# CIVIL PROCEDURE

## *SIBERGRAMME 2/2008*

*ISSN 1814-0564*

8 April 2008

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## Cases



## Legislation

None

## Literature

None

# 1. INTRODUCTION

In this Sibergramme cases on civil procedure published in the **December 2007** issues of ***The All South African Law Reports*** and ***Butterworths Constitutional Law Reports*** are considered.

Other materials on civil procedure published during December 2007 were dealt with in **Civil Procedure Sibergramme 1 of 2008**.

# 2. JURISDICTION

***Company***

In ***Manong & Associates (Pty) Ltd v City of Cape Town & others*** **[2007] 4 All SA 1452 (C)** Moosa J held that the High Court, sitting as an equality court, had jurisdiction to entertain a claim against a company which had its registered office and principal place of business within the territorial jurisdiction of the High Court (para 17 at 1458*a*—*b*).

***Equality court***

An equality court does not have jurisdiction to review per se matters covered by the Promotion of Administrative Justice Act 3 of 2000 (PAJA). It can enquire into such a matter only if the cause of action is founded on unfair discrimination. In that event, the court or tribunal which has jurisdiction to review matters of administrative action will have concurrent jurisdiction with the equality court. For example, where a public tender has not been allocated to a particular service provider by virtue of unfair discrimination, that service provider can approach either court or both courts for relief**:** ***Manong & Associates (Pty) Ltd v City of Cape Town & others*** **[2007] 4 All SA 1452 (C)** para 4 at 1454*g*—*h*. Specialized courts and tribunals are created by PAJA with the power to review judicially an administrative action. In the absence of such specialized courts or tribunals, the High Court and the Constitutional Court have jurisdiction. Proceedings for judicial review of administrative action may be brought under and in terms of PAJA. There is no provision in the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 ('the Equality Act') for the bringing of such judicial review (para 5 at 1455*b*—*c*). The ancillary powers conferred on equality courts by the Equality Act are circumscribed by the powers and functions of the equality court, and are not to be extended beyond what is necessary or reasonably incidental to the performance of its functions and the exercise of its powers. The ancillary powers must be construed purposively, having regard to the object and context of the Equality Act (para 8 at 1455*h*—*i*). Accordingly, it must be held that **the equality court has jurisdiction to enquire into and review matters pertaining to complaints of unfair discrimination under the Equality Act but not under PAJA, unless the issue is whether administrative action constitutes unfair discrimination**, in which event the relief provided for in the Equality Act may be granted by an equality court (para 9 at 1456*a*—*b*; see also para 20 at 1458*g*—*h*).

## 3. REPRESENTATION OF PARTIES

***Withdrawal of attorney***

A notice purporting to notify the intended recipients of the withdrawal of one attorney and his replacement by another attorney does not comply with the requirements of uniform rule 16**:** ***Makuwa v Poslson*** **[2007] 4 All SA 1260 (T), 2007 (3) SA 84**. When an attorney withdraws from a matter, he is obliged timeously to deliver a notice of withdrawal. This is a duty he owes to his client as well as to the court (para 11 at 1262*j*—1263*b* (All SA), 87I—88A (SA), with reference to *MacDonald t/a Happy Days Café v Neethling* 1990 (4) SA 30 (N)). Furthermore, the court is entitled to know how notice was given in order to determine whether to dispense with a further notice to the other party. The notice must indicate *(a)* that the attorney is withdrawing, *(b)* who was notified of the withdrawal, and *(c)* when and how the notice was sent. **To combine a notice (of withdrawal) in terms of rule 16(4) with a notice (of appointment) in terms of rule 16(1) is undesirable**, and invariably results in unnecessary confusion. In this regard, the court ought not to countenance the proverbial 'short cuts'. For withdrawing attorneys simply to neglect to furnish proper notice of withdrawal is 'unforgivable' and 'slovenly', and 'demonstrates nothing but disdain for the Rules and practice' of the court (para 11 at 1263*b*—*d* (All SA), 88A—D (SA)).

## 4. APPLICATIONS

***Dispute of fact***

The test for the determination of disputes of fact laid down in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 620 (A) at 634E—G was applied in ***Traut v Fiorine & another*** **[2007] 4 All SA 1317 (C)** para 34 at 1326*e*—*h*. Yekiso J added that in motion proceedings **evidence in a founding affidavit which is not disputed by the respondent will be treated as factually correct** (para 35 at 1326*h*—*i*, with reference to a passage now appearing in I Ellis & M Dendy 'Civil Procedure**:** High Court' in W A Joubert (ed) *The Law of South Africa* Volume 3 Part 1 2 ed (2007) para 136 at 80). Accordingly, if, notwithstanding the disputed facts, the facts stated by the respondents in their answering or opposing affidavits, together with the admitted facts averred in the applicant's affidavit, justified the granting of the order, then the applicant would be entitled to the order sought in terms of the notice of motion, provided (in the case of an order which prima facie violated a constitutionally entrenched right) that the threshold requirements of the limitation clause (s 36(1) of the Constitution of the Republic of South Africa, 1996) were met (para 36 at 1327*a*—*b*).

See also ***Hirt & Carter (Pty) Ltd v Mansfield & another*** **[2007] 4 All SA 1423 (D)** para 5 at 1425*f*—*g* and para 76 at 1436*d*, where the *Plascon-Evans Paints* test was again applied.

***Urgent applications***

Breaches of restraint-of-trade clauses are invariably of an urgent nature**:** ***Advtech Resourcing (Pty) Ltd t/a The Communicate Personnel Group v Kuhn & another*** **[2007] 4 All SA 1368 (C)** para 4 at 1371*b*.

## 5. TRIAL ACTIONS

***Amendment of pleadings***

In ***Duduzile v Road Accident Fund*** **[2007] All SA 1241 (W)** Jajbhay J allowed the plaintiff to amend her claim, instituted against the Road Accident Fund prior to the running of prescription, so as to add past and future loss of earnings to the heads of damage (past and future medical expenses, and general (non-patrimonial) damage) in respect of which compensation was initially sought. The amendment was permitted notwithstanding the fact that the claiming of compensation for past and future loss of earnings would have been blocked by prescription had the summons not been served at all by the time when the amendment was made. This was because the claim for past and future loss of earnings did not constitute a new cause of action inasmuch as it was part and parcel of the original cause of action, and merely represented a fresh quantification of the original claim and the addition of a further item of damages (para 18 at 1247*d*—*e*, with reference to *Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 (A) at 836D—E). In the course of his judgment, Jajbhay J remarked that the distinction between a 'right of action' or 'claim' and a 'cause of action' has been repeatedly emphasized by our courts. A right of action must be noted to bear a wide and general meaning, and not the technical meaning given to the concept of a cause of action (sc the set of material facts relied upon to establish the right of action). The service of summons in *Duduzile* interrupted the running of prescription, and the amendment was permissible because **the right of action sought to be enforced in the summons subsequent to its amendment was recognizable as the same or substantially the same right of action as that disclosed in the original summons** (para 14 at 1245*b*—*e*, with reference to *Churchill v Standard General Insurance Co Ltd* 1977 (1) SA 506 (A) at 517A—C, *Sentrachem Ltd v Prinsloo* 1997 (2) SA 1 (A) at 15H—16B, *CGU Insurance Ltd v Rumdel Construction (Pty) Ltd* 2004 (2) SA 622 (SCA), [2003] 2 All SA 597 para 6 at 627G—628A (SA), 601*c*—*d* (All SA), and *Firstrand Bank Ltd v Nedbank (Swaziland) Ltd* 2004 (6) SA 317 (SCA) at 321A—C (discussed in *Civil Procedure Sibergramme Yearbook 2005* (2006) 54—5)).

For a more detailed survey of the judgment in *Duduzile*, which falls outside the scope of the present publication, see Mervyn Dendy **The Law of Delict Sibergramme 2 of 2008** (31 March 2008) 9—12.

***Collation, pagination and indexing***

Uniform rule 62(4) provides that an applicant or plaintiff must, not later than five days prior to the hearing of a matter, collate, number consecutively and suitably secure all pages of the documents delivered, and prepare and deliver a complete index of them.

Paragraph CA 4.1 of the *Practice Manual* (2002) of the Transvaal Provincial Division and the Witwatersrand Local Division states that the plaintiff/applicant must arrange all pages, number them consecutively and bind them in an acceptable manner. A complete index must be prepared and delivered. Annexures should be briefly described. Uniform rule 62(4) is relaxed by reason of urgency or other exceptional circumstances, which should be fully explained in an affidavit, or in an application which is known to be unopposed provided that the papers consist of less than 20 pages and have less than 10 annexures.

In ***Makuwa v Poslson*** **[2007] 4 All SA 1260 (T), 2007 (3) SA 84** an exception was struck off the roll after the excipient, who was the dominus litis in relation to that part of the proceedings, had complied with neither rule 62(4) nor paragraph CA 4.1 of the *Practice Manual*. E M Patel J remarked that it was the duty of the excipient to collate, paginate and index the papers. This was not merely for the convenience of the parties, but more particularly for the court. Rule 62(4) had been in existence for many years, and the *Practice Manual* fortified the rules of court to enhance the efficacy of the courts and the overall administration of justice. **Judges had frequently warned that the courts would not tolerate non-compliance with rule 62(4)** (para 10 at 1262*g—i* (All SA), 87G—I (SA), with reference to *Star Marine Yacht Services v Nortier* 1993 (1) SA 120 (SE) at 121D—E). Since it would 'certainly' be unfair for the excipient (defendant) to bear the costs occasioned by his attorneys' negligence and unreasonable conduct in failing to comply with the provisions relating to collation, pagination and indexing, an appropriate order was to disallow the attorneys from recouping any costs from the excipient (para 15 at 1263*i—j* (All SA), 88H—J (SA)). The excipient's attorneys were accordingly ordered to bear the wasted costs of the hearing de bonis propriis (para 16 at 1264*b—c* (All SA), 89B—C (SA)).

***Exception***

The attorneys of record for the excipient in ***Makuwa v Poslson*** **[2007] 4 All SA 1260 (T), 2007 (3) SA 84** were ordered to pay de bonis propriis the wasted costs of an exception which was struck off the roll on account of the absence of the combined summons and particulars of claim to which exception was taken from the court file, and on account of the failure by the excipient's attorneys to ensure that the papers in the court file were timeously collated, paginated and indexed. The court file compromised nothing other than a notice of exception, a notice of set down and a practice note together with the excipient's short heads of argument. Also missing from the court file was any indication whether the plaintiff (respondent in the exception) had evinced an intention to remove the cause of complaint which had led to the institution of the exception proceedings. The combined summons, remarked E M Patel J, was 'a vital document for the purposes of determining the exception' (para 9 at 1262*f—g* (All SA), 87E—G (SA)). Nor was the court file collated, paginated or indexed (as to which, see under '***Collation, pagination and indexing***' immediately above). It was not possible to hear the exception since there was a failure to comply with the rules and practice of the court (para 8 at 1262*e—f* (All SA), 87D—E (SA)).

***Notice of intention to defend***

For a notice of intention to defend to omit to give the defendant's full residential or business address is 'not necessarily fatal' since an objection that this requirement has not been complied with is 'of a highly technical nature'**: *Makuwa v Poslson* [2007] 4 All SA 1260 (T), 2007 (3) SA 84** para 2 at 1261*f—g* (All SA), 86E—F (SA), with reference to *Trans-African Insurance Co Ltd v Maluleka* 1956 (2) SA 273 (A) at 278F—G. An affidavit opposing an application in terms of uniform rule 30 which arose from this omission 'certainly cured the omission' by furnishing the defendant's business and residential address, and consequently the plaintiff did not suffer any prejudice (para 3 at 1261*g—h* (All SA), 86F—G (SA)).

***Rules of court***

In ***Makuwa v Poslson*** **[2007] 4 All SA 1260 (T), 2007 (3) SA 84** E M Patel J had occasion to issue a warning to practitioners to comply punctiliously with the rules of court, and not to take procedural 'short cuts' or give in to slovenly practices. Rules, said the judge, are crafted for the court whose function it is to secure the conduct of proceedings in an orderly manner to serve the just needs of the parties and the efficient administration of justice. **Rules and practice of the court must be observed in order to facilitate due and proper compliance**, since non-compliance 'merely encourages casual, easy-going and slipshod practice which often leads to compromising the highest standards of practice which the courts require of practitioners' (para 1 at 1261*c—e* (All SA), 86B—D (SA), with reference to *Highfield Milling Co (Pty) Ltd v A E Wormald & Sons* 1966 (2) SA 463 (E) at 465G—H and *Molebatsi v Federated Timbers (Pty) Ltd* 1996 (3) SA 92 (B) para 32 at 96G—H).

Referring to the *Practice Manual* (2002) of the Transvaal Provincial Division and the Witwatersrand Local Division, E M Patel J remarked that the *Practice Manual* fortifies the rules of court to enhance the efficacy of the courts and the overall administration of justice. The *Manual* is there to assist practitioners to know what is expected of them so as to avoid failures, delays, frustration and the resultant wasted costs. Practitioners must act in accordance with the rules of court and the *Manual* (para 10 at 1262*h—j* (All SA), 87H—I (SA)).

The court added that there was 'unfortunately a growing tendency amongst some practitioners to simply hand up documents which ought to be properly filed through the office of the Registrar'. Judges 'are not the postboxes for the Registrar'. There were times when it was necessary to hand up documents, and under such circumstances a brief explanation would suffice to invoke the indulgence of the court. The current tendency of 'willy-nilly handing up notices' had to be reduced to a minimum, thereby ensuring that the administration of justice was maintained at a proper level (para 12 at 1263*d—f* (All SA), 88D—E (SA)).

There was also 'a growing prevalence' of failure to comply with the rules of court and of having a total disregard for the practice in the Transvaal Provincial Division as enjoined by the *Practice Manual*. In *Reitmann v Jansen van Rensburg* 1984 (2) SA 174 (W) at 179H, Coetzee J had said that rules were made to be followed, and rules existed so

that rights and duties flowed; in the event of non-compliance, legal results flowed (para 13 at 1263*f*—*g* (All SA), 88E—G (SA)). Undoubtedly, it was time to sound a stern warning that **the courts would not countenance non-compliance with the rules of court and practice, unless there were justifiable circumstances warranting condonation for the omission or default**. Those practitioners whose conduct in any way was simply to let the practice and administration of justice be undermined would incur the displeasure of the court and invariably attract an exemplary order of costs (para 14 at 1263*g*—*h* (All SA), 88G—H (SA)).

Further on this aspect of the decision in *Makuwa v Poslson*, see under '**COSTS: *De bonis propriis***' below.

## 6. INTERDICTS

### *Final interdict*

In ***Traut v Fiorine & another*** **[2007] 4 All SA 1317 (C)** Yekiso J stated that in order **to be afforded a final interdict as a form of relief, an applicant must show and establish a clear right, that he has suffered an injury or that there is a reasonable apprehension that an injury will be suffered, and that there is no other alternative remedy available to him** (para 43 at 1329*c*—*d*, with reference to *Setlogelo v Setlogelo* 1914 AD 221 at 227). Taking into consideration, inter alia, that an alternative action for damages (for alleged defamation) was available to the applicant instead of an interdict to prohibit future publication of defamatory material, and that there was no evidence to suggest that such further publication would take place in the absence of an interdict, Yekiso J refused to grant the interdict sought. The applicant, in the light of the respondents' constitutionally protected right to freedom of expression, had failed to establish a clear right which the respondents had violated, and had 'another ordinary remedy' (a claim for damages) available to him which he could pursue (paras 43—4 at 1329*d*—*g*, read with para 41 at 1328*i*).

In ***Hirt & Carter (Pty) Ltd v Mansfield & another*** **[2007] 4 All SA 1423 (D)** Naidu AJ treated the application (for an interdict to enforce a restraint-of-trade clause) as being 'substantially an application for final relief' even though the relief sought was in the form of an interim interdict, since the interdict sought was to endure for the entire unexpired period of the restraint (para 4 at 1425*e*—*f*, with reference to *BHT Water Treatment (Pty) Ltd v Leslie & another* 1993 (1) SA 47 (W) at 55A—E).

## 7. APPEALS

### *Equality court*

Regulation 19(7)*(a)* of the regulations promulgated under the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 appears to be 'plain and unequivocal' in providing that **after an appeal against a decision of an equality court is noted, the appeal must be prosecuted as if it was an appeal against the decision of a magistrate**

**in a civil matter**, and the rules regulating the conduct of the proceedings in the High Courts in so far as they relate to civil appeals from the magistrates' courts apply, with the necessary changes, to any such appeal**:** ***Hopf v The Spar Group (Build It Division) & another*** **[2007] 4 All SA 1249 (D)** para 7 at 1251*h*—*i*. It follows that when a matter proceeds to the High Court on appeal from a magistrate's court designated as an equality court, the judges who hear such an appeal do not have to have been designated by the Judge President as presiding officers of the equality court in terms of s 16(1)*(b)* of the Act or to have undergone training as set out in s 31(4) of the Act (para 14 at 1254*d*—*e*). There is no specialized appeal structure restricted to judges trained in terms of s 31. The equality court does not have any apparatus of specialized appeal courts (para 22 at 1258*b*—*c*). No appeal against a decision of an equality court can therefore take place before a single judge, and no local division which lacks appellate jurisdiction in ordinary civil matters can hear such an appeal (para 24 at 1258*d*—*e*, with reference to ss 13(2)*(a)*(i) and 19(2)*(a)* of the Supreme Court Act 59 of 1959). A so-called 'appeal' against a decision of an equality court brought before a single judge of the Durban and Coast Local Division was therefore misconceived, and had to be struck off the roll (para 25 at 1258*e*).

***Further evidence***

See ***Shaik & others v S*** **2007 (12) BCLR 1360 (CC)** (also reported sub nom ***S v Shaik & others*** **2008 (2) SA 208, 2008 (1) SACR 1**), which is surveyed under '**CONSTITUTIONAL PRACTICE: *Further evidence on appeal***' below.

## 8. COSTS

***De bonis propriis***

Describing ***Makuwa v Poslson*** **[2007] 4 All SA 1260 (T), 2007 (3) SA 84** as 'one of the worst cases of utter disregard of the Rules and practice of this Court' (para 1 at 1261*c*—*d* (All SA), 86A—B (SA)), E M Patel J struck an application in terms of uniform rule 30 off the roll and ordered the applicant's (plaintiff's) attorneys to bear the costs of the application de bonis propriis. The application had previously been dismissed with costs on account of non-appearance, but the applicant's attorneys thereafter simply set the matter down afresh and re-enrolled it in disregard of the earlier order dismissing it. The 'purported application' was thus 'totally misconceived and irregular', and should not have been set down on the roll because there was already an order of court in existence in relation to the same application, which was 'in essence a nullity' (para 5 at 1261*i*—1262*b* (All SA), 86H—87A (SA)). The 'appalling carelessness' with which the applicant's attorneys had persisted in this 'sterile application' certainly demanded censure, and counsel had been unable to explain why the applicant's attorneys should not be ordered to bear the wasted costs (para 6 at 1262*b*—*c* (All SA), 87A—B (SA)). What was of significance was the slackness of the applicant's attorneys in re-enrolling the application, and 'total failure' to acquaint themselves with the fact that there was already an order of court in existence. It was clear that **the attorneys were negligent and their conduct was**

**unreasonable. It would thus be grossly unfair to mulct the applicant with the costs** of this futile application (para 7 at 1262*c—d* (All SA), 87B—C (SA); see also para 15 at 1263*i—j* (All SA), 88H—J (SA) and para 16 at 1264*a—b* (All SA), 89A—B (SA)).

A similar order was also made against the defendant's attorneys in relation to exception proceedings instituted by them. This was because the exception could not be heard as the papers in the court file were incomplete, inasmuch as the combined summons and particulars of claim (in a claim for damages) were missing from the court file. Nor was there any indication in the court file whether the plaintiff had evinced the intention to remove the cause of complaint or to oppose the exception. **The combined summons was a vital document for the purpose of determining the exception** (paras 8—9 at 1262*e—g* (All SA), 87D—G (SA)).

In addition, the excipient, who was the dominus litis in the exception, had not complied with either uniform rule 62(4) or paragraph CA 4.1 of the *Practice Manual* (as to which, see under '**TRIAL ACTIONS: *Collation, pagination and indexing***' above). It was a duty of the excipient to collate, paginate and index the papers, not merely for the convenience of the parties but more particularly for the court. Judges had frequently warned that the courts would not tolerate non-compliance with rule 62(4) (para 10 at 1262*g—j* (All SA), 87G—I (SA)).

Furthermore, the excipient's counsel had handed up a document headed 'Kennisgewing van toetrede en onttrekking as prokureurs van rekord', which did not comply with uniform rule 16. When an attorney withdrew from a matter, he was obliged timeously to deliver a notice of withdrawal. This was a duty he owed to his client as well as to the court. It was undesirable to combine a notice (of withdrawal) in terms of rule 16(4) with a notice (of appointment) in terms of rule 16(1), and combining them invariably resulted in unnecessary confusion. In this regard, the court ought not to countenance the proverbial 'short cuts'. The manner in which the excipient's erstwhile attorneys of record had conducted themselves was unforgivable and slovenly, and demonstrated 'nothing but disdain' for the rules and practice of the court (para 11 at 1262*j*—1263*b*, 1263*c—d* (All SA), 87I—88A, 88B—D (SA)).

The erstwhile attorneys for the excipient were accordingly ordered to bear the wasted costs of the exception proceedings de bonis propriis and were precluded from levying and claiming any costs in respect of the hearing from the excipient (para 16 at 1264*b—c* (All SA), 89B—C (SA); see also para 15 at 1263*i—j* (All SA), 88H—J (SA)).

Further on *Makuwa v Poslson* in relation to disregard for the rules of court and for the adjurations of the *Practice Manual* (2002) of the Transvaal Provincial Division and the Witwatersrand Local Division, see under '**TRIAL ACTIONS: *Rules of court***' above.

An order directing an advocate to pay the costs of abortive appeal proceedings de bonis propriis was made in ***Hopf v The Spar Group (Build It Division) & another*** **[2007] 4 All SA 1249 (D)**, as a result of the fact that the record in appeal proceedings which had been pursued before a court that lacked jurisdiction was in 'a deplorable state'**:** vast numbers of irrelevant documents had been included and essential documents had been omitted (para 27 at 1258*f—g*). The advocate had conceded that none of the fault for 'this deplorable state of affairs' rested with his client (the appellant), and that he should pay the costs de bonis propriis (para 29 at 1258*h—i*). The court would, in appropriate circumstances, award costs de bonis propriis against an attorney or advocate. Such an

order was made where an attorney had been guilty of professional negligence. The tendency was to award costs de bonis propriis against erring attorneys only in reasonably serious cases, such as cases of dishonesty, wilfulness or negligence in a serious degree. The profession was a learned one, and required great proficiency of its members. **Mistakes made by practitioners in litigation which resulted in unnecessary costs being paid should not be easily overlooked, and a litigant should not be required to pay costs attributable to his attorney's negligence** (para 30 at 1258*i*—1259*b*, with reference to *Waar v Louw* 1977 (3) SA 297 (O) at 304D—E).

## 9. CONSTITUTIONAL PRACTICE

***Further evidence on appeal***

In ***Shaik & others v S*** **2007 (12) BCLR 1360 (CC)** (also reported sub nom ***S v Shaik & others*** **2008 (2) SA 208, 2008 (1) SACR 1**) the Constitutional Court reiterated the well-established antipathy of our courts towards the introduction of fresh evidence in appeal proceedings. Dealing first with applications made under Constitutional Court rule 31, the Court held that **if evidence sought to be introduced under rule 31 is not incontrovertible, then it is inadmissible**. In essence, rule 31 would find no application where facts sought to be canvassed were irrelevant or genuinely disputed, and thus were not incontrovertible (para 19 at 1372D—F (BCLR), 223F—224B (SA), 16*e*—17*a* (SACR), with reference to *Prince v President, Cape Law Society, & others* 2002 (2) SA 794 (CC), 2002 (3) BCLR 231 para 10 at 802D—F (SA), 237D—E (BCLR) and *Rail Commuters Action Group & others v Transnet Ltd t/a Metrorail & others* 2005 (2) SA 359 (CC), 2005 (4) BCLR 301 para 38 at 387B—D (SA), 320F—H (BCLR)).

A second route by which new evidence might be introduced on appeal was provided by Constitutional Court rule 30, read with s 22 of the Supreme Court Act 59 of 1959. Although appeal courts had a discretion under s 22, **leave to adduce further evidence was ordinarily granted only where special grounds existed, or where there would be no prejudice to the other side and further evidence was necessary in order to do justice between the parties** (para 20 at 1372F—1373A (BCLR), 224B—D (SA), 17*a*—*c* (SACR)). Section 22 had been interpreted as allowing for the admission of new evidence in appeal cases only in exceptional circumstances (paras 21—2 at 1373A—E (BCLR), 224D—225B (SA), 17*c*—*g* (SACR), with reference to the *Rail Commuters Action Group* case para 43 at 389A—C (SA), 322E—F (BCLR) and *Prophet v National Director of Public Prosecutions* 2007 (6) SA 169 (CC), 2006 (2) SACR 525, 2007 (2) BCLR 140 para 33 at 185D—F (SA), 540*h*—541*c* (SACR), 152B—D (BCLR)).

An evaluation of the new evidence which the applicants wished to have admitted on appeal revealed that the evidence was irrelevant, controvertible or both, and the application for it to be admitted was accordingly refused (para 30 at 1375G (BCLR), 227D—E (SA), 20*b*—*c* (SACR), para 34 at 1376I and 1377B—C (BCLR), 228E and G (SA), 21*b* and *d*—*e* (SACR), and para 37 at 1377G—H (BCLR), 229C—D (SA), 21*i*—22*b* (SACR)).

For a survey of dicta in the *Rail Commuters Action Group* case, and other decisions reported in 2005, on the admissibility of further evidence on appeal, see *Civil Procedure Sibergramme Yearbook 2005* (2006) 186—8.

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