Reportable
Case No: 622/98

In the matter between:

DESMOND JAMES THOMPSON
Applicant

and

SOUTH AFRICAN BROADCASTING CORPORATION
Respondent

Coram:	GROSSKOPF, HARMS, OLIVIER, ZULMAN JJA and MTHIYANE AJA
Heard:	IN CHAMBERS
Delivered:	8 MARCH 2001
Subject:	Reconsideration of a costs order made by the SCA

JUDGMENT

HARMS JA/

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[1] The applicant appealed against an order of the Cape High Court in

a trial action in which he was ordered to pay damages to the respondent (the plaintiff) and costs. His appeal was allowed on 29 November 2000 with costs and the order of the Court *a quo* was set aside and replaced with an order of absolution from the instance, but no order was made as to costs in the High Court. This means that the applicant had to pay his own trial costs.

[2] Being dissatisfied with the fact that he had been disallowed costs, the applicant applies for the reconsideration of this part of the order. His case is that since costs were not argued during the appeal, the costs order was a provisional one and open to reconsideration (*Estate Garlick v Commissioner for Inland Revenue* 1934 AD 499 505). The applicant accepted that this application could be dealt with in chambers by this Court on written submissions from both sides without the necessity of oral argument. Full argument was filed by both parties and we are indebted to counsel for their assistance.

[3] The adverse costs order had as its antecedent the following statement in the main judgment (per F H Grosskopf JA at par 14):

"The court a quo found the appellant to be 'a very unreliable and dishonest witness'. . . . I fully agree with that conclusion. The appellant committed fraud and then relied on spurious defences. In my view this court should indicate its displeasure by making no order as to costs in the court *a quo*."

The finding of the High Court is reported: *South African Broadcasting Corporation v Thompson and another* [1998] 3 All SA 586 (C) par 16.

[4] Although the finding of the Court *a quo* was attacked by the applicant when applying for leave to appeal, it is noteworthy that in the heads of argument filed on his behalf, it was not alluded to at all. Instead, the argument focussed on legal issues. This Court was therefore justified in assuming that the applicant accepted these findings. Factual findings of trial courts are in any event presumed to be correct unless shown otherwise. At the hearing in this Court the argument was directed towards the legal issues.

[5] The applicant does not submit that the costs order was unjustified if the correctness of Grosskopf JA's factual findings were accepted. Instead, the

argument is that the factual findings were incorrect and should be reconsidered. In this regard there appears to be a misunderstanding about the power of a court to amend or supplement its findings in contradistinction to its orders. The correct position was spelt out in *Firestone South Africa (Pty) Ltd v Gentiruco AG* 1977 (4) SA 298 (A) 307C-G:

"The Court may correct a clerical, arithmetical or other error in its judgment or order so as to give effect to its true intention . . .. This exception is confined to the mere correction of an error in expressing the judgment or order; it does not extend to altering its intended sense or substance. KOTZÉ, J.A., made this distinction manifestly clear in [*West Rand Estates Ltd v New Zealand Insurance Co Ltd* 1926 AD 173 at 186 - 7], when, with reference to the old authorities, he said:

'The Court can, however, declare and interpret its own order or sentence, and likewise correct the wording of it, by substituting more accurate or intelligent language so long as the sense and substance of the sentence are in no way affected by such correction; for to interpret or correct is held not to be equivalent to altering or amending a definitive sentence once pronounced.'"

And in *S v Wells* 1990 (1) SA 816 (A) 820C-F the matter was dealt with in these words:

"The more enlightened approach, however, permits a judicial officer to change, amend or supplement his pronounced judgment, *provided that the sense or substance of his judgment is not affected thereby* (*tenore substantiae perseverante*). . . . According to Voet a Judge may also, on the same day, after the pronouncement of his judgment add (*supplere*) to it all remaining matters which relate to the consequences of what he has already decided but which are still missing from his judgment. He may also explain (*explicare*) what has been obscurely stated in his judgment and thus correct (*emendare*) the wording of the record *provided that the tenor of the judgment is preserved*."

(Emphasis added.)

[6] It is also necessary to have regard to the object of the rule permitting a party to have the costs order reconsidered if costs were not argued at the oral hearing. This appears also from *Firestone* at 307G-H:

"Where counsel has argued the merits and not the costs of a case (which nowadays often happens *since the question of costs may depend upon the ultimate decision on the merits*), but the Court, in granting judgment, also makes an order concerning the costs, it may thereafter correct, alter or supplement that order (see *Estate Garlick's* case, *supra*, 1934 AD 499). The reason is (see pp. 503 - 5) that in such a case the Court is always regarded as having made its original order 'with the implied understanding' that it is open to the mulcted party (or perhaps any party 'aggrieved' by the order - see p. 505) to be subsequently heard on the appropriate order as to costs."

(My emphasis.) As I understand the words emphasised, they imply that the argument relating to costs should be based upon the findings of the court and

not upon an argument that the court was wrong in it findings (cf the approach in *Pogrund v Yutar* 1968 (1) SA 395 (A) 397G - 398C and in *Ex parte Barclays Bank* 1936 AD 481).

[7] There is an underlying assumption in the applicant's submissions to the effect that unless something was raised or dealt with during oral argument, the matter can be reopened and that the court can amend its judgment in relation thereto. This is a misconception. The function of oral argument, especially in a court of appeal, is supplementary to the written argument. If a party chooses not to raise an obvious issue in his heads, he does so at his peril. The court is entitled to base its judgment and to make findings in relation to any matter flowing fairly from the record, the judgment, the heads of argument or the oral argument itself. If the parties have to be forewarned of each and every finding, the court will not be able to function.

[8] In a case such as this, the trial judge had a discretion relating to costs exercisable on the basis of his judgment. Disallowing the applicant's costs in the light of the factual finding of dishonesty would have been a proper exercise of the discretion. In upholding the appeal, this Court had to place itself in the position of the trial judge and make any order that the trial judge justifiably could have made, which it did.

[9] I may add in conclusion and *ex abudante cautela* that in preparing the appeal we had to consider the credibility issue, not only because it formed part of the reasoning of the trial judge but also because the respondent in its heads of argument had dealt with the matter extensively. Notwithstanding the applicant's present submissions, which I have considered carefully, I am

satisfied that our findings upon which the order was based, were fully justified.

[10] The employment of two counsel by the respondent for the limited purpose of preparing argument on costs was not reasonably necessary. In the result the application is dismissed with costs.

LTC HARMS
JUDGE OF APPEAL

AGREE:

GROSSKOPF JA
OLIVIER JA
ZULMAN JA
MTHIYANE AJA