IN THE SOUTH GAUTENG HIGH COURT
(JOHANNESBURG)

CASE NO 03/21585

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED.

21 August 2009 DATE — **FHD van Oosten** SIGNATURE

In the matter between

INVICTUS HOLDINGS (PTY) LTD (formerly MERIDIAN INVESTMENT HOLDINGS (PTY) LTD)	**FIRST APPLICANT**
MARINA WELIHOCKYJ	**SECOND APPLICANT**
ANDRY WELIHOCKYJ	**THIRD APPLICANT**

and

ADvTECH LIMITED	**FIRST RESPONDENT**
ADvTECH RESOURCE HOLDINGS (PTY) LTD	**SECOND RESPONDENT**
ADvTECH RESOURCING	**THIRD RESPONDENT**

J U D G M E N T
(APPLICATION FOR LEAVE TO APPEAL)

VAN OOSTEN J:

[1] This is an application for leave to appeal against the whole of the judgment and the orders made by Snyders J (as she then was) who, having since been elevated to the Supreme Court of Appeal Bench, is no longer available to hear this application. For the sake of convenience and consistence I will refer to the parties by the designations used in the judgment of Snyders J, *viz* to the applicants as 'the Welihockyjs' and the respondents as 'AdvTech'.

[2] Two interlocutory applications in a pending action[1] between the parties were heard by Snyders J, firstly, an application by AdvTech in terms of Rule 35(7) to compel compliance with a Rule 35(3) and 36(6) notice, where only the costs of the application remained in dispute, and secondly, a counter application by the Welihockyjs to compel 'further and better' discovery in terms of Rule 35(7). The learned Judge on the first application ordered the Welihockyjs to pay the costs thereof and further dismissed the counter application with costs.

[3] It is firstly necessary to consider the appealability of the orders made by Snyders J which was challenged by counsel for AdvTech. In support of the contention that the orders are not appealable counsel for Advtech relied on the recent judgment of the Supreme Court of Appeal in *Van Niekerk and Another v Van Niekerk and Another* 2008 (1) SA 76 (SCA) which he submitted on a parity of reasoning applies with equal force to the present matter. In *Van Niekerk* the order refusing to set aside an *Anton Piller* order was held not appealable on the basis that the granting of an *Anton Piller* order was akin to the grant of an interim interdict[2] and moreover "largely procedural 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".[3] More directly in point in my view, is an earlier judgment of the Supreme Court of Appeal in *Hassim v Commissioner, South African Revenue Service* 2003 (2) SA 246 (SCA) [2003] All SA 10 (SCA) in which it was held that the decision by the court *a quo* (the

[1] The claims and counter claims in the action arise from an agreement between the parties for the sale of a business.
[2] See *Cronshaw and Another v Fidelity Guards Holdings (Pty) Ltd* 1996 (3) SA 686 (A).
[3] See para [15] of the judgment.

Income Tax Special Court) to dismiss the respondent's application to compel discovery was not appealable. Concerning the appealability of the decision Streicher JA held as follows:

> [15] The main dispute between the parties concerns the validity of the assessments made by the respondent. The decision by the court *a quo* regarding discovery is incidental to the main dispute between the parties. It regulates the procedure to be followed in order to determine that dispute. It is not a decision that disposes of any issue or any portion of the issue in the main proceedings between the parties or, put differently, it does not preclude any of the relief, which may be given at the hearing of the main dispute. It is, therefore, a purely interlocutory decision which may be corrected, altered or set aside by the court *a quo* at any time before final judgment (see *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (A) at 549F – 551A; *Globe and Phoenix Gold Mining Co Ltd v Rhodesian Corporation Ltd* 1932 AD 146 at 163). It follows that the decision by the court *a quo* in regard to discovery is not appealable.

Counsel for AdvTech further submitted that the relief granted in the present matter was neither definitive of the rights of the parties nor did it have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings, and therefore falls short of the second and third "attributes" for appealability set out in the leading case of *Zweni v Minister of Law and Order* 1993 (1) SA 523 (A) 531I.[4] LTC Harms in *Civil Procedure in the Supreme Court* having discussed the jurisdictional requirement for appealability under s 20 of the Supreme Court Act 59 of 1959 (that the decision appealed against must be a 'judgment or order' as opposed to a 'ruling'), lists as one of the examples of 'rulings', 'A discovery order and one refusing discovery'. In support hereof the learned author cites *Zweni,* and *Hassim* which I have already referred to. As will become apparent later in this judgment the conclusion I have come to underscores the correctness of the listing.

[4] In deciding the appealability of the order all the factors impacting on the issue must be considered.[5] The disputes between the parties in the action in

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[4] The three 'attributes' for a decision to qualify as a 'judgment or order', mentioned by Harms AJA (as he then was) are: "…first, 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...".

[5] *Beinach v Wixley* 1997 (3) SA 721 (SCA) 730D.

essence concern a business relationship where financial documents[6], as the history of the matter[7] has shown, will play a pivotal role. The objective, importance and necessity of discovery and production of documents in preparation for trial are well-known. It has *inter alia* been described as "one of the mightiest tools for the exposure of the truth".[8] By means of proper discovery[9] the issues between the parties become properly circumscribed and are narrowed, if not totally eliminated with the resultant advantage of a more expeditious and cost effective final determination at the trial of the main dispute between the parties.[10] In their counter application the Welihockyjs sought the following relief:

1. Directing the applicants to make discovery on oath within five days from date of this order of all documents and tape recordings relating to any matter in question in the action between the parties under the above case number.
2. Directing the applicants to comply with the requirements of rule 35 in making discovery, inter alia by properly specifying the documents referred to in the schedules attached to their discovery affidavit in such a manner that the documents can be identified by the plaintiffs.
3. Directing that applicants to rectify their discovery affidavit dated 27 July 2007 to the extent that the requirements in paragraph 2 above have not been complied with, within 10 days from the date hereof.
4. Directing the applicants to pay the costs of this counter-application jointly and severally, the one paying the other to be absolved.

It must be remembered that discovery by AdvTech had already been made when the counter application was launched. The counter application therefore was a further step incidental to discovery already having been made, which was aimed merely at obtaining further and better discovery. It was therefore a preparatory step[11] in preparation of trial. The order granted by Snyders J does not have the effect of disposing of any portion of the relief sought in the action. Nor does the order in any way "anticipate or preclude or prejudice, in

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[6] The bulk of the documents thus far discovered by both sides are financial documents.
[7] The litigation between the parties commenced when AdvTech obtained an *Anton Piller* order against *inter alia* the Welihockyjs, which was subsequently set aside and substituted with an order aimed at preserving documents attached during the execution of the *Anton Piller* order.
[8] *Per* Thring J in *The MV URGUP Owners of the MV URGUP v Western Bulk Carriers (Australia) (Pty) Ltd and Others* 1999 (3) SA 500 (C) 513G.
[9] See for example *Copalcor Manufacturing (Pty) Ltd and Another v GDC Hauliers (Pty) Ltd (formerly GDC Hauliers CC)* 2000 (3) SA 181 (W).
[10] *Per* Harms AJA in *Zweni* supra at 531J-532A.
[11] See *Pretoria Garrison Institutes v Danish Variety Products* 1948 (1) SA 839 (A) 870; and *South Cape Corporation* (cited by Streicher JA in the passage quoted in para [3] above), at p 549 G.

whole or in part", the relief claimed in the action.[12] It accordingly was a pure and simple interlocutory order largely procedural in nature concerning discovery of documents.

[5] Lastly, the order dismissing the counter application cannot be regarded as definitive of the rights of the parties. The main objection raised in the counter application was directed at an alleged inadequate description and identification of documents numbered 450 to 12102, listed in Schedule "A" to the AdvTech's discovery affidavit. It hardly demands any form of computer literacy to recognise that those documents are computer-generated and therefore electronic data stored on a computer. Counsel for AdvTech submitted (correctly in my view) that the computer hard drive or other storage device on which these documents are stored, remains available and that the Welihockyjs can still avail themselves of the further remedies available under Rule 35 to obtain production thereof.[13] Further militating against finality are the provisions in Rule 35 providing a number of remedies to obtain discovery to which should be added Rule 37(6) which specifically directs the parties at the pre-trial conference, to deal with and reach agreement concerning copying, preparation, and proof of documents to be used at the trial. Finally, Rule 35(4) provides this safeguard in respect of documents not discovered: they may not, save with the leave of the court, be used for any purpose at the trial by the party who was obliged but failed to disclose them.

[6] For these reasons I conclude that the order of Snyders J is not a judgment or order as contemplated in s 20 of the Supreme Court Act and that it accordingly is not appealable.

[7] It remains to deal with the two costs orders made by Snyders J. It is well established that leave to appeal in respect of an order for costs only is not lightly granted unless a matter of principle is involved and the amount of costs

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[12] *Per* Curlewis JA in *Globe and Phoenix Gold Mining Co Ltd* (cited by Streicher JA in the passage quoted in para [3] above), at p163.

[13] Which immediately distinguishes this case from those cases where the discovering party referred to a large volume of documents without providing sufficient identificatory details of each document forming part thereof (see *Copalcor* supra, para [27]).

is not insubstantial.[14] The costs thus far incurred are substantial: the claims in convention in the action range between R6,5million and R20,3million, while those in reconvention amount to R138million. The papers in the applications extend into more than 900 pages. Senior counsel appeared on behalf of the parties. On the other hand I have held that the order dismissing the counter application is not appealable. The issues between the parties concerning discovery are therefore moot and should not be allowed to re-enter through the back door. Any order that may be made on appeal will have no practical effect on either the parties or on others.[15] Snyders J in making the costs orders exercised her discretion against the Welihockyjs. I am not satisfied that either special circumstances or any valid ground exists for another court to interfere with the discretion so exercised.

[8] In the result the application for leave to appeal is dismissed with costs.

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FHD VAN OOSTEN
JUDGE OF THE HIGH COURT

COUNSEL FOR THE APPLICANTS	***ADV LJ VAN DER MERWE SC***
APPLICANTS ATTORNEYS	***DINO RAKITZIS ATTORNEYS***
COUNSEL FOR THE RESPONDENTS	***ADV CE WATT-PRINGLE SC***
RESPONDENTS ATTORNEYS	***BOWMAN GILFILLAN INC***
DATE OF HEARING	***12 AUGUST 2009***
DATE OF JUDGMENT	***21 AUGUST 2009***

[14] *Harms* op cit C1.33 and s 21A of the Supreme Court Act.
[15] Erasmus *Superior Court Practice* A1-50.