THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

CASE NO: 460/06

Reportable

In the matter between:

MARIUS VAN NIEKERK	First Appellant
SWEEPRO BRUSH (PTY) LTD	Second Appellant

and

GERHARD ALBERTUS VAN NIEKERK	First Respondent
SWEEPA INSTRUMENTS (PTY) LTD	Second Respondent

Coram**:** Harms ADP, Scott, Mthiyane, Van Heerden, JJA et Kgomo AJA

Heard: 14 September 2007

Delivered: 21 September 2007

Summary: ***Anton Piller order – preservation of evidence – application for setting aside of order granted ex parte – dismissal of application – whether appealable*****.**

Neutral citation: This judgment may be referred to as *Van Niekerk & Others v Van Niekerk & Another* [2007] SCA 116 (RSA)

REASONS FOR ORDER

VAN HEERDEN JA:

Introduction

[1] This appeal was directed against an order of the Port Elizabeth High Court (Liebenberg J), dismissing an application by the appellants for the setting aside of an order for the preservation of evidence (commonly referred to as an *Anton Piller* order) earlier granted by Jansen J. An application for leave to appeal against the whole of this order was dismissed by Liebenberg J on the basis that the order was not appealable. With leave subsequently granted by this court, the appellants appealed to us.

[2] On 14 September 2007, after hearing argument, we struck this appeal from the roll with costs, including the costs occasioned by the employment of two counsel. We indicated that reasons for our order would follow in due course. These are the reasons.

The test for appealability

[3] In *Zweni v Minister of Law and Order* (1993 (1) SA 523 (A) at 531H–533E), Harms AJA embarked on 'a brief exposition and a critical review of some of the general propositions commonly (and sometimes loosely) advanced in the decided cases' before summarising the following 'three attributes' of an appealable judgment or order (at 532J–-533A):

'[F]irst, the decision must be final in effect and not susceptible of alteration by the Court of first instance; second, it must be definitive of the rights of the parties; and, third, it must have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings.'

[4] *Zweni's* case has been referred to and followed in numerous subsequent decisions of this Court (see eg *Maize Board v Tiger Oats Ltd & Others* 2002 (5) SA 365 (SCA) para 6 at 370C–371C and authorities there cited).

[5] The test as formulated in *Zweni*, although easy to state, is not always easy to apply. Thus, in *Cronshaw & Another v Coin Security Group (Pty) Ltd* (1996 (3) SA 686 (A) at 690D-E), Schutz JA remarked that 'the question [as to when a decision is 'interlocutory', and thus not appealable, or 'final', and thus appealable] is –

'. . . a question that has vexed the minds of eminent lawyers for many centuries and the answer has not always been the same. The question is intrinsically difficult, and a decision one way or the other may produce some unsatisfactory results.'

In similar vein, in *Minister of Safety and Security & Another v Hamilton* (2001 (3) SA 50 para 4 at 52B), Cameron JA stated that the question of which judgments, orders and rulings are appealable to this court 'has presented persisting complexity'.

[6] In considering the question of appealability, the underlying consideration is that it is undesirable to have a piecemeal appellate disposal of the issues in litigation and that it is advisable to limit appeals to certain 'orders'. (See, eg, *Pretoria Garrison Institutes v Danish Variety Products (Pty) Ltd* 1948 (1) SA 839 (A) at 866–871; *Guardian National Insurance Co Ltd v Searle NO* 1999 (3) SA 296 (SCA) at 301B–D.)

[7] 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 (see *Take and Save Trading CC & Others v Standard Bank of SA Ltd* 2004 (4) SA 1 (SCA) para 4 at 5D). Thus, in the *Guardian National* case (at 301B-C), Howie JA held that –

> 'As previous decisions of this Court indicate, there are still sound grounds for a basic approach which avoids the piecemeal appellate disposal of the issues in litigation. It is unnecessarily expensive and generally it is desirable, for obvious reasons, that such issues be resolved by the same Court and at one and the same time.'

[8] Howie JA proceeded to point out that, where this approach has been relaxed, it has been because the judicial decisions in question – 'whether referred to as judgments, orders, rulings or declarations' – had the three attributes referred to in *Zweni's* case (above, *loc cit*).

Applying the test to an Anton Piller *order*

[9] Whether the grant of an *Anton Piller* order is appealable or not has not thus far pertinently been decided by this court. Appeals concerning *Anton Piller* orders which have thus far reached this court have all concerned *refusal* by the court *a quo* of relief (see, eg, *Universal City Studios Inc v Network Video* 1986 (2) SA 734 (A); *Jafta v Minister of Law and Order* 1991 (2) SA 286 (A)*; Shoba v Officer Commanding, Temporary Police Camp, Wagendrift Dam, & Another; Maphanga v Officer Commanding, South African Police Murder and Robbery Unit, Pieter-maritzburg, & Others* 1995 (4) SA 1 (A); *Memory Institute SA CC v Hansen* 2004 (2) SA 630 (SCA)) and the question of appealability has not arisen, presumably because it is settled law that the refusal, but *not* the granting, of interim interdicts is appealable (see, eg, *African Wanderers Football Club (Pty) Ltd v Wanderers Football Club* 1977 (2) SA 38 (A) at 47C–48H), *Cronshaw's* case at 690B–691G; *Knox D'Arcy Ltd & Others v Jamieson & Others* 1996 (4) SA 348 (A) at 356H–360D).

[10] As repeatedly emphasised by this court, an *Anton Piller* order is directed at the preservation of vital evidence that might otherwise be lost. It will be granted, *inter alia* where 'there is a real and well-founded apprehension that this evidence may be hidden or destroyed or in some

manner be spirited away by the time the case comes to trial or to the stage of discovery' (*Shoba's* case at 15G–16D; and cf also the *Memory Institute* case para 3 at 633E–F).

[11] The order granted in this case – as most other orders of this kind – consists, on the one hand, of procedural directions and safeguards and, on the other, of orders aimed at obtaining evidence to be preserved. Its provisions have nothing to do with the substantive rights of the parties in the causes of action which are foreshadowed in the papers. As pointed out by Conradie J in *Hall & Another v Heyns & Others* 1991 (1) SA 381 (C) at 385D –

> 'The relief which it [an *Anton Piller* order] affords serves no end in itself. Its only utility is that it assists the successful applicant by ensuring the greater effectiveness of some other proceedings in which substantive relief is claimed. It does not dispose of any issue in those proceedings.'

[12] In the circumstances, counsel for the respondents argued that the relief granted in this case falls short of all three of the requirements for appealability set out in *Zweni's* case. Counsel relied, *inter alia*, on the judgment of Froneman J in *The Reclamation Group (Pty) Ltd v Smit & Others* (unreported judgment in SECLD Case No 678/02), where the learned judge refused leave to appeal against the *Anton Piller* order

previously granted by him (see *The Reclamation Group (Pty) Ltd v Smit & Others* 2004 (1) SA 215 (SEC)) on the basis that the order was not appealable. In his judgment refusing leave to appeal, Liebenberg J was 'unable to hold that Froneman J was clearly wrong in his approach'.

[13] Counsel for the appellants contended that both these decisions are wrong and should be overruled. Relying on the judgments of this court in *Phillips & Others v National Director of Public Prosecutions* 2003 (6) SA 447 (SCA) and *Metlika Trading Ltd & Others v Commissioner, South African Revenue Service* 2005 (3) SA 1 (SCA), counsel sought to persuade us that the grant of *Anton Piller* relief is *not* akin to the grant of an interim interdict, and that the *African Wanderers* and *Cronshaw* cases are thus distinguishable. As in the *Cronshaw* case, counsel stressed the prejudice suffered by the respondents by the grant of the *Anton Piller* order and argued that this order had 'final jurisdictional effect' in the sense referred to by this court in *Phillips* para 19 at 452I–453A).

[14] I do not agree. In my view, the grant of an *Anton Piller* order is indeed akin to the grant of an interim interdict and I am unpersuaded that the principles laid down in (*inter alia*) *Cronshaw's* case are not directly applicable to the present situation. As was pointed out by Grosskopf JA in *Knox d'Arcy* (above, at 359F–360B), albeit *obiter*:

'As far back as *Prentice v Smith* (1889) 3 SAR 28 the Court held (at 29) that an order granting an interim interdict "is an interlocutory order, and that consequently there can be no appeal". On the whole this view was followed in the Provincial Divisions (see *Loggenberg v Beare* 1930 TPD 714; *Davis v Preiss & Co* (*supra*) [1944 CPD 108]; and the authorities referred to in those cases) and, ultimately, prevailed in the Appellate Division (*African Wanderers Football Club (Pty) Ltd v Wanderers football Club* 1977 (2) SA 38 (A) at 46H-47A and *Cronshaw's* case *supra*). Some Judges have questioned the validity of the distinction between the refusal and the grant of an interim interdict. This distinction cannot be justified by the nature of the proceedings giving rise to the decision – it is the same in both cases (see, for example, *Davis v Preiss & Co* (*supra* at 118 *per* Fagan J)). And it may be argued that the prejudice suffered by the unsuccessful party also does not differ in principle. See *Davis'* case *supra* at 112–113 (De Villiers J). However, in *Loggenberg's* case *supra*, Greenberg J expressed the view (at 723) that "there is in fact a real distinction on the question of irreparability between the case of a granting of a temporary interdict and the refusal of a temporary interdict". There may also be a difference in the finality of the decision. Thus, as stated above, the refusal of an interim interdict is final. It cannot be reversed on the same facts (I disregard the possibility . . . of a refusal on some technical ground). The same may not be true of the grant of an interim interdict. It may be open to the unsuccessful respondent to approach the Court for an amelioration or setting aside of the interdict, even if the only new circumstance is the practical experience of its operation. And, apart from the theoretical differences between the grant and the refusal of an interdict, there is also the practical one, discussed in *Cronshaw's* case . . . [at 691C–G], that an appeal against the grant of a temporary interdict would often be inconsistent with the very purpose of this remedy.'

[15] It should also be pointed out that the judgment in the *Phillips* case largely concerned the interpretation of provisions of a certain statute (the Prevention of Organised Crime Act 121 of 1998) and is thus inapplicable on that basis. As regards *Metlika Trading*,, the interim order granted in that

case, ordering a party to take all necessary steps to procure the return of an aircraft to South Africa, pending finalisation of an action launched against (*inter alia*) that party by the applicant for the interim order, Streicher JA held that, on the facts before the court, the interim order was final in its effect in the sense required to render it appealable. As was pointed out by Streicher JA (para 22 at 12D-E), 'whether or not the aircraft [in which the applicant for the interim order allegedly had an interest] should be returned to South Africa and whether or not the other orders relating to the aircraft should be granted is not an issue in the action pending which the interdict was granted.' The order with which we are here concerned is a largely procedural one aimed at the preservation of evidence so as to ensure the greater effectiveness of other proceedings in which substantive relief is or will be claimed, and for the substantiation of which such evidence will be vital (see the *Shoba* case at 15H–16B). To my mind, the *Metlika* case is not comparable and does not constitute an obstacle to the conclusion that the preservation order under discussion is not appealable.

[16] In the result, we concluded that the order granted by Liebenberg J refusing to set aside the original *Anton Piller* order is not appealable. For this reason, we struck the appeal from the roll with costs, including the costs of two counsel.

B J VAN HEERDEN
JUDGE OF APPEAL

CONCUR:

HARMS JA
SCOTT JA
MTHIYANE JA
KGOMO AJA