IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Case No. : 3514/2004

In the matter between:

TALEB SALEH ALSAIRI Applicant

and

BCF DISTRIBUTORS (PTY) LTD Respondent

JUDGMENT: RAMPAI J

HEARD ON: 19 MAY 2005

DELIVERED ON: 21 JULY 2005

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[1] The matter came to this court by way of an urgent application on 13 October 2004. It served before Hattingh J. He granted the rule *nisi*, and fixed the return day. In terms of the provisional court order the respondent was directed to restore the undisturbed possession of the property situated at Plot No. 8, Glenara Road, Olive Hill, Bloemfontein, Free State Province to the applicant.

[2] The application was not really contested by the respondent in the sense that the respondent did not file the opposing papers. The rule *nisi* was finally confirmed on 2 December 2004. The final order was granted with the consent of the respondent. This means that the rule *nisi* was confirmed without the usual judicial inquiry into the merits of the application. However, the question of costs remained unresolved. Therefore it stood over for later adjudication.

[3] The issue was at long last argued before me on 19 May 2005. Having heard the argument I reserved judgment. Since the main relief sought has already been disposed of, the only issue I am called upon to decide now is the ancillary relief which concerns costs.

[4] There are two fundamental rules pertaining to costs in civil litigation. The first rule is that success carries the costs. In other words the costs are normally awarded in favour of a victorious party and against the vanquished party. The second rule is that the awarding of costs is always an issue in the discretion of a court. The first rule is often regarded as a general rule of costs while the second rule is often

regarded as the principle rule of costs. A.C. Cilliers: **Law of Costs** p. 1 – 6 (Service issue 30 September 2004).

[5] As regards the general rule that success carries costs, there are some exceptions. Two of these exceptional rules are that a successful party may be deprived of his costs on good cause shown and that a successful party may be directed to pay the costs of his adversary in the proceedings initiated by the winner himself against the loser. A.C. Cilliers *supra* at p. 1 – 7:

> "A successful party may in certain very limited circumstances be ordered to pay the costs of his adversary (in addition, of course, to his own). This occurs where the successful party has brought about and is responsible for the proceedings."

[6] Where a winner is shown to have made himself guilty of certain kinds of misconduct, he may be penalised by applying one of the aforesaid exceptional rules. In other words a winner may be deprived of the whole or part of the costs which he would ordinarily have been entitled to recover

from the loser. The winner may even be ordered to pay the costs of his adversary depending on the gravity of the misconduct. Attempts to mislead the court by means of perjured evidence or actually giving false evidence especially in a case where an application is brought on *ex parte* basis or on an urgent basis may be visited with punitive costs orders. (**VAN DER MERWE v STRYDOM** 1967 (3) SA 460 (AD), **EVATT AND ANOTHER v PHILIP** 1931 WLD 163 and **BLES v WOODIFIELD AND BOTHA** 1910 EDC 15.)

[7] Before the issue which arose for decision is considered it is necessary to set out in brief the historical background which gave rise to this litigation between the parties.

[8] The applicant owned a property known as Plot No. 8, Glenara Road, Olive Hill, Bloemfontein, Free State Province. On this property there was an abattoir, abattoir business equipments, motor vehicles, trucks and three dogs. The building structure on the plot originally consisted of a dwelling section and an abattoir section at the time the applicant purchased the plot from its previous owner a certain Saad Shaat on 19 March 2003. Adjacent to the main

building, there was apparently the so-called a wendy in other words a tiny wooden dwelling structure. Somewhere on the property there were some sink dwellings. It does not appear on the papers how many such dwellings there were on the plot. The property was fenced. Access to the plot was through one main gate. The applicant Taleb Saleh Alsairi was a businessman as was Ronald John Nel, the sole director of the respondents, BCP Distributors (Pty) Ltd with its principal place of business at Centurion in Gauteng Province.

[9] The applicant arrived from Dubai in Saodi Arabia back in this country on 13 September 2004 and proceeded to Bloemfontein to oversee his business interest. On his return to the city from abroad he spent the first three days in the city. During the second half of the ninth month he was involved in business negotiations with the respondent for the sale of his aforesaid plot measuring 4,2827 hectares. Among other places, the negotiations preceding the conclusion of the agreement were held at a certain flat

somewhere in the city. On a certain day two gentlemen Ronald John Nel and John John represented the respondent. The applicant acted in person. The parties reached an agreement.

[10] They signed the contract in Bloemfontein on 30 September 2004. The purchase price was the amount of R1,2 million. The contract was drawn up by the respondent's attorney Krohn Incorporated. The following clauses of the contract are relevant to the dispute:

> "2.1 The purchaser is to pay the purchase price by way of the creation of a loan account in the purchaser company for credit of the seller against date of registration of transfer of the **PROPERTY** in the name of the **PURCHASER**.

5.1 Possession of the property shall be given to the Purchaser on:
date of registration of transfer

from which date it shall be held by the Purchaser at his sole risk, loss or profit.

5.2 OCCUPATIONAL INTEREST

In the event that occupation does not coincide with registration, then the party enjoying possession of the property while it is registered in the name of the other party will be liable for the payment of occupational interest to the owner of the property. Occupational interest is to be calculated on a pro-rata basis for the period of occupation enjoyed by the non-owner at the rate of **R N.A.** per month from **THE DATE OF OCCUPATION** to date of registration of the transfer.

16.1 The parties hereto confirm that all provisions of this agreement go to the root of the contract.

16.2 This document contains the full agreement between the parties hereto and no variation or amendment hereof will be valid unless it is reduced to writing and signed by both parties.

16.3 No concession which the Seller may from time to time allow the Purchaser will in any way prejudice the Seller's strict rights in terms of this agreement and the Seller will at all times, notwithstanding any possible prior waiver or concession, be entitled to the strict and full compliance of all the provisions of this agreement by the Purchaser."

[11] On Friday 8 October 2004 the applicant and the respondent's attorney met. They discussed certain issues pertaining to the sale agreement between the applicant and the respondent. The applicant voiced his dissatisfaction about the specific stipulation in the contract that as the seller, he would not receive the capital of the transaction in other

words the purchase price, after the registration of the transfer and that instead the respondent would create a loan account in its business books of account in favour of the applicant. There was also a telephone conversation between the applicant and the respondent's director between 8 October 2004 and 13 October 2004.

[12] By Tuesday 12 October 2004 one of the respondent's employees was already staying on the plot. He was staying there with his wife and two children. In addition there was also a private security guard posted at the gate of the plot. Among others his duty was to restrict access to the premises in question.

[13] On Wednesday 13 October 2004 the applicant launched this urgent application. The primary ground upon which the applicant claimed the final interdict was common law rule of spoliation. That is to say that the respondent had wrongfully deprived the applicant of the undisturbed and peaceful possession of the aforesaid plot or landed property. The

secondary basis of the relief according to the applicant was that his dispossession constituted a contractual breach of the written agreement which stipulated that possession of the plot remained with the seller and that such possession shall be given to the purchaser on the day of the registration of the transfer which event had not yet eventualised. (*Vide* clause 5 annexure "B" founding affidavit.)

[14] The conduct complained of can according to the respondent's contention, neither be regarded as an act of wrongful dispossession on the primary basis that it constituted a common law spoliation, nor can it be regarded as wrongful dispossession on the secondary basis that it constituted a breach of contract. The respondent's defence is that the applicant after his return from overseas never resumed possession of the property specifically on 16 September 2004 as alleged, that the applicant on his own accord and free will allowed the respondent to take possession, occupation and control of the plot and that at the applicant's own special request a certain employee of the

respondent as well as independent security guards were deployed on the plot for the purpose of securing the movables and the property as a whole.

[15] I am not now called upon to consider the merits of the matter. That is now water under the bridge. The respondent consented to the confirmation of the rule *nisi*. The question which now falls to be determined at this stage of the proceeding is whether good cause exists for depriving the successful party, in other words the applicant, of the costs of the application.

[16] The applicant's version is that he was the possessor of the property at all times material to this dispute. He re-entered the RSA from an overseas trip on 13 September 2004. Three days later, on 16 September 2004 to be precise, he returned to his place of residence on the plot outside Bloemfontein. He subsequently sold the plot to the respondent in terms of a written agreement signed in Bloemfontein on 30 September 2004. This was the only agreement in respect of the property. There was no prior oral agreement in terms of which he surrendered possession of the property to the respondent. Subsequent to the sale of the property he remained in possession thereof pending the registration of the transfer. On Friday 8 October 2004 he went away from the plot on a weekend visit to the city. On his return to the plot on Monday 11 October 2004 he was prevented from re-entering the plot by a security guard engaged by the respondent and posted at the gate. His three further attempts on three

consecutive days to regain possession were fruitless.

[17] The respondent's version is that the applicant did not resume possession of the property on 16 September 2004. Before the signing of the sale agreement, the applicant allowed the respondent by way of an oral agreement to take possession of the property. The applicant was not staying on the plot but in a certain flat in the city. The applicant was anxious that the fixed property might be vandalised and the movables stolen. The respondent deployed its employees on the plot and later posted a private security guard at the gate in order to reinforce the security on the plot. However, the applicant was never denied access to the plot. But from 12 October 2004 the applicant was prohibited from removing vehicles, equipments, assets or any other items from the plot. The applicant became disgruntled because, as the respondent's deponent said, the respondent had declined to have the sale agreement amended as the applicant wanted.

[18] There are four ethical grounds on which the respondent relies in support of its submission that in the exercise of my discretion, I must depart from the customary rule which postulates that the litigation costs generally must be awarded in favour of the

successful litigant. I proceed to examine such grounds.

[19] In the first place, the respondent's case was that the applicant had consented to the occupation of the plot by the respondent. On behalf of the respondent it was argued that the respondent's case that occupation of the plot was given voluntarily by the applicant to the respondent was evidenced by the fact that the keys to the premises were in fact handed to the respondent by the applicant himself.

[20] Counsel for the applicant submitted that the applicant, in order to obtain the spoliation relief on urgent basis, created the false impression that he had never consented to the occupation of his plot by the respondent prior to the registration date of the transfer. According to the respondent the alleged consent was given before 30 September 2004.

[21] The applicant denied the respondent's claim of such an oral agreement. He alleged that he returned to his plot on 16 September 2004 after an overseas trip and that since then until 11 October 2004 he was in free, peaceful and undisturbed possession of the property. He deposed that from Monday 11 October 2004 until Wednesday 13 October 2004 he made a few attempts to gain entry onto the property but that he was prevented from re-entering the plot on the

respondent's instructions.

[22] I find it difficult to accept the respondent's version in this regard. On the respondent's own version the oral agreement in terms of which the respondent was authorised to take immediate possession of the property was reached before 30 September 2004, a date on which the written agreement was signed. In the answering affidavit, the respondent made no attempt to explain why such an important term, agreed upon during the negotiations which preceded the signing of the written contract, was not expressly embodied in the written contract which was subsequently signed.

[23] The version of the respondent is also inconsistent with certain clauses of the written contract.

> "5.1 Possession of the property shall be given to the Purchaser on:
>
> date of registration of transfer
>
> from which date it shall be held by the Purchaser at his sole risk, loss or profit.
>
> 16.1 The parties hereto confirm that all provisions of this agreement go to the root of the contract.

16.2 This document contains the full agreement between the parties hereto and no variation or amendment hereof will be valid unless it is reduced to writing and signed by both parties."

[24] The respondent's submission that upon proper interpretation of clause 5.1 the respondent was not precluded from taking

possession of the property prior to the registration of the transfer is a thin if not a hollow submission. However generous I tried to interpret clause 5.1 I could find nothing to support such an interpretation. Even if one reads clause 5.1 together with clause 5.2 nothing significant emerges to bolster the benevolent interpretation contended for by the respondent. Had the parties agreed as the respondent claimed they did, clause 5.1 would have been differently worded bearing in mind the fact that such a material term was according to the respondent agreed upon before the undisputed written contract was concluded.

[26] The respondent did not even say exactly when in September 2004 such an oral agreement concerning its early possession of the property was reached. All the respondent alleged was:

> "7.3 Enkele dae voor 30 September 2004 waarop **aanhangsel "A"** (which should be "B") deur applikant onderteken is, het applikant by ooreenkoms die respondent toegelaat om besit en beheer te neem van **die eiendom**."

If this version was indeed so, clause 5 would for instance have stipulated the precise date on which the respondent took occupation of the plot as well as the amount of occupational rent he would have been obliged to pay as the purchaser to the applicant as the seller.

[27] The parties agreed that the terms and conditions of the written contract they signed on 30 September 2004 went to the heart of their agreement; that the document so signed contained their complete agreement; and most importantly in the context of this matter, that notwithstanding any possible prior waiver or prior concession the applicant as the seller was at all times entitled to the strict and full compliance with the terms of the written agreement. In other words the respondent was precluded from relying on any other prior oral consent or deal which was not in keeping with the terms of their written agreement. (*Vide* clause 16.)

[28] The written agreement was drawn up by the respondent's attorney. Had such an early occupation of the property by the respondent been agreed upon prior to the signing of the contract, the respondent's attorney would almost certainly

have ensured that such a material term was incorporated and reflected in the contract he drew afterwards. He did not. Since the term was comparatively more favourable to the respondent than it was to the applicant one would have expected the respondent's deponent to have readily noted its omission from the written contract before he signed that contract. He did not.

[29] As regards the respondent's alleged first ground of misconduct, I am unable to find that the applicant misled the court by withholding any information relating to the alleged oral concession whereby the applicant, as the respondent claimed, consented to the occupation of the plot by the respondent.

[30] In the second place the respondent's contention was that the parties identified a need to protect the property against possible vandalism, damage and stealing. It is so that the applicant launched the urgent application not only for the purpose of regaining possession of the immovable property

we are here concerned with but also for the purpose of regaining possession of the movable property on the plot.

[31] Whether the loose assets or movable property such as the abattoir business equipment, the motor vehicles or any other business implements were part and parcel of the deal or not was not the issue. The real issue was in whose peaceful and undisturbed possession such movables were from 16 September 2004 until 11 October 2004. Seeing that I have already found in favour of the applicant that he and not the respondent was in free, peaceful and undisturbed possession of the plot, it follows that he must also have been in a similar possession of the movables thereon.

[32] In his replying affidavit the applicant admitted that he and the respondent's deponent agreed on certain arrangements pertaining to the safeguarding of the property. I shall revert to these arrangements later.

[33] It is so that in his founding affidavit the applicant did not

mention such arrangements. However, the mere fact that he did not disclose any information in connection with such sideline issue does not necessarily portray him as a deceptive litigant. I can find nothing in the applicant's omission from which it can objectively be construed that he acted in an unethical manner. Therefore the respondent's second ground of the alleged misconduct on the part of the applicant holds no water, in my view.

[34] In the third place the respondent's contention was that the applicant had failed to mention in his founding affidavit that the respondent had to place certain employees of the respondent on the premises by mutual agreement since the plot was uninhabited. The underlying reason for such placement was to protect the plot in other words the fixed property as well as the movables thereon including the applicant's three dogs. The respondent moved the family of one of its employees from town and settled such employee and his family on the plot and housed such employee and his family in a shack away from the abattoir building structure. It

was contended for the respondent that the applicant's omission to disclose these facts in his founding affidavit amounted to a misconduct. According to the respondent the presence of its employees on the property signified the respondent's occupation, possession and control of the property.

[35] In his replying affidavit the applicant confessed some of the aforegoing factual allegations made by the respondent but avoided others. He admitted for instance that the placement of the respondent's employee on the plot was an arrangement which was done with his knowledge and consent; and that the purpose was to secure the entire property. He also admitted that he had handed certain keys to the respondent for the purpose of implementing the proposed new security measures and that he owned the three dogs which he was keeping on the plot for security purposes.

[36] The applicant denied among others the allegation that he

lived in the city and not on the plot at all relevant times and averred that he lived in the house which was attached to the abattoir building as one structure. He also denied the allegation that the respondent's employee and his family were staying in a shack on the plot but averred that such employee and his family were in fact accommodated inside the abattoir itself on the plot.

[37] In my view, nothing significant turns around the issue of the applicant's precise place of residence. Whether he lived in a flat somewhere in the city or in the house on the plot is really not the point. It cannot be seriously argued with conviction in the circumstances of this case that a person who owns a plot on the outskirts of a city but lives in the city and not on the plot itself thereby looses possession of the plot because of his residence away from the plot coupled with his extensive and frequent travels overseas. (*Vide* Silberberg & Schoeman : **The Law of Property** 4th Edition p. 295 - 296.) As long as such a person has *animus revertendi* in respect of his landed property his temporary absence however frequent

cannot justify the proposition that he had given up possession of his property or that he has abandoned it. I have already found that the applicant did not surrender possession of his property fixed or movable as the respondent claimed he did.

[38] The transfer of the respondent's employees to and their settlement on the applicant's plot did not fortify the respondent's contention that the applicant had voluntarily surrendered the possession of the property and had allowed the respondent to take early occupation and control thereof. The parties are agreed as to the real purpose of the placement of the employees. The underlying reason was the tightening up of the existing security measures an idea which was apparently mooted out by the respondent's sole director Nel. Until then the applicant's attitude was that he and his dogs provided adequate protective measures for the property.

[39] It was also argued on behalf of the respondent that if the

applicant was prevented from entering the plot as he claimed and not merely prevented from removing movables especially abattoir equipments from the plot he could not have been in a position to aver that the respondent's workers were accommodated in the abattoir itself. Since the precise location or site of the abattoir in relation to the gate was unknown to the court or rather undisclosed even by the respondent's deponent himself, the contention becomes a lame argument for the reasons I shall give in paragraph [42] below in connection with the security guards. The applicant's averment that the workers were housed inside the abattoir and not outside the abattoir in a shack must be accepted as an undisputed fact. The nondisclosure relating to the settlement of the workers on the plot does not amount to misconduct.

[40] In the forth place the respondent contended that the applicant did not mention in his founding affidavit that the respondent had to post the private security guards at the gate of the plot by mutual agreement in order to secure the

property which was unoccupied. The first security guard was deployed from Tuesday 12 October 2004 according to the respondent's version. The physical presence of the security guard on the property was a further indication of great symbolic importance. Like the physical presence of the respondent's workers on the plot, the physical presence of the private security guards also symbolised the occupation, possession and control of the property by the respondent. So went the respondent's argument.

[41] Much of what I have already said about the workers applies equally well to the guards. The parties were agreed that the primary purpose for the posting of the guards on the property was to protect the property fixed and loose. In its answering affidavit the respondent alleged that the security guards were instructed to see to it that the applicant did not remove any movables from the property and that he was not prevented from entering or leaving the property. The respondent vehemently denied that the security guards had prevented the applicant from accessing the property as the applicant had alleged in his founding affidavit.

[42] As I see it the version of the applicant has to prevail. In determining an appropriate order of costs I have to remind myself that the applicant's averments as set out in his founding affidavit were not disputed by the respondent at the right stage of the proceedings. The practical effect of the

respondent's consent to the final confirmation of the rule *nisi* was a wholesale admission of the applicant's averments as contained in the founding affidavit. I do not think that it is permissible now, after the provisional order has been confirmed as a final order of spoliation, with the consent of the respondent for that matter, to revisit the averments in the founding affidavit which were never disputed originally. The attack is simply belated. I am bound to approach the question of costs on the premise that the undisputed averments of the first applicant remained as admissions on the merits. To the extent that the belated answering affidavit attempts to recreate a dispute on the merits it should be treated with caution. What I have here is no usual answering affidavit but an answering affidavit seriously watered down and drastically dented by the respondent's own consent which boiled down to a complete admission of the founding affidavit in its entirety.

[43] The applicant's case was that on three consecutive days commencing on Monday 11 October 2004, the security

guards deployed at the gate by the respondent prevented him, not from leaving the property with any movables, but from re-entering the plot at all. In other words he was locked outside and not inside. He responded in his replying affidavit that he agreed to the deployment of the security guards on the understanding that they were going to secure the property. Their deployment was for security purposes and not dispossessive purposes. Therefore the security guards with the respondent's authority overstepped the mark. Denying the applicant access to the plot was never within the applicant's contemplation when he acceded to the respondent's request to have private security guards deployed on the property. It could not have been intended and it cannot be readily accepted by this court that the applicant would readily relinquish his rights to possession, occupation and control of the property before its registration in the name of the respondent for nothing in return.

[43] The fallacy of the respondent's contention is that the occurrence report book kept at the gate and completed by

the three security guards did not support the respondent. Contrary to the respondent's version the occurrence report book showed that the first security guard was posted at the gate as early as Monday 11 October 2004 as the applicant averred and not only on Tuesday 12 October 2004 as the respondent claimed. Moreover, all the three security guards noted that all was in order on the farm from 11 to 13 October 2004. The point I am trying to make is that had the applicant been on the plot and had he tried to remove any movables from the plot as the respondent alleged he did on Tuesday 12 October 2004 such an incident would probably have been recorded by the security guard on duty. After all it was their primary duty to prevent possible stealing of assets. No such entry was made. No answering affidavit from any of the security guards was annexed to the answering affidavit in order to verify the respondent's version. Therefore, that part of the respondent's version remains an inadmissible hearsay. But the applicant's averment that he was turned away on Monday 11 October 2004 was in a way supported by the occurrence report book. The occurrence report book showed that the gate was already manned by a security guard a day earlier than the respondent had alleged.

[45] Counsel for the respondent asked the question why the applicant had consented to the deployment of the security guards if there was no need to secure the property since he was leaving there? If I understood the applicant's version as a whole well, he kept three dogs on the property for security reasons and he also lived on the property. Those two factors provided, in his opinion, some sort of security. According to him, therefore, there was no need to secure the property by providing further security measures as the respondent's deponent suggested. But because he had other business interests elsewhere inside and outside the country he accepted the respondent's proposals for the provision of extra security measures which included the deployment of security guards in addition to the workers. I get the impression that the applicant readily accepted the respondent's security proposal because the respondent had apparently undertaken to do so at its own expense and in

addition because the respondent was on the verge of owning the property anyway if the deal went through.

[46] It would seem that no security guards did any night duty on the property. Now, if protection of the property was the primary underlying reason for engaging and deploying security guards, it makes one wonder as to why such security services were dispensed with at night a time during which the property was most vulnerable.

[47] The respondent's averment that its consent was required before anyone could enter the property strengthened, in my view, the applicant's version that on the instructions of the respondent's deponent the security guards repeatedly barred him from getting onto the plot despite his persistent attempts.

[48] Having considered the question of the deployment of the security guards I am not persuaded that the applicant, in not informing the court in his founding affidavit about the full circumstances which led to their deployment, committed a misconduct. In my view, he did not do so in an apparent attempt to mislead the court. Therefore the applicant cannot on that basis be deprived of the costs.

[49] Since the real and undisputed reason which underpinned all the three transactions namely the placement, the deployment and the handing over of the key were considerations of security and not considerations of surrender of the

possession, the applicant is not to blame for not divulging them in his founding affidavit. I am of the view that none of them was significantly connected to the central issue. They were all sideline matters. It cannot therefore be seriously contended that the applicant chose to withhold these facts in an apparent or deliberate attempt to mislead the court so that a spoliation order which he did not deserve could be granted in his favour.

[50] The real essence of the applicant's case was that on Monday 11 October 2004 the respondent despoiled him of the free, undisturbed and peaceful possession of the property, the plot and certain movables thereon. According to the respondent the applicant's case was granted on totally untrue foundation. Despite the respondent's knowledge of the demerits of the application and a number of the alleged ethically wrong actions on the part of the applicant, the respondent elected to file no answering affidavit to resist the confirmation of the provisional order as a final order.

[51] The respondent had ample opportunity to do so. But he chose not to avail himself of such an opportunity. Instead of doing so he consented to the final confirmation of the rule *nisi* on Thursday 2 December 2004 more than six weeks since the rule *nisi* was provisionally granted. Almost six weeks after the confirmation of the rule *nisi* in other words twelve weeks since the provisional order was granted the respondent filed an answering affidavit in which it contested the customary award of costs to the applicant notwithstanding his success on the merits.

[52] In a way the respondent attempted to revisit the merits and to cast some doubt as to the correctness of the final spoliation order. It was for instance contended on behalf of the respondent that the respondent reluctantly consented whatever that means to the confirmation of the rule *nisi*. The version of the respondent as to the merits is now meaningless and irrelevant. Only the version of the applicant was placed before Musi J in deciding the fate of the rule *nisi*. By consenting to the confirmation of the rule *nisi* the

respondent forfeited the benefit of the rule as laid down in **PLASCON EVANS PAINTS LTD v VAN RIEBEECK PAINTS (PTY) LTD** 1984 (3) SA 623 (AD) per Corbett JA.

[53] In the answering affidavit the respondent raised a series of alleged acts of misconduct. I have examined four of the main alleged grounds of unethical conduct. I was at pains to scrutinise the respondent's complaint about the applicant's behaviour as far as this matter of costs was concerned. I could find no real substance in any of the acts complained of. There were no obvious traces of deceptive or unethical conduct let alone any convincing proof of perjured evidence. (*Vide* **VAN DER MERWE v STRYDOM** 1967 (3) SA 460 (AD) at 470 A – H.)

[54] The applicant brought the urgent application on two grounds as I have indicated earlier in this judgment. Each of those grounds was perfectly sound in law. None of them was tainted by any acts of deplorable misconduct so unethical as to move me, in the exercise of my judicial discretion, to

deprive the successful litigant, in other words the applicant, of the costs. In the absence of any proven grounds of misconduct I would be inclined to hold the respondent responsible for the payment of the applicant's costs. No good cause was shown to exist, which warrants depriving the applicant the costs of this litigation. On a balance of probability no proper case has been made out to justify a departure from the general rule that success carries the costs.

[55] Accordingly I direct that the costs of this application must be borne and paid by the respondent in favour of the applicant and that such costs must include those incurred on 27 January 2005.

M.H. RAMPAI, J

On behalf of applicant: Adv. J.G. Gilliland
Instructed by:
Stander, Venter & Kleynhans
BLOEMFONTEIN

On behalf of respondent: Adv. C. Snyman
Instructed by:
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