the correct interpretation of a clause in a contract, the excipients have to show that the clause cannot reasonably bear whatever meaning is contended for by the plaintiffs** (para 11 at 26*h*—*j* (All SA), 70I—J (SA), with reference to *Lewis v Oneanate (Pty) Ltd & another* 1992 (4) SA 811 (A) at 817F—G and *Vermeulen v Goose Valley Investments (Pty) Ltd* 2001 (3) SA 986 (SCA), [2001] 3 All SA 350 para 7 at 997B (SA), 362*e* (All SA); see also para 24 at 30*e*—*f* (All SA), 74H—I (SA)).

In a similar vein, Levinsohn DJP held in ***Thekweni Properties v Picardi Hotels Ltd & another*** **[2008] 1 All SA 172 (D)** para 10 at 174*h*—*i* that the onus rests on an excipient who alleges that his opponent's plea does not disclose a defence to establish that in all its possible meanings, the plea discloses no defence (with reference to *Amalgamated Footwear & Leather Industries v Jordan & Co Ltd* 1948 (2) SA 891 (C) at 893).

7. RES JUDICATA

The appellant in ***Molefe v Regent Insurance Company (Pty) Ltd*** **[2008] 1 All SA 158 (W)** had successfully brought an insurance claim against the respondent, obtained a default judgment and defeated an attempt by the respondent to rescind the default judgment. The respondent accordingly paid the amount of the judgment debt to the appellant and then sued the appellant for that amount, on the ground that the appellant had committed fraud in relation to the insurance agreement by representing that the appellant's vehicle, which was insured under the policy in question, would be used for private and domestic motoring only, whereas in truth it was being used as a taxi. The appellant raised a special plea of res judicata, arguing that the respondent was precluded from raising the issue of fraud by its failure to take the dismissal of its rescission application on review or on appeal.

Relying upon dicta of Olivier JA (for the majority) in *National Sorghum Breweries Ltd (t/a Vivo African Breweries) v International Liquor Distributors (Pty) Ltd* 2001 (2) SA 232 (SCA), [2001] 1 All SA 417 paras 3—5 at 239H—240D (SA), 419*c*—*g* (All SA), Saldulker J (Willis J concurring) held that the special plea of res judicata had been correctly dismissed by the court a quo. **The appellant's original claim had been based on a contract, and the subsequent claim by the respondent was based on a fraudulent misrepresentation. Clearly, these were two different causae**. The special plea could not succeed in those circumstances (para 10 at 160*d*—*e* read with para 9 at 159*i*—160*d*).

8. INTERDICTS

Final interdict

The decision in ***Traut v Fiorine & another*** **2008 (1) BCLR 84 (C)** was previously reported in [2007] 4 All SA 1317, and was surveyed in **Civil Procedure Sibergramme 2 of 2008** (8 April 2008) 8.

9. JUDGMENTS AND ORDERS

Anton Piller

In ***Van Niekerk & another v Van Niekerk & another*** **[2008] 1 All SA 96 (SCA), 2008 (1) SA 76** the court held that the grant of an Anton Piller order is not appealable. For a detailed survey of the judgment, see under '**APPEALS: *Appealability***' below.

Rule 43 order

An order which had been granted by default in terms of uniform rule 43, for the payment of maintenance pendente lite and for a contribution towards costs, was set aside in ***Spangenberg & another v De Waal*** **[2008] 1 All SA 162 (T)** where the respondent wife had indicated that she had no intention of instituting an action for divorce and her husband, who had previously been declared by a court to be of unsound mind and as such incapable of managing his own affairs, could not be found to have had the mental capacity to institute divorce proceedings without a curator ad litem. (No curator ad litem had at the time of the making of the rule 43 order been appointed, and the husband's curator bonis was held to lack locus standi to institute divorce proceedings on the husband's behalf.)

Further on *Spangenberg's* case, see under '**PARTIES: *Curator bonis***' and '**PARTIES: *Person of unsound mind***' above.

10. APPEALS

Appealability

The question that arose for determination in ***Van Niekerk & another v Van Niekerk & another*** **[2008] 1 All SA 96 (SCA), 2008 (1) SA 76** was whether the dismissal of an application for the setting aside of an Anton Piller order was appealable. This in turn depended upon whether the grant of an Anton Piller order was itself appealable. The answer to the question, held Van Heerden JA (Harms ADP, Scott and Mthiyane JJA and Kgomo AJA concurring), turned on an application of the test for appealability laid down in *Zweni v Minister of Law and Order* 1993 (1) SA 523 (A) at 532I—533B, where Harms AJA (as he then was) stated that the three attributes of an appealable judgment or order were (i) that the decision must be final in effect and not susceptible of alteration by

the court of first instance, (ii) that it must be definitive of the rights of the parties, and (iii) that it must have the effect of disposing of at least a substantive portion of the relief claimed in the main proceedings (para 3 at 97*j*—98*b* (All SA), 77F—H (SA)). Although *Zweni* had been referred to and followed in numerous subsequent Appeal Court decisions (para 4 at 98*b*—*c* (All SA), 77H (SA)), the test in that case was not always easy to apply (para 5 at 98*c*—*e* (All SA), 77I—78B (SA), with reference to *Cronshaw & another v Fidelity Guards Holdings (Pty) Ltd* 1996 (3) SA 686 (A) (also reported sub nom *Cronshaw & another v Coin Security Group (Pty) Ltd* in [1996] 2 All SA 435) at 690C—E (SA), 437*h*—*i* (All SA) and *Minister of Safety and Security & another v Hamilton* 2001 (3) SA 50 (SCA) para 4 at 52B). In the determination of the question of appealability, the underlying consideration is that **it is undesirable to have a piecemeal appellate disposal of the issues in litigation**, and it is advisable to limit appeals to certain 'orders' (para 6 at 98*e*—*f* (All SA), 78B—C (SA)). Generally speaking, the balance of convenience more often than not requires that the case be brought to a conclusion at the first level and the whole case then be appealed. As was held in *Guardian National Insurance Co Ltd v Searle NO* 1999 (3) SA 296 (SCA), [1999] 2 All SA 151 at 301B—D (SA), 154*f*—*h* (All SA), there were still sound grounds for a basic approach which avoided the piecemeal appellate disposal of the issues in litigation. It was unnecessarily expensive, and generally it was desirable that such issues be resolved by the same court and at one and the same time. Where this approach had been relaxed, it had been because the judicial decisions in question, whether referred to as judgments, orders, rulings or declarations, had the three attributes referred to in *Zweni* (paras 7—8 at 98*g*—*i* (All SA), 78D—F (SA)).

Van Heerden JA remarked next that whether the grant of an Anton Piller order was appealable or not had not previously been decided by the Appeal Court. Appeals concerning Anton Piller orders which had thus far reached the Appeal Court had all concerned the refusal by the court a quo of relief (para 9 at 98*j*—99*a* (All SA), 78G (SA)). The question of appealability had not arisen, presumably because it was settled law that the refusal, but not the granting, of interim interdicts is appealable (para 9 at 99*b*—*c* (All SA), 78H—I (SA)). An Anton Piller order was directed at the preservation of vital evidence that might otherwise be lost. It would be granted, inter alia, where there was a real and well-founded apprehension that evidence might be hidden or destroyed or in some manner spirited away by the time the case came to trial or to the stage of discovery (para 10 at 99*d*—*e* (All SA), 79A—B (SA), citing *Shoba v Officer Commanding, Temporary Police Camp, Wagendrift Dam, & another*; *Maphanga v Officer Commanding, South African Police Murder and Robbery Unit, Pietermaritzburg, & others* 1995 (4) SA 1 (A) at 15I).

The order granted in *Van Niekerk*, like most orders of the kind, consisted, on the one hand, of procedural directions and safeguards and, on the other hand, of orders aimed at obtaining evidence to be preserved. **Its provisions had nothing to do with the substantive rights of the parties in the causes of action which were foreshadowed in the papers**. As pointed out in *Hall & another v Heyns & others* 1991 (1) SA 381 (C) at 385D—E, the relief which an Anton Piller order afforded served no end in itself. Its only utility was that it assisted the successful applicant by ensuring the greater effectiveness of some other proceedings in which substantive relief was claimed. It did not dispose of any

issue in those proceedings (para 11 at 99*e*—*g* (All SA), 79B—D (SA)). The grant of an Anton Piller order was akin to the grant of an interim interdict (para 14 at 100*b*—*c* (All SA), 79I (SA)). The order with which the court was concerned in *Van Niekerk* was a largely procedural one aimed at the preservation of evidence so as to ensure the greater effectiveness of other proceedings in which substantive relief was or would be claimed, and for the substantiation of which such evidence would be vital (para 15 at 100*j*—101*a* (All SA), 80H—I (SA)). The order refusing to set aside the earlier grant of an Anton Piller order was accordingly not appealable, and an appeal against it was struck from the roll (para 16 at 101*b*—*c* (All SA), 80J—81A (SA)).

Application for leave to appeal

The question in ***High School Ermelo & another v The Head of Department & others*** **[2008] 1 All SA 139 (T)** was whether the filing of a late application for leave to appeal against the refusal of interim relief should be condoned. Refusing the application, Ngoepe JP (Seriti J and Ranchod AJ concurring) remarked that, **although the court usually adopted a robust attitude by granting such condonation applications in order to dispose of the matter (for example in an appeal), care had to be taken not to create the impression that an application for condonation was a mere formality**. An applicant still had to make out its case. In order for an application for condonation to succeed, an applicant had to show reasonable prospects of success (sc in the application for leave to appeal), and in the *High School Ermelo* matter there were none. Furthermore, the explanation for the delay was not reasonable. The cause of the delay was gross ineptitude on the part of the applicants' legal representatives in delivering an obviously fatally defective notice of application for leave to appeal and then wasting time by prematurely rushing to the Supreme Court of Appeal (which referred the matter back to the High Court, on the basis that the applicants had not been refused leave to appeal by the High Court, since their application for leave to appeal had been fatally defective and could not have been considered by the High Court). The applicants' representatives had then caused a further delay by attempting to amend 'an unamendable defective notice'. The court could not accept this. Finally, in considering any possible prejudice to the applicants, the court took into account the fact that the main application was about to be heard. In the event of the judgment in the main application going against the applicants, they could appeal on grounds that would include the grounds they wished to raise in opposition to the refusal of the interim order. The door was thus not permanently shut against them (para 9 at 141*c*—*g*). The application for condonation was accordingly dismissed, and the application for leave to appeal was struck from the roll (at 141*g*—*h*).

Equality court

The decision in ***Hopf v The Spar Group (Build It Division) & another*** **2008 (1) BCLR 72 (D)** was previously reported in [2007] 4 All SA 1249, and was surveyed in **Civil Procedure Sibergramme 2 of 2008** (8 April 2008) 8—9.

Further evidence

The decision in ***S v Shaik & others*** **2008 (1) SACR 1 (CC)** is also reported in 2008 (2) SA 208 and (sub nom *Shaik & others v S*) in 2007 (12) BCLR 1360, and was surveyed in **Civil Procedure Sibergramme 2 of 2008** (8 April 2008) 11—12.

The court in ***Molefe v Regent Insurance Company (Pty) Ltd*** **[2008] 1 All SA 158 (W)** refused an application by the appellant for further evidence to be placed before the court on appeal. The basis of the application was that the appellant could not have anticipated the nature of the cross-examination that he would have to face during the trial, and could not have brought documents in support of his responses at that time. Rejecting this explanation as 'unconvincing', Saldulker J (Willis J concurring) remarked that the appellant was at all times aware that the claim against him at the trial was based on fraud. The tenor of the cross-examination by the respondent had left him in no doubt of that, yet **he had not sought a postponement to secure any of the documents that he applied to tender in evidence and on appeal** (para 13 at 160*h*—*i*). The explanation why the documentation in question was not tendered by the appellant at the trial was not acceptable, and in any event even if the documents were to be admitted, they would not alter the outcome of the appeal and would not disturb the probabilities in the matter (para 14 at 160*i*—*j*).

To the reasoning of Saldulker J one must add that the appellant would (if served with a rule 23(1) notice) have been under a duty to make discovery of the books and documents in his possession or under his control which related to the action and which he intended to use in the action or which tended to prove or disprove either party's case. For this reason also, it was the appellant's own fault that the documents in question were not available at the trial.

11. COSTS

De bonis propriis

The decision in ***Hopf v The Spar Group (Build It Division) & another*** **2008 (1) BCLR 72 (D)** was previously reported in [2007] 4 All SA 1249, and was surveyed in **Civil Procedure Sibergramme 2 of 2008** (8 April 2008) 10—11.

12. CONSTITUTIONAL PRACTICE

Application for leave to appeal to Constitutional Court

The decision in ***Minister of Safety and Security v Van Niekerk*** **2008 (1) SACR 56 (CC)** was previously reported in 2007 (10) BCLR 1102, and was discussed in **Civil Procedure Sibergramme 11 of 2007** (15 January 2008) 5—7.

Costs

A costs order granted by the High Court against the applicant in ***Masetlha v The President of the Republic of South Africa & another*** **2008 (1) BCLR 1 (CC), 2008 (1) SA 566** was set aside on appeal, since the applicant had sought to vindicate important constitutional guarantees and should not be unduly mulcted in costs for attempting to do so (para 103 at 32C (BCLR), 600E—F (SA)).

Direct appeal to Constitutional Court

In ***Masetlha v The President of the Republic of South Africa & another*** **2008 (1) BCLR 1 (CC), 2008 (1) SA 566** Moseneke DCJ (writing for the majority in the Constitutional Court) allowed a direct appeal to the Court from a decision of the High Court. It was by now trite that whether leave to appeal should be granted involved a determination of whether the issues raised were constitutional matters, and whether it was in the interests of justice to adjudicate upon the dispute raised (para 27 at 10D (BCLR), 577E (SA)). Important constitutional issues fell to be resolved in the application (para 28 at 11A—B (BCLR), 578B—C (SA)), and the term of office of the applicant (whose claim for reinstatement was based on a complaint to the effect that his suspension from, and termination of, his employment as head of the National Intelligence Agency was unconstitutional) was due to expire on 31 December 2007 (some seven and a half months after the date of the hearing in the Constitutional Court). There was thus urgency and merit in having the claim determined prior to the end of 2007. **If the applicant were to appeal to a Full Bench of the provincial division or to the Supreme Court of Appeal, a possible further appeal to the Constitutional Court would be frustrated because, on expiry of his term of office, his claim for reinstatement would become academic** well before the appeal found its way to the Constitutional Court (para 29 at 11B—C (BCLR), 578C—E (SA)). The constitutional matters which arose did not involve the development of the common law, but rather turned on the direct application of the Constitution of the Republic of South Africa, 1996. In those particular circumstances, it could not be said that the benefit which might be derived from a judgment of the Supreme Court of Appeal outweighed the disadvantage of rendering any further appeal to the Constitutional Court moot. It was accordingly in the interests of justice that leave to appeal directly to the Constitutional Court be granted (para 30 at 11C—E (BCLR), 578E—F (SA)).

Further evidence on appeal

The decision in ***S v Shaik & others*** **2008 (1) SACR 1 (CC)** is also reported in 2008 (2) SA 208 and (sub nom *Shaik & others v S*) in 2007 (12) BCLR 1360, and was surveyed in **Civil Procedure Sibergramme 2 of 2008** (8 April 2008) 11—12.

In ***Masetlha v The President of the Republic of South Africa & another*** **2008 (1) BCLR 1 (CC), 2008 (1) SA 566** a request by the applicant in appeal proceedings before the Constitutional Court to refer certain issues to the High Court for the hearing of oral evidence was turned down where the evidence in question related to a 'marginal dispute'

which did not weigh more heavily than the need for finality in the matter. The disputed issues of fact related to matters peripheral to the basic legal questions (para 95 at 30B and C (BCLR), 598C and D (SA)). Moseneke DCJ (for the majority) added that ordinarily the election (to seek a referral to oral evidence after motion proceedings have been instituted) is not done on appeal (para 94 at 29H—I (BCLR), 597I—598B (SA)).

Jurisdiction of Constitutional Court

The decision in ***Minister of Safety and Security v Van Niekerk*** **2008 (1) SACR 56 (CC)** was previously reported in 2007 (10) BCLR 1102, and was discussed in **Civil Procedure Sibergramme 11 of 2007** (15 January 2008) 5—7.

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