CIVIL PROCEDURE

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1. INTRODUCTION

In this Sibergramme decisions on civil procedure reported in the **March 2007** issue of ***The South African Law Reports*** are considered, other than the decision in ***Transnet Ltd & others v Chirwa*** **2007 (2) SA 198 (SCA), [2007] 1 All SA 184**, which will form the subject matter of **Civil Procedure Sibergramme 9 of 2007**, to be published shortly.

Cases reported in the March 2007 issues of *The All South African Law Reports*, *Butterworths Constitutional Law Reports* and *The South African Criminal Law Reports* were dealt with in **Civil Procedure Sibergramme 7 of 2007**.

Legislation relevant to civil procedure promulgated during March 2007 is also surveyed in this issue.

2. LEGISLATION

A **small claims court for the area of Tulbagh** was established by **GN 159 *GG* 29651 of 2 March 2007**.

The amount of tax in dispute for purposes of the **hearing of an appeal by the Tax Board** in terms of s 83A of the Income Tax Act 58 of 1962 or s 33A of the Value-Added Tax Act 89 of 1991 was fixed at R500 000 by **GN 271 *GG* 29742 of 28 March 2007**.

The **rules of the KwaZulu-Natal Law Society** were amended by ***GG* 29669 of 9 March 2007** by (inter alia) the insertion of a new rule 16B, dealing with '**collapse fees**'. The rule provides that a member may not charge a fee where a matter which has been set down for hearing collapses for any reason unless the fee (1) has been agreed to in writing in advance with the client, and the client has been informed that the client is not obliged to agree to such a fee, and (2) is determinable and reasonable, and takes into account any work that is actually done by the member after the collapse of the matter but before the end of the period for which the matter had been scheduled to run.

A **practice directive of the Supreme Court of Appeal** published in March 2007 relating to the mode of addressing the Court provides that the **mode of address to the Bench** in proceedings before the Court, with effect from 2 May 2007, in English should no longer employ the expressions 'My Lord', 'My Lady', 'Your Lordship(s)' or 'Your

Ladyship(s)'. Instead, the Bench must be addressed through the presiding Judge and be referred to as 'the Court'. Where an individual member of the Bench is referred to, this should be done by using the Judge's surname preceded by the word 'Justice'. The mode of address used in Afrikaans prior to 2 May 2007 continues to apply.

3. JURISDICTION

International competence of foreign court

Richman v Ben-Tovim **2007 (2) SA 283 (SCA)** was an appeal against the judgment of Van Zyl J in *Richman v Ben-Tovim* 2006 (2) SA 591 (C), which was surveyed in **Civil Procedure Sibergramme 10 of 2006** (31 August 2006) 3—5. The appellant (plaintiff) there sought an order of provisional sentence directing the respondent (defendant) to pay an amount expressed in pounds sterling which had been awarded to the plaintiff in the High Court of Justice of England and Wales (Queen's Bench Division). The central issue in dispute was whether the English court had had jurisdiction to grant a default judgment against the respondent according to principles recognized by South African law with reference to the jurisdiction of foreign courts by virtue of the physical presence of the respondent in England when the initiating process was served upon him (para 1 at 284G—H). The appellant's case was predicated on the proposition that there was international competence in South African law if a defendant was merely physically present in the jurisdiction of the foreign court at the time when action was instituted and process served (para 3 at 285D—E). Van Zyl J in the court a quo had found that such international jurisdiction was lacking, and had accordingly dismissed the action for provisional sentence.

Delivering the judgment on appeal, Zulman JA (Cameron, Brand and Maya JJA and Theron AJA concurring) remarked at the outset that the question which obtruded was why a party armed with a final and conclusive judgment of an English court should not be entitled, prima facie at least, if only on the grounds of comity between civilized nations and having regard to the current global environment, to relief in our courts (para 4 at 285E—F and n1 thereto at 285H—J, with reference to *Jones v Krok* 1995 (1) SA 677 (A) at 692I—J, where Corbett CJ had remarked (inter alia) that **a party armed with an otherwise final and conclusive foreign judgment should be entitled, prima facie, to relief in our courts**). A foreign judgment was not directly enforceable in South Africa, but constituted a cause of action and would be enforced by our courts provided that (inter alia) the court which had pronounced the judgment had jurisdiction to entertain the case according to the principles recognized by our law with reference to the jurisdiction of foreign courts (sometimes referred to as 'international jurisdiction or competence') (para 5 at 285G—286A, with reference to *Jones v Krok* at 685B—C). The question which arose in *Richman's* case was whether mere personal service of process on the respondent in London, where he was neither domiciled nor resident, was sufficient to vest the English court with jurisdiction in terms of our law. The requirement appeared to telescope two components**:** the principles of our law and the jurisdiction of the foreign court according to its law. The second component was a matter of fact, and expert

evidence had been given that an English court would have jurisdiction to entertain a claim in personam if the defendant, even if only temporarily present, was served with process in England. That fact was not disputed by the respondent (para 6 at 286B—D).

The fact that the English court had jurisdiction according to English law was not enough. The matter had also to be decided according to the principles recognized by South African domestic law. In this regard, Van Dijkhorst J in *Reiss Engineering Co Ltd v Insamcor (Pty) Ltd* 1983 (1) SA 1033 (W) at 1037G—1038A, quoting Walter Pollak *The South African Law of Jurisdiction* (1937) 219, had held that a foreign court had jurisdiction to entertain an action for a judgment sounding in money against a defendant who was a natural person, in three situations**:**

- if at the time of the commencement of the action the defendant was physically present within the state to which the court belonged;
- if at the time of the commencement of the action the defendant, although not physically present within that state, was either domiciled or resident within that state; and
- if the defendant had submitted to the jurisdiction of the court.

The decision in *Reiss* had been approved and applied, without any controvertion of the relevant exposition, in *Jones v Krok* at 685G, *Erskine v Chinatex Oriental Trading Co* 2001 (1) SA 817 (C) at 820I—821B and *Blanchard, Krasner & French v Evans* 2001 (4) SA 86 (W), [2001] 2 All SA 450 at 89H—90A (SA), 453*a—c* (All SA). In the court a quo, however, Van Zyl J had considered himself bound by a statement in *Purser v Sales*; *Purser & another v Sales & another* 2001 (3) SA 445 (SCA), [2001] 1 All SA 25 para 12 at 450I—451B (SA), 29*d—e* (All SA) to the effect that a foreign court would have jurisdiction over a defendant if, at the time of commencement of proceedings, the defendant was domiciled or resident within the state in which the foreign court exercised jurisdiction or if the defendant submitted to the jurisdiction of the foreign court (with reference to *Pollak on Jurisdiction* 2 ed (1993) by David Pistorius 162 and A B Edwards 'Conflict of Laws' in W A Joubert (ed) *The Law of South Africa* volume 2 First Reissue (1993) para 478 (see now, in the second edition (2003) of *The Law of South Africa* volume 2 part 2, the updated chapter on 'Conflict of Laws' by Ellison Kahn para 346 at 384) (para 7 at 286D—287D).

The seeming suggestion in *Purser* that our law would recognize the jurisdiction of the foreign court if at the time of commencement of the proceedings the defendant was domiciled or resident within the state of the foreign court that exercised jurisdiction, or if the defendant submitted to the jurisdiction, but not in the case of temporary presence of the defendant, said Zulman JA, was 'plainly *obiter*'. No mention was made in *Purser* of the first edition of *Pollak on Jurisdiction* or the endorsement of it by Van Dijkhorst J in *Reiss*. The appellant (defendant) in *Purser* had not been physically present in the foreign jurisdiction at the time when proceedings had been instituted, and mere presence in the foreign state had not been explored or even mentioned in that case. The only issue argued in *Purser* had been whether the defendant had submitted to the jurisdiction of the foreign court or not. Furthermore, the reference in *Purser* to the exposition in the second edition of *Pollak on Jurisdiction* by Pistorius (which omitted temporary presence) had been

misconstrued by Van Zyl J in *Richman's* case as constituting deliberate approval of a change from the contrary statement in the first edition of *Pollak* referred to in *Reiss*. In the first reissue of volume 2 of *The Law of South Africa* para 478 at 387 the statement was made that there had been no decision on the question whether the mere temporary physical presence of a person who was neither a resident nor a domiciliary would suffice. A footnote referred to an obiter dictum of Beadle CJ in *Steinberg v Cosmopolitan National Bank of Chicago* 1973 (4) SA 564 (RA) at 574E—F, to the effect that in a case sounding in money, if a common-law tort or delict was committed within the jurisdiction of a foreign court and the defendant was within that jurisdiction and was there served with process when the action commenced, the judgment of the foreign court would be recognized in Rhodesia. Commenting on the *Steinberg* case, Ellison Kahn in 1973 *Annual Survey of SA Law* 437 had stated that jurisdictional criteria of internal and international jurisdiction did not always coincide, although in principle they should. But normally where they did not, the internal grounds were the more extensive. **It sounded strange**, suggested Professor Kahn, **that personal service within the area sufficed abroad but not locally** (para 8 at 287D—288E).

It was perhaps of some significance, continued Zulman JA, that in South African domestic law the drastic procedure of arrest to found jurisdiction (though constitutionally suspect) might be resorted to where a peregrine was temporarily within the jurisdiction of the court. Such a procedure was unknown in English law, where service was sufficient to confer jurisdiction. Zulman JA then proceeded to refer to, inter alia**:**

- the endorsement by the judgment in *Reiss* of the view adopted in the first edition of *Pollak on Jurisdiction*;
- the view expressed by Christopher Forsyth *Private International Law* 4 ed (2003) 401—2 that mere presence is not a ground of international competence;
- an obiter statement in *Erskine v Chinatex Oriental Trading Co* 2001 (1) SA at 820I—J to the effect that physical presence at the time of institution of the action would suffice; and
- the statement in *Supercat Incorporated v Two Oceans Marine CC* 2001 (4) SA 27 (C), [2001] 3 All SA 1 at 30H—I (SA), 4*c—d* (All SA) that our courts sometimes recognize the jurisdiction of a foreign court although they themselves would not have assumed jurisdiction on the same footing.

There were, said Zulman JA, compelling reasons why, in this modern age, traditional grounds of international competence should be extended, within reason, to cater for itinerant international businessmen. In addition, it was now well established that **the exigencies of international trade and commerce required that final foreign judgments be recognized as far as was reasonably possible in our courts and that effect be given to them**. The Supreme Court of Appeal had said in *Mayne v Main* 2001 (2) SA 1239 (SCA), [2001] 3 All SA 157 para 6 at 1243J—1244B (SA), 159*h—i* (All SA) that a common-sense and realistic approach should be adopted in assessing jurisdictional requirements because of modern-day conditions and attitudes, and the tendency towards a more itinerant lifestyle, particularly among businesspeople. Not to do

so might allow certain persons habitually to avoid the jurisdictional nets of the courts and thereby escape legal accountability for their wrongful actions. Having regard to all of the above factors, the view expressed by Pollak in his first edition, quoted with approval in *Reiss*, should be followed (para 9 at 289A—E).

This meant that two other defences raised by the respondent had to be considered. The first of these was based on s 1(1)*(a)* of the Protection of Businesses Act 99 of 1978, which provided that, except with the permission of the Minister of Economic Affairs, no judgment, order or arbitration award delivered, given, issued or emanating from outside the Republic and arising from any act or transaction contemplated in s 1(3) may be enforced in the Republic. Section 1(3) states that in the application of s 1(1)*(a)* an act or transaction shall be an act or transaction which took place at any time, whether before or after the commencement of the Act, and is connected with the mining, production, importation, exportation, refinement, possession, use or sale of or ownership to any matter or material, of whatever nature, whether within, outside, into or from the Republic. The wording of the section, said Zulman JA, referred to transactions connected with raw materials or substances. Even manufactured goods were excluded from the operation of the Act (para 11 at 289H—290A, with reference to *Chinatex Oriental Trading Co v Erskine* 1998 (4) SA 1087 (C) at 1095F—1096C and *Tradex Ocean Transportation SA v MV Silvergate (or Astyanax) & others* 1994 (4) SA 119 (D) at 121A—D). The appellant's claim in *Richman* was for services and disbursements relating to negotiations, advice, drafting of contract documents and incidental matters pertaining to a restructuring, rearrangement and (ultimately) dissolution of various joint ventures. **If manufactured goods were sufficiently remote from 'matter' and 'material' within the meaning of the Act, then by parity of reasoning there could be no scope for applying the Act to a claim for payment sounding in money where the claim was one for professional services rendered**. The defence based on the Protection of Businesses Act was accordingly without merit (para 11 at 290A—C).

The final defence relied on by the respondent was based on considerations of public policy. The respondent contended that the appellant was not an attorney duly admitted to practise locally, nor a solicitor admitted to practise in the United Kingdom, and that he was accordingly under South African legislation not entitled to levy fees. This complaint, said Zulman JA, was misdirected**:** the question was not whether the appellant was entitled in terms of South African legislation to charge for the services and rendered disbursements made by him., but whether he was permitted to do so in England, where he had been mandated by the respondent and where the services had been rendered and the disbursements incurred. No facts had been adduced by the respondent to show that the appellant was prohibited in England from obtaining payment of the amounts claimed. On the contrary, the plaintiff practised in England as a South African attorney practising foreign law, which was a valid and accepted practice in England. There was no bar in England to such practitioners recovering fees for services rendered by them. The appellant was an admitted attorney in South Africa, though no longer practising as such. There were no considerations of public policy which militated against the recognition or enforcement of the applicant's claim for his fees and disbursements arising from the services lawfully rendered by him in England. If anything, **public policy would require the recognition by a South African court of a lawful judgment given by default by**

an English court where personal service in England had taken place (para 12 at 290C—G).

The appellant's action for provisional sentence ought, in all the circumstances, therefore to have succeeded, and the order of Van Zyl J was set aside and replaced with an order granting (inter alia) provisional sentence in favour of the appellant against the respondent for payment of the amount claimed in pounds sterling, alternatively the rand equivalent thereof determined in accordance with the exchange rate prevailing as at the date of payment, and interest thereon (para 13 at 290G—I).

4. PARTIES

Joinder

See ***Stock & another v Minister of Housing & others*** **2007 (2) SA 9 (C)**, where the joinder of the first and second respondents was held to be proper on the basis that they had 'an obvious interest' in the application such that a failure to join them would have amounted to improper non-joinder (at 14B).

Noise-control regulations

The applicants in ***Laskey & another v Showzone CC & others*** **2007 (2) SA 48 (C)** sought interdictory relief arising out of what were alleged to be ongoing violations of the noise-control regulations in force in Cape Town through the creation by the first respondent of a 'disturbing noise', alternatively a 'noise nuisance', as defined in the regulations. Binns-Ward AJ agreed with counsel for the applicants that the matter had to be approached on the basis of the principle stated in *Patz v Greene & Co* 1907 TS 427 at 433, read with *Roodepoort-Maraisburg Town Council v Eastern Properties (Prop) Ltd* 1933 AD 87 at 95—6, sc that **when it appears that a statute was enacted in the interests of a particular person or any class of persons, a party who shows that he or she is one of those persons or one of that class of persons and who seeks the grant of interdictory relief premised on the statute is not required to show harm as a result of the contravention of the statute, such harm being presumed**. When, on the other hand, a statutory duty is imposed, not in the interest of a particular person or a particular class, but in the public interest generally, the applicant must show that he or she has sustained, or apprehends, actual harm in order to obtain interdictory relief on the grounds of a breach of the statute (para 13 at 54E—H).

Finding that, on an analysis of the noise-control regulations, it could not be said that the regulations were intended for the benefit of any particular person or class of persons in the sense referred to in the *Roodepoort-Maraisburg* case (para 17 at 55F—G), Binns-Ward AJ held that the fact that the first respondent had been shown to be in apparent breach of certain of the provisions of the regulations did not, without more, entitle the applicants to interdictory relief. In order for them to obtain such relief, it was necessary for them to show that the breach had occasioned them harm, or was likely to do so. In the circumstances of *Laskey's* case, the requirement of harm would be established if the conduct of the first respondent about which the applicants complained gave rise to a

private nuisance actionable at their instance (para 18 at 56B—C). Since an actionable nuisance had indeed been proved (para 37 at 65E—F), an interdict in appropriate terms was granted.

Further on *Laskey's* case, see under '**INTERDICTS: *Final interdict*: Suspension or postponement of operation**' below.

5. APPLICATIONS

Dispute of fact

The well-known test laid down in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E—635C for resolving disputes of fact on the affidavits in motion proceedings was again applied in ***Automotive Tooling Systems (Pty) Ltd v Wilkens & others*** **2007 (2) SA 271 (SCA)** para 9n11 at 279G—I. Cachalia AJA (Farlam, Nugent, Lewis and Maya JJA concurring) added that **this approach is followed even when the onus to prove any fact in issue rests on the respondent**, as in restraint-of-trade cases, in which the covenantor (the respondent) bears the onus to show that the restraint is offensive to public policy (with reference to *Ngqumba en 'n ander v Staatspresident en andere*; *Damons NO en andere v Staatspresident en andere*; *Jooste v Staatspresident en andere* 1988 (4) SA 224 (A) at 262B).

Urgent applications

In ***Stock & another v Minister of Housing & others*** **2007 (2) SA 9 (C)** Davis J applied dicta in *Nelson Mandela Metropolitan Municipality & others v Greyvenouw CC & others* 2004 (2) SA 81 (SE) para 34 at 94E—F, where the court held that **protracted attempts by a litigant to resolve a matter before it approached the court did not amount to dilatory action which negated the urgency of the matter** (at 12I—13B).

6. PROVISIONAL SENTENCE

Foreign judgment

See ***Richman v Ben-Tovim*** **2007 (2) SA 283 (SCA)**, which was concerned with the enforceability of a foreign default judgment sounding in money and which is surveyed under '**JURISDICTION: *International competence of foreign court***' above.

7. INTERDICTS

Final interdict

Suspension or postponement of operation

After referring in ***Laskey & another v Showzone CC & others*** **2007 (2) SA 48 (C)** paras 41—5 at 67C—69D to various conflicting authorities on the existence or otherwise of a discretion on the part of the court to refuse a final interdict when the applicant has satisfied the well-known requirements for final interdictory relief in accordance with the principles stated by Innes JA in *Setlogelo v Setlogelo* 1914 AD 221, Binns-Ward AJ remarked that the temporary suspension or postponement of the operation of a final interdict was a question quite distinguishable from the refusal of a final interdict in a context in which the applicant had satisfied the requirements for relief. **No authority had been cited by counsel which made it clear that the court lacked the discretionary jurisdiction to suspend the operation of a final interdict. On the contrary, precedent supported the existence of such a power**. In the absence of any argument based on the common law to demonstrate the fallacy of such authority, such a discretion could be presumed to exist. Obviously, it had to be exercised judicially (para 45 at 69D—G).

The remedy to which the applicants in *Laskey* were entitled was an interdict directing the first respondent to abate a nuisance caused by noise emanating from its theatre-restaurant premises. The applicants were not primarily entitled to an order directing the respondent to refrain from the conduct of its business, and the respondent would need a reasonable period of time to do what was necessary to abate the nuisance. (Even the noise-control regulations upon which the applicants relied provided for the giving of an instruction notice by the local authority stipulating a time by which the noise nuisance had to be abated.) The social utility of the first respondent's business, which provided not only an important facility of entertainment and culture, but also employment and theatrical career opportunities to many vitally dependent thereon, was such as to outweigh the interest of the applicants in the immediate cessation of the 'nuisancesome' noise which intruded on their comfort for about two hours a day. Having regard to the fact that the end-of-year period was approaching, when it was 'notoriously difficult to get anything in the line of building alterations done in Cape Town' (the judgment was delivered at the end of October 2006), it would be reasonable to afford the first respondent a period of four months to undertake the building alterations necessary to abate the nuisance by soundproofing the premises in question (para 47 at 70B—E and n1 thereto at 70J).

The court accordingly granted an interdict prohibiting the first respondent from conducting its theatre-restaurant business until effective measures had been taken to abate the nuisance in question by acoustically insulating the premises, and suspended the operation of the interdict until 28 February 2007 (para 49 at 70H—I).

Interlocutory interdicts

Irreparable harm

In ***Stock & another v Minister of Housing & others*** **2007 (2) SA 9 (C)** Davis J held that **since the applicants had demonstrated that a clear right of theirs might well have been breached, there was no need for them to show irreparable harm** (at 18G—H; see also C B Prest SC *The Law & Practice of Interdicts* (1996) 64**:** 'If an applicant establishes a clear right, he need not prove any irreparable damage but he must prove a well-grounded apprehension of a prejudicial act on the part of the respondent; if the applicant establishes only a *prima facie* right, he must prove irreparable damage and a well-grounded apprehension of a prejudicial act on the part of the respondent').

Balance of convenience

In ***Stock & another v Minister of Housing & others*** **2007 (2) SA 9 (C)** Davis J held that since the applicants had demonstrated a clear right to the relief sought, the court did not have to satisfy itself on the balance of convenience (at 18D—E; see also at 18G—H, *Olympic Passenger Service (Pty) Ltd v Ramlagan* 1957 (2) SA 382 (D) at 383C—D and *Herbstein and Van Winsen The Civil Practice of the Supreme Court of South Africa (Now the High Courts and the Supreme Court of Appeal)* 4 ed (1997) by the late Louis de Villiers van Winsen, Andries Charl Cilliers & Cheryl Loots 1077).

Discretion of the court

The court in ***Stock & another v Minister of Housing & others*** **2007 (2) SA 9 (C)** exercised its discretion against granting an interim interdict to prevent the further construction of a temporary residential area (TRA) pending the hearing of an application to review the decision to create the TRA and to prevent the construction thereof until all lawful requirements for its construction had been met, because the applicants had been prepared to accept the presence of the TRA for a two-year period but not for a far shorter period which would elapse until the envisaged review application was heard. To decide in favour of the applicants and to the detriment of the implementation of desperately needed housing, said Davis J, would be 'to act contrary to all important principles which underlie the Constitution' (at 19H—J; see also at 19J—20C).

Requirements

The requirements for the grant of an interlocutory interdict were listed in ***Stock & another v Minister of Housing & others*** **2007 (2) SA 9 (C)** as 'a *prima facie* right; a well-grounded apprehension of irreparable harm if an interim interdict is not granted and the ultimate relief is eventually granted; a balance of convenience in favour of the granting of an interim interdict[;] and the absence of any other satisfactory remedy' (at 14C—D; see also *L F Boshoff Investments (Pty) Ltd v Cape Town Municipality*; *Cape Town Municipality v L F Boshoff Investments (Pty) Ltd* 1969 (2) SA 256 (C) at 267B—E, *Steel and Engineering Industries Federation & others v National Union of Metalworkers*

of South Africa (2) 1993 (4) SA 196 (T) at 199E—F, and C B Prest SC *The Law & Practice of Interdicts* (1996) 50—1).

8. JUDGMENTS AND ORDERS

Rescission

Magistrate's court rule 49(3) provides that where an application for rescission of a default judgment is made by a defendant against whom the judgment was granted, and who wishes to defend the proceedings, the application must be supported by an affidavit setting out the reasons for the defendant's absence or default and the grounds of the defendant's defence to the claim. In ***Leo Manufacturing CC v Robor Industrial (Pty) Ltd t/a Robor Stewarts & Lloyds*** **2007 (2) SA 1 (SCA)** Zulman JA (Van Heerden JA and Cachalia AJA concurring) held, with reference to *Cooper & Ferreira v Magistrate for the District of Humansdorp & another* [1997] 1 All SA 420 (E) and *F & J Car Sales v Damane* 2003 (3) SA 262 (W), that **an application for rescission under rule 49(3) has to be supported by an affidavit setting out not only the reasons for the defendant's absence or default but also the grounds of the defendant's defence to the action or proceedings in which the judgment was given** (para 4 at 3G—I). **This is so**, held Zulman JA, **even if the default judgment was void ab origine** by reason of non-service of the initiating summons on the defendant (para 5 at 4A—C). The provisions in rule 49(3) are peremptory when a court considers an application to rescind a default judgment. In particular, the wording of the subrule makes it clear that the grounds of the defendant's defence to the claim must be set out. Where the objection is that the judgment was void ab origine, compliance with rule 49(3) nevertheless involves proof of the existence of a valid and bona fide defence to the claim (para 6 at 4C—E, with reference to *Jones & Buckle The Civil Practice of the Magistrates' Courts in South Africa* II *The Rules* 9 ed (1997) by H J Erasmus & D E van Loggerenberg ('Jones & Buckle II') 49—8 (which now, in revision service 19, incorporates a reference to the judgment in the *Leo Manufacturing* case)).

Zulman JA added that rule 49(8), which refers to the rescission or variation of a judgment on the ground (inter alia) that the judgment is void ab origine, in no way overrides the provisions of rule 49(3). Rule 49(8) simply provides a different time period for the service and filing of an application for the rescission of a judgment (whether a default judgment or not) on specified grounds. An applicant seeking rescission of a default judgment on the ground that the judgment in question is void ab origine must (in terms of rule 49(3)) set out a defence 'with sufficient particularity' to enable the court to decide whether or not there is a valid and bona fide defence (para 7 at 4E—G, with reference to Jones & Buckle II at 49—12; see also at 49—8).

Section 36(1) of the Magistrates' Courts Act 32 of 1944 provides that the court may, on application by any person affected thereby, or suo motu (sc on the court's own initiative) in cases falling under *(c)* –

(a) rescind or vary any judgment granted by it in the absence of the person against whom the judgment was granted;

(b) rescind or vary any judgment granted by it which was void ab origine or which was obtained by fraud or by mistake common to the parties;
(c) correct patent errors in any judgment in respect of which no appeal is pending;
(d) rescind or vary any judgment in respect of which no appeal lies.

Referring to these provisions in ***Adonis v Additional Magistrate, Bellville, & others*** **2007 (2) SA 147 (C)**, Van Zyl J set out the law as follows**:**

- It appears from s 36(1) that **all applications in terms of that provision to rescind a judgment (including an order of court) must be on notice to any person affected thereby**. Such an application must be of a substantive nature, setting out fully the grounds on which the applicant seeks to have the judgment or order rescinded (para 15 at 153C—E).
- Section 36(1)*(a)* requires that the person bringing an application for rescission, or his duly appointed legal representative, must have been physically absent from the court when the judgment or order in question was given against him. That person would then have to persuade the court that, through no fault of his own, he was not afforded an opportunity to oppose the order granted against him. In addition, he would have to show that, having ascertained the existence of the order, he took all reasonable steps to have the position expeditiously rectified (para 16 at 153E—F).
- Section 36(1)*(c)* allows rescission only in the case of errors which are patent, in the sense that they are clear, obvious or unequivocal. If an order does not reflect the true or real intention of the magistrate, it is indicative of a patent error, which falls to be corrected in terms of that subsection (para 17 at 153G—H).
- **Except for the circumstances provided for in s 36(1), it is settled law that once a court has duly pronounced a final judgment or order, it is functus officio and no longer has the authority to correct, amend or supplement it** (para 18 at 153I—J).
- **The provisions of s 36(1) do not constitute a bar to taking a magistrate's judgment or order on review**. A person is not prevented from applying to the High Court for relief where his very complaint is the illegality or fundamental irregularity of the decision he seeks to challenge or impugn (para 20 at 154E—F).
- It is generally accepted, however, that the High Court will not readily interfere in lower-court proceedings which have not yet terminated, unless grave injustice may otherwise result or where justice may not be obtained by other means (para 21 at 154G—H).
- **Intervention on review will be justified in the case of a gross irregularity which has caused, or is likely to cause, prejudice to the applicant notwithstanding the failure to apply for rescission in terms of s 36(1)**. A magistrate's court does not have the power, for example, to order the provisional liquidation of a close corporation on an ex parte basis, and the grant of such an order is an irregularity which will cause the close corporation in question 'substantial wrong'. This entitles the close corporation to take the magistrate's decision on review despite the fact that

remedies in the magistrate's court have not been exhausted (para 22 at 154I—155B, with reference to *Rynders v Bankorp Ltd t/a Trust Bank & others* 1995 (2) SA 494 (W) at 497B—C).

Applying these principles to the facts before him, Van Zyl J held that s 36(1) did not apply where a magistrate, having dismissed with costs an application for the liquidation of a close corporation, purported shortly afterwards to rescind that order in the absence of the attorney for the close corporation, and to grant an order placing the close corporation under provisional liquidation at the request of a candidate attorney acting for the applicant for liquidation. Although the magistrate had purported to rely on s 36(1)*(c)*, on the basis that he had granted the initial order 'in error', there was no question of any such error, let alone a 'patent error' as required by that provision. Section 36(1)*(a)* was likewise not applicable, for the candidate attorney had been present in court at the time when the initial order dismissing the liquidation application had been granted, and had not reacted when the matter was called (para 24 at 155D—E).

The order placing the close corporation under provisional liquidation was, in the circumstances, set aside on review.

Further on the *Adonis* case, see under '**REVIEWS: *Inferior-court decision***' below.

9. APPEALS

From magistrate's court

Section 83 of the Magistrates' Courts Act 32 of 1944 provides that, subject to s 82 of the Act (which is not material to the present discussion), 'a party to any civil suit or proceeding' in a magistrate's court may appeal to a High Court having jurisdiction to hear the appeal against any judgment of the nature described in s 48 of the Act, or any rule or order made in such suit or proceeding and having the effect of a final judgment. This provision fell to be considered in ***Abarder v Astral Operations Ltd t/a County Fair* 2007 (2) SA 184 (C)**, where the appellant, a journalist, had been subpoenaed as a witness to give evidence in a defamation action instituted by the first respondent against the other respondents, but had refused to give evidence on the ground that journalists allegedly enjoy a general immunity from testifying unless they are called as witnesses of 'last resort'. The magistrate had ruled that the appellant was obliged to answer questions put to him, and the appellant appealed against this order.

On appeal, Fourie J (Dlodlo J concurring) raised the issue whether the appellant had the right to appeal the order made by the magistrate. This request was prompted by s 83 of the Magistrates' Courts Act (at 186B—C). What had to be determined was whether the appellant was a party to any civil suit or proceeding before the magistrate, and if so whether the order made by the magistrate was a judgment, order or ruling of the nature which is capable of being appealed against in terms of s 83 (at 186F).

It had been held in *Collier v Redler & another* 1923 AD 640 at 651, said Fourie J, that the word 'suit' was synonymous with the word 'action'. A civil suit or action was a dispute between two litigants which was initiated by an ordinary summons in which the one litigant cited the other before a magistrate's court or some other court (at 186F—G,

with reference to *Myers v Benoni Municipality* 1913 TPD 632 at 635). (This is not to deny, of course, that there may be a multiplicity of plaintiffs, of defendants or of both in a single action.) It was clear in *Abarder*, however, that **the appellant was not, and had never been, a party to a civil suit or action in the court a quo. The pending action was between the first respondent and the other respondents, and the appellant had no interest in the subject matter of that dispute** (at 186G—H).

The question therefore arose whether the appellant was a party to 'any civil proceedings' in the court a quo. The phrase 'any civil proceedings' had been judicially interpreted in relation to s 20 of the Supreme Court Act 59 of 1959. The accepted view was that the phrase bore a wide meaning and referred to any civil proceedings whatsoever (at 186H—J, with reference to *Prokureursorde van die Oranje Vrystaat v Louw en andere* 1989 (1) SA 310 (O), *Middelberg v Prokureursorde, Transvaal* 2001 (2) SA 865 (SCA) and H J Erasmus et al *Superior Court Practice* (1994) A1—46). On a proper construction of s 83 of the Magistrates' Courts Act, the judgment or order against which a party wished to appeal in a civil suit or proceeding had to be a judgment delivered or an order made in a civil suit or proceeding for which provision was made in the Act (at 187C—D).

The magistrate's court, continued Fourie J, was a creature of statute and there were only two ways in which a prospective litigant could institute civil proceedings (in the wide sense of the word) against another party in the magistrate's court, sc by the issuing of a summons or by the bringing of an application on notice of motion. In regard to applications, the use of that procedure in the magistrate's court was limited to those cases specifically laid down in the Magistrates' Courts Act (and, one must add, the magistrate's court rules) (at 187D—E, with reference to *Jones & Buckle The Civil Practice of the Magistrates' Courts in South Africa* II *The Rules* 9 ed (1997) by H J Erasmus & D E van Loggerenberg 55—2f). It followed that **the phrase 'any civil suit or proceeding' in s 83 had to be interpreted to mean a civil action instituted by the issuing of a summons or a notice of motion (in application proceedings)** coupled, in the latter instance, with supporting affidavits. It also followed that **it was only a party to such an action or application who or which had the right to appeal an order made in such proceedings** (at 187E—G; see also at 187H—188C, with reference to *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 344 and *E Castignani (Pty) Ltd v Claude Neon Lights (SA) Ltd* 1969 (4) SA 462 (O) at 464H—465A). The appellant was not a party to any action or application in the court a quo, and the fact that a dispute had arisen as to whether he was legally obliged to answer questions did not convert that dispute, or the manner in which it was resolved by the magistrate, into a civil suit or proceeding which entitled the appellant to appeal against the order of the magistrate (at 187G—H).

Logic and practical considerations, added Fourie J, dictated that s 83 should not cover the proceedings in which the appellant was involved in the court a quo. The issue that the appellant wished to have adjudicated was the alleged infringement of his constitutional right to freedom of expression, which had nothing to do with the issues to be decided in the action between the first respondent and the other respondents. If a witness were to be afforded a right of appeal in such circumstances, it would mean that the trial in which he or she was to testify would have to be suspended pending the preparation of an appeal

record and the hearing of an appeal, which could take a year or more (at 188C—E). There was no reason why the parties should be put to the disadvantage of enabling an appeal to be heard on an issue that was in effect a personal claim by an outsider (the appellant) to the effect that he should be called only as a witness of last resort. It was obvious that **the correct procedure to be followed by a witness in the position of the applicant was to approach the High Court for an order reviewing and setting aside the order made by the magistrate and/or seeking a mandamus or a declarator** on the ground that his constitutional rights had been infringed by the magistrate. If necessary, such an application could be brought as a matter of urgency to ensure that there was a minimum of delay in finalizing the trial of the action in the magistrate's court (at 188E—G).

Fourie J went on to quote with approval, and to apply, a statement in *Herbstein and Van Winsen The Civil Practice of the Supreme Court of South Africa (Now the High Courts and the Supreme Court of Appeal)* 4 ed (1997) by the late Louis de Villiers van Winsen, Andries Charl Cilliers & Cheryl Loots 934, to the effect that where the course of the proceedings is affected by matters not germane to the issue between the parties, as when a witness of his own motion claims privilege, the matter is one for review and not appeal (at 188G—H). The appellant, Fourie J concluded, was therefore not and had never been a party to any civil suit or proceeding in the court a quo as envisaged in s 83 of the Act, which would entitle him to appeal against the order of the magistrate (at 188H—I).

It was accordingly not necessary to deal with the issue whether the magistrate's order had the effect of a final judgment, although it appeared that the magistrate's order did not have the character of a final judgment as it did not have final and definitive effect on an issue in the main action between the first respondent and the remaining respondents (at 188I—J).

Fourie J concluded by emphasizing that **this did not leave the appellant without a remedy:** his obvious and speedy remedy would have been an application for review and/or for a mandamus or a declarator in which he could have asked the High Court to set aside the magistrate's order and for an order directing that he was not obliged to answer questions. It followed that the interpretation given to s 83 of the Magistrates' Courts Act did not violate the appellant's constitutional rights since the appellant had always had the right to approach the High Court for an order protecting him against an infringement of his constitutional rights (at 188J—189C).

The appeal was accordingly struck off the roll (at 189E).

There can, it is respectfully submitted, be no doubt that the decision in *Abarder* is correct, for the reasons furnished by Fourie J.

10. REVIEWS

Inferior-court decision

In ***Adonis v Additional Magistrate, Bellville, & others*** **2007 (2) SA 147 (C)** Van Zyl J held that although an application for judicial review may have to be deferred until the applicant has exhausted domestic remedies available to him (whether by statute or otherwise), there is no general rule that an aggrieved person is precluded by the existence

of domestic or extrajudicial remedies from having recourse to a court of law until he has exhausted such remedies. This question will depend on the clear intention expressed in the governing legislation, or it may be inferred by necessary implication from all the relevant circumstances (para 19 at 154B—D, with reference to *Bindura Town Management Board v Desai & Co* 1953 (1) SA 358 (A) at 362G—H, *Golube v Oosthuizen & another* 1955 (3) SA 1 (T) at 4F—H and *Welkom Village Management Board v Leteno* 1958 (1) SA 490 (A) at 502C—503D).

It was accordingly held that an application for review by the High Court of the decision of a magistrate to rescind an order dismissing an application for the liquidation of a close corporation and to substitute in its place an order placing the close corporation under provisional liquidation in the absence from court of any legal representative of the close corporation was competent, despite the lack of any application for rescission of the latter order under s 36(1) of the Magistrates' Courts Act 32 of 1944. An important principle emanating from the *Welkom Village Management Board* case, said Van Zyl J, was that **a person was not prevented from applying to the High Court on review for relief where his very complaint was the illegality or fundamental irregularity of the decision he sought to challenge or impugn**. The provisions of s 36(1) did not constitute a bar to taking a magistrate's judgment or order on review (para 20 at 154E—F). Intervention on review would be justified in the case of a gross irregularity which had caused, or which was likely to cause, prejudice to the applicant. The granting ex parte of an order of provisional liquidation of a close corporation was such an irregularity, which entitled the applicant to take the magistrate's decision on review despite the fact that he might have failed to exhaust his remedies in the magistrate's court (para 22 at 154I—155B).

When these principles were applied to the facts in the *Adonis* case, continued Van Zyl J, there could be no doubt that the magistrate had misdirected himself in setting aside the order initially made by him dismissing an application for liquidation of the close corporation and purporting to replace it with an order, granted in the absence of the legal representative for the close corporation (who by then had left court), of provisional liquidation. The magistrate's initial order had been 'a considered order with final effect'. The magistrate was hence clearly functus officio and could not revisit such order unless an affected party placed a substantive application for its rescission or amendment before him (para 23 at 155B—D). It was 'quite unacceptable' that the magistrate had been requested to rescind the original order without ensuring that the attorney for the close corporation was present (para 26 at 155G—H). The rescission of the initial order and the granting of a provisional order of liquidation constituted a gross and fundamental irregularity which had caused the close corporation and the applicant (who was a member of the close corporation) a grave and substantial injustice. Even if the magistrate had been empowered to rescind the initial order, he was clearly not authorized to grant a provisional liquidation order against an unrepresented respondent on an ex parte basis (para 27 at 155I—156B).

The applicant had therefore been fully justified in approaching the High Court despite the fact that the liquidation order was only provisional, and that the liquidation proceedings were therefore not yet terminated. The 'extremely serious and aggravating nature' of the irregularity committed by the magistrate 'stridently called

for intervention' by the High Court to right the obvious wrong done to the close corporation. The High Court was, in fact, enjoined in the circumstances to make full use of its inherent power to review and set aside the irregular proceedings (para 28 at 156B—C).

Further on the *Adonis* case, see under '**JUDGMENTS AND ORDERS: *Rescission***' above.

11. COSTS

Attorney-and-client costs

The unsuccessful respondent in ***Erf 441 Robertsville Property CC & another v New Market Developments (Pty) Ltd*** **2007 (2) SA 179 (W)** was ordered to pay the applicants' costs on the attorney-and-client scale in the light of the fact that the respondent sought to use its own alleged contravention of a provincial ordinance (which, if the contravention had occurred, would have constituted an offence) for financial gain (para 9 at 183F).

Successful party deprived of costs

Notwithstanding the dismissal of the application in ***Stock & another v Minister of Housing & others*** **2007 (2) SA 9 (C)**, the respondents were ordered to pay the applicant's costs on account of the 'unacceptable' failure by the respondents to comply with the provisions of the Land Use Planning Ordinance 15 of 1985 (C), which precipitated the application. The court, said Davis J, needed to state in clear terms that this kind of conduct should not occur, and the respondents for that reason had to be penalized in costs (at 20F—G).

12. CONSTITUTIONAL PRACTICE

Application for leave to appeal to Constitutional Court

The decision in ***Minister of Safety and Security v Luiters*** **2007 (2) SA 106 (CC)** was previously reported in 2007 (3) BCLR 287, and was surveyed in **Civil Procedure Sibergramme 7 of 2007** (31 October 2007) 9—10.

Delay in finalization of proceedings

The decision in ***Minister of Safety and Security v Luiters*** **2007 (2) SA 106 (CC)** was previously reported in 2007 (3) BCLR 287, and was surveyed in **Civil Procedure Sibergramme 7 of 2007** (31 October 2007) 12—13.

Jurisdiction of Constitutional Court

The decision in ***Minister of Safety and Security v Luiters*** **2007 (2) SA 106 (CC)** was previously reported in 2007 (3) BCLR 287, and was surveyed in **Civil Procedure Sibergramme 7 of 2007** (31 October 2007) 16—17.

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