IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT CAPE TOWN

REPORTABLE

CASE NO : C529/2004

In the matter between :

G J D VOLSCHENK **Applicant**

and
ALEXKOR LIMITED **Respondent**

JUDGEMENT

MURPHY AJ

1 On 16 August 2004 Commissioner C J Wessels of the CCMA handed down an award declaring the applicant's dismissal on 31 December 2003 to have been procedurally and substantively unfair and ordered reinstatement on terms no less favourable than those that existed at the time of the applicant's dismissal and ordered the respondent to pay the applicant backpay for the period 31 December 2003 to 31 August 2004, being the day on which he directed the reinstatement to take effect. On 12

November 2004 on the basis of an urgent application I handed down an order making the Commissioner's award an order of court in terms of section 158(1)(c) of the Labour Relations Act of 1996 ("the LRA"). At the time I reserved my reasons for making the order. These are my reasons.

2 The dispute between the parties has a long and unfortunate history. The applicant, a medical practitioner, commenced employment with the respondent on a locum basis for a period of 3 months as its Occupational Health Practitioner during November 1998. After the expiry of the locum, the applicant continued in employment on special terms and conditions peculiar to his position until he received a letter from the respondent on 20 December 1999 advising him that his contract of employment would expire on 31 January 2000. The CCMA ruled this dismissal to be unfair and in terms of an award dated 28 April 2000 ordered the respondent to reinstate the applicant retrospectively to 1 February 2000 and to pay him R52 500 as backpay. The respondent failed to comply with the award and the applicant was compelled to approach this court to have the award made an order of court in terms of section 158(1)(c) of the LRA. The respondent opposed that application, contending that it had complied with the award and that in the circumstances it was not necessary for the award to be made an order. On 26 June 2000, Gamble AJ handed down a judgement making the first arbitration award an order of court and awarded costs

against the respondent on an attorney client scale finding that a punitive costs order was warranted as an indication of the court's displeasure with the respondent's vexatious behaviour. He said:

"Not only has the Respondent conducted itself in an obstructive, vindictive and disingenuous fashion, it has obliged the applicant to bring these proceedings to correct a wrong which it simply refused to address".

It should also be noted that the applicant's first dismissal was preceded by a dispute in which he had raised legitimate concerns about an issue concerning his salary.

3 In his founding affidavit in these proceedings the applicant contends that the respondent's conduct in its lengthy dispute with him suggests that it sees itself as a law unto itself and is not prepared to voluntarily comply with arbitration awards of the CCMA. The respondent in reply neither admits nor denies these allegations, but dismisses them as risible opinion evidence. The somewhat baffling approach the respondent has taken in these proceedings suggests there may be some basis for the applicant's suspicions. However, the respondent did at least comply with the order of Gamble AJ, though subsequent events suggest it may not have been entirely happy in having to do so.

4 In dismissing the applicant for the second time, the respondent justified the dismissal by alleging that the applicant had reached normal retirement age before 31 December 2003 and that his services had terminated by the effluxion of time. The CCMA rejected this argument and accordingly reinstated the applicant. As it did in the application before Gamble AJ, the respondent claims it has complied with arbitration award. The applicant disputes this and has brought this application as a matter of semi-urgency to have the award made an order of court so that it can proceed with contempt proceedings if necessary.

5 Hence this is an application in terms of section 143 (4) of the LRA, brought on an urgent basis, for the enforcement of an arbitration award of the CCMA by way of contempt proceedings instituted in the Labour Court.

6 Such a process by necessity has two components. The first component is to have the award of the CCMA made an order of court in terms of section 158(1)(c) of the LRA. The second component would be a declarator to the effect that respondent would be in contempt of court if it does not comply with the order. At this stage of the proceedings the applicant merely seeks an order making the award an order of court, but at the same time seeks an order granting him leave to approach this court on the same papers duly amplified for both the declarator and appropriate

further relief should it prove necessary to continue with the contempt proceedings.

7 The respondent does not dispute the existence of the award. And in fact has conceded on the basis of legal advice from its attorneys that the award is good in law and fact. Thus it states that during September 2004 it sought legal advice on whether to review the award and was advised not to do so. Accordingly, it did not proceed with a review and instead wrote to the applicant asking him to tender his services.

8 Accordingly the respondent has opposed the present application on three grounds. Firstly it has contended that the application is not urgent. Secondly, it has categorised the application as being one for an interdict and argues that the applicant has failed to satisfy the legal requirements for such relief. And thirdly, echoing its stance in the earlier dispute, it submits that the applicant has failed to establish that the respondent is refusing to honour the CCMA award, more particularly that it is refusing to reinstate the applicant on terms and conditions no less favourable than those that existed at the time of the dismissal. In other words it says it has complied with the award.

9 Having brought the matter in terms of rule 8 as one of semi-urgency the

applicant requires condonation for not having complied with the time limits set by rule 7, more specifically in not having afforded the respondent the full 15 day period which the rule affords a respondent within which to file its answering affidavit. The application was filed on 5 November 2004, the respondent filed opposing papers on 9 November 2004 and the matter was enrolled for hearing on 12 November 2004 at which both parties were legally represented. The condonation sought is therefore limited to excusing the applicant for affording the respondent 3 days instead of 15 to file answering papers.

10 The application was preceded by various attempts at getting the respondent to comply with the award to the applicant's satisfaction. These are clearly documented in correspondence addressed by the applicant's attorney to the respondent's attorney dated 18 October 2004. The letter records that the respondent has accepted that the award is good in law and that it is ready to comply, but continues to fail to do so. It continues:

> Notwithstanding your statement that your client is ready to comply with the CCMA award……your client has yet to comply with the award. The clearest example hereof is the simple fact that even though the CCMA Commissioner ordered your client to pay our client an amount of R345 659,45 on or before 31 August 2004, your client to date has failed and it appears refuses to do. The basis upon which this flagrant non-compliance with this part of the award can ever be justified is beyond our client's comprehension.

11 The letter also mentions that the respondent is in continuing breach of the award by refusing to pay the applicant's salary. The letter goes on to document the dispute that had arisen between the parties after the award was handed down and the applicant tendered his services. From the applicant's position he was reinstated into the post he occupied at the time of his dismissal, namely, that of Occupational Health Practitioner. The respondent however has taken the view that it is entitled to reinstate the applicant into the more senior post of Medical Superintendent: Hospital and refuses to comply with the other provisions of the award until the applicant bows to its conditions.

12 In support of the claim that the applicant was reinstated into the post of Occupational Health Practitioner his attorney drew attention to various paragraphs of the arbitration award. Paragraph 25 of the award records that the Applicant had been promoted to in July 2003 to a job titled "Occupational Health Practitioner and Superintendent" and that his salary was to be increased to compensate him for his augmented responsibilities. However, in paragraph 26 of the award, the commissioner accepted that on 16 September 2003 the applicant and the respondent agreed that the applicant, for legitimate reasons advanced by the applicant, would be relieved of his responsibilities as Superintendent and would continue in his

original post of Occupational Health Practitioner. This is clearly recorded in the minutes of the meeting in question and is confirmed by the fact that the applicant never received an increased salary.

13 Although a dispute arose shortly thereafter about whether the Occupational Health Practitioner post remained available, it appears from the award that the commissioner accepted that the applicant had until his dismissal continued to perform the functions of the Occupational Health Practitioner and such was the post he had in mind when reinstating the applicant. The respondent has held consistently to its position that it is only prepared to employ the applicant as the Medical Superintendent and will "comply" with the award if the applicant returns to this position. Its stance in this regard is puzzling and seems to be at variance with the legal advice it received that the award was good in law and fact. Had it disagreed with the commissioner's factual finding that the applicant had resigned the position of Superintendent and had continued as Occupational Health Practitioner one might have expected it to review his findings. It did not do so, but rather communicated that it accepted them as correct. I shall return to this critical issue later.

14 Given the respondent's stance, the applicant's attorneys ultimately informed the respondent's attorneys on 27 October 2004 that unless the

respondent complied with the award by 29 October 2004, the applicant would approach the court as a matter of urgency to have the award enforced in terms of section 143(4).

15 As explained, the respondent had already been given a detailed breakdown of the applicant's position in the letter of 18 October 2004. When no reply was received from the respondent's attorneys to the letter of 27 October 2004, the applicant launched these proceedings on 4 November 2004 giving the respondent until 9 November 2004 to file its answering affidavit, which the respondent then did. The respondent makes no claim in its answering affidavit that the short notice prejudiced it. One presumes it felt sufficiently apprised of the issues by reason of the lengthy and detailed correspondence that preceded the application. The fact that it availed itself of the afforded time and filed a comprehensive answering affidavit suggests therefore that the respondent had sufficient time within which to file its answering affidavit. The degree of deviation from the rules for which condonation is sought is in the circumstances therefore not extreme.

16 It would seem that the entertaining of this application as a matter of relative urgency causes no prejudice to the respondent. The 6-week period within which Respondent could have taken the award on review expired at

the end of September 2004. And as explained, the respondent has confirmed that it has no intention of taking the award on review, accepting that the award was good in law and on the facts. The bringing of the application, as a matter of some urgency, accordingly did not substitute for another remedy or deprive the respondent of its right to review.

17 The applicant on the other hand suffers ongoing prejudice. He has not received remuneration from the respondent since December last year, a period of nearly 11 months, despite the respondent acknowledging that he is entitled to it. I agree with Mr Stelzner, who appeared for the applicant, that this fact cannot simply be brushed aside, as the respondent seeks to do, on the basis that loss of income is not a ground for urgency. That may be so when an applicant is seeking to interdict a dismissal where the fairness of such remains contested. In this instance we have the exceptional circumstance that the applicant has an arbitration award in his favour, ordering the respondent to pay him his remuneration and the respondent simply refuses to do, despite admitting its liability to comply with the award and its decision not to review it.

18 The present matter is accordingly unusual. While one appreciates the need for caution about exercising the controversial power to grant urgent interim relief as expressed by Mlambo J (as he then was) in *University of*

the Western Cape Academic Staff Union & others v University of the Western Cape (1999) 20 *ILJ* 1300 (LC), we are not here concerned with the urgent grant of interdictory relief under section 158(1)(a)(i) of the LRA. We are seized with an application in terms of section 158(1)(c) of the LRA and in accordance with rule 8, which bestows a discretion on this court to dispense with the ordinary time periods and to deal with the urgent application in any manner it deems fit. The considerations applicable are thus quite different. Paramount among them is the need for the orderly and proper administration of justice in the enforcement of awards and court orders. As one of the objects of contempt proceedings, of which this application may be seen as a legitimate part, is to compel performance of the order, the element of urgency required to constitute the application as being urgent is satisfied if it is shown that the respondent is continuing to disregard the order – *Protea Holdings Ltd v Wriwt & another* 1978 (3) SA 865 (W). Moreover, the purpose of the LRA is *inter alia* to advance social justice, labour peace and the democratisation of the workplace by fulfilling the primary objects of the Act, which include giving effect to the fundamental rights conferred by the Constitution (including access to justice) and promoting the effective and speedy resolution of labour disputes.

19 The applicant's grounds for urgency are however not restricted to his

total loss of employment income for nearly a year and the fact that he has an award in his favour which is not being observed. There are additional circumstances that should be kept in mind.

20 As discussed earlier, this is the second time that the applicant has had to approach this court for an order enforcing an arbitration award against Respondent. On both occasions, the applicant was dismissed by respondent and then referred the matter to arbitration before the CCMA and obtained an award reinstating him. On both occasions the respondent has refused to comply with the award of the CCMA on grounds that might be fairly described as spurious, putting the applicant to the additional trouble and expense of approaching this court for appropriate relief.

21 In the present instance the award handed down on 16 August 2004 ordered the respondent to reinstate the applicant on or before 30 August 2004. On 30 August 2004 the applicant reported for duty and tendered his services at his office. The respondent admits this but informed the applicant that he should not report for duty as it was considering taking the award on review. On Monday, 6 September 2004 Applicant once again physically presented himself at his office to resume his duties. The respondent's security officials requested him to vacate the premises on the instructions of the CEO. The applicant was then informed in writing that

should the company decide to comply with the award he would be advised as such.

22 The applicant accordingly afforded the respondent the 6-week period requested by the respondent to consider taking the award on review. Had the applicant brought this application within that period the respondent would simply have said it was still deciding whether to have the award taken on review or not. By 28 September 2004 Respondent had decided not to do so. At this point there was hence no basis upon which the respondent could still refuse to at least pay the applicant the remuneration it had been ordered to pay for the period from January 2003. Consistent with the reticence it had displayed throughout its dispute with the applicant, the respondent simply did not do so. Instead it requested the applicant to attend a meeting for the purpose of discussing, amongst other things, the job description of Medical Superintendent and the required standards expected of the applicant.

23 The fact that the respondent wanted to discuss these things before complying with the terms of the award gives the lie to the respondent's contention that it was prepared to reinstate the applicant on the same terms and conditions of employment, as it was expected to do. If the respondent was prepared to comply with the award, to show good faith it

should firstly have paid applicant his remuneration, which it has yet to do, and secondly to have told the applicant to resume his former duties. There was no need for any discussion about job descriptions to be a pre-condition for reinstatement. If the award and compliance with it led to an operational requirements problem, it was incumbent on the respondent to deal with the problem after the applicant had been reinstated and remunerated, and in accordance with the rights and procedures contained in section 189 of the LRA. A letter of 28 September 2004 addressed by the CEO to the applicant makes it clear that the respondent did not intend to comply with the award, but instead planned to give the applicant a new job which it knew for a fact the applicant did not want, nor felt qualified to perform.

24 The applicant was informed that he was to be “reinstated” with immediate effect “retrospectively” to the position of Medical Superintendent. But the job as Medical Superintendent was on new terms and conditions of employment and subject to the company’s standard terms and conditions of service. The irrational, arbitrary and high-handed manner in which the CEO approached the matter is noteworthy when one considers that the dispute before the CCMA had centred on exactly this issue and the very basis of the award was that the applicant was not subject to the respondent’s standard conditions of service. And again

despite the respondent having communicated its view that the award was good in law and in fact, the CEO evidently had decided that he was free to impose on the applicant a bargain different to that initially agreed to by the applicant and later upheld by the CCMA. From the letter alone it is difficult to discern whether the CEO was acting *mala fides.* At the very least his stance reflects poor insight into the management of the situation. Whatever the case, his conduct was not in compliance with the award.

25 During October 2004 the applicant continued to meet on various occasions with the respondent in the hope of getting the respondent to comply with the arbitration award. All his endeavours were unsuccessful. To this day the respondent has not paid the applicant any remuneration for 2004.

26 Subsequent to a meeting of 27 October 2004 the applicant's attorney addressed a letter to the respondent recording concern about statements allegedly made by the CEO during the meeting to the effect that as long as he was CEO the applicant would never be reinstated as Occupational Health Practitioner; that as CEO he could hire and fire people as he wished; and that he refused to make the payments in terms of the CCMA award since in his opinion the award was calculated on the wrong salary amount. No response was received to this letter. The statements attributed

to the CEO at the meeting are not denied in the current application either.

27 In its answering affidavit the respondent is fairly direct. The CEO openly admits that he was not prepared to allow the applicant to return to work “as he was intent on occupying the position of Occupational Health Practitioner and not Medical Superintendent which was vacant”. He offers no real or convincing explanation for why he refused to pay the applicant his outstanding salary. In effect he has blatantly disregarded the award and simply refuses to comply. His attitude as the CEO of a large public enterprise committed to upholding constitutional values is troubling.

28 The respondent’s disdain of the CCMA award and of the applicant’s predicament is consequently worthy of urgent redress. In the face of such disdain, to strike the matter off for want of urgency would bring little credit to the administration of justice. The Labour Court in the interests of granting effective access to justice ought to come to the assistance of a litigant in exceptional circumstances such as these. The applicant has been without a salary for a year. The CCMA has twice upheld the special contractual basis of his employment. The respondent concedes that the CCMA’s findings are correct in both law and fact. It persists in flagrant non-compliance apparently in the hope of coercing the applicant to accept its preferred modification of the award. The respondent has had an

opportunity to put its case before the court and has raised no complaint about being prejudiced by the short notice. At the hearing of the matter Mr Cartwright, who represented the respondent, in the face of its concession that the award was not reviewable, could also point to no advantage in referring the matter to the opposed motion roll, other than it gaining more time to stall its compliance. Moreover, the applicant is 64 years old and nearing the end of his professional career as a medical doctor and should in the circumstances be spared unnecessary stress.

29 Rule 8(9) grants this court a discretion to deal with an application brought in terms of the rule in any manner it deems fit. As such in deciding to treat a matter as urgent the court must judicially consider all the circumstances bearing in mind the practical consequences of affording the applicant the unusual indulgence that he seeks. This is not a case in which there has been a significant deviation from form and process. The condonation sought relates exclusively to the shortened period for reply, which the respondent met with little demur. The deviation and indulgence requested is one easily tolerated when balanced against the value of advancing the effective administration of justice in the peculiar circumstances of this case. Therefore at the hearing I ruled that the applicant had made out a sufficient case for the application to be entertained as a one of urgency.

30 The respondent's second argument that the applicant has not complied with the requirements for an interdict is misplaced. This application, as stated before, is not an application for an interdict. It is an application for the enforcement of an award of the CCMA, first by making it an order of court in terms of section 158(1)(c) of the LRA and later if necessary by way of contempt proceedings as contemplated in section 143(4). Applications for interdicts are separately provided for in section 158(1)(a) of the LRA and have different requirements. It follows that it is not incumbent on the applicant to establish a *prima facie* right open to some doubt, a reasonable apprehension of irreparable harm, no alternative remedy or that the balance of convenience favours him. Section 158(1)(c) requires only that there be an award in need of enforcement and the court will normally exercise its discretion in favour of making it a court order - *Kgaditse v Pep Stores (Pty) Ltd* (1999) 20 *ILJ* 617 (LC); and *Phefo & another v Consteen Brickworks (Pty) Ltd* (1998) 19 *ILJ* 874 (LC). Rule 8 allows for an application to enforce the award to be brought on a basis dispensing with the requirements of rule 7 in exceptional and urgent circumstances. Once the conditions of urgency are met the court is at liberty to dispense with the ordinary requirements and the application in terms of section 158(1)(c) must be heard as it normally otherwise would. The pre-requisites for an interdict have no direct application in this case.

31 In *FAWU v Buthelezi & others* (1998) 19 *ILJ* 829 (LC) it was held that an award should not be made an order of court if no purpose would be served by doing so, in the sense that the award had already been complied with and the matter is a *fait accompli*. The respondent in this matter has contended that it has indeed complied with the award. From what has gone before, it is evident that I have reservations about whether it has indeed done so.

32 The award ordered the respondent to reinstate the applicant retrospectively on terms no less favourable than those that existed at the time of the applicant's dismissal on 31 December 2003. As seen in its correspondence, the respondent preferred its own interpretation of the award when it sought to impose its standard conditions of service in place of the applicant's unique terms of contract. It argued that it complied with the award by tendering to "reinstate" the applicant in the position of Medical Health Superintendent on 28 September 2004. The respondent's tender is not what Commissioner Wessels ordered the respondent to do. In ordering the respondent to reinstate the applicant the Commissioner made use of his powers in terms of section 193(1)(a) of the LRA, which provides that an arbitrator may order the employer to *reinstate* an employee from any date not earlier than the date of dismissal. Section

193(1)(b) of the LRA, on the other hand, provides for a different remedy, namely an order of re-employment. In terms thereof the Commissioner could have ordered the respondent to *re-employ* the applicant, either in the work in which he was employed before his dismissal or in other reasonably suitable work on any terms. In this case the Commissioner ordered reinstatement in terms of section 193(1)(a), not re-employment in terms of section 193(1)(b). In terms of section 193(1)(b) re-employment can be qualified to mean re-employment in other reasonably suitable work. In effect this is what the respondent's tender amounted to. Reinstatement cannot be qualified in this manner in terms of section 193(1)(a). Reinstatement by its very nature does not allow for the employee to resume service "in other reasonably suitable work". An employee may accordingly not be "reinstated" by an employer to a post inferior to that in which the employee was employed at the time of his dismissal or even in some other reasonably suitable position. That would not amount to reinstatement properly speaking, as provided for in section 193(1)(a).

33 The fact that the applicant was reinstated in terms of the award is supported by the fact that the Commissioner ordered that the reinstatement was to be "*on terms no less favourable than those that existed at the time of Applicant's dismissal*". The respondent was not ordered to reinstate the applicant *in a position* no less favourable than the

one he previously occupied nor in any other reasonably suitable position. He was put back into the job he held at the time he was dismissed.

34 The question to be determined then is what position did the applicant occupy at the time of his dismissal. The Commissioner determined in his award that as at 31 December 2003 the applicant, having resigned as Medical Superintendent in September 2003, occupied the position of Occupational Health Practitioner. As I have said, it is clear from a proper construction of the arbitration award as a whole that the applicant was employed as the Occupational Health Practitioner at the time of his dismissal. Moreover, the minutes of the meeting on 16 September 2003 indicate undoubtedly that the applicant was no longer prepared to continue in the position of Superintendent: Hospital and that he wished to be relieved of the responsibilities. This was accepted by the CEO, who instructed Mr Duckitt, the respondent's HR Manager, to adjust the applicant's salary accordingly. Since the applicant had never received the additional R9 000,00 per month promised to him, for assuming the duties of the Superintendent he had no problem with his salary being adjusted. Additionally, the Commissioner found that even after 1 October 2003 the applicant still performed certain Occupational Health Practitioner examinations, even though it had informed him that the post had been allocated to someone else. Besides, he was never informed that if he were

to accept the additional responsibilities and duties of Superintendent : Hospital, he would no longer be employed as the Occupational Health Practitioner. And in fact when promoted his designation was to be Superintendent and Occupational Health Practitioner. He still performed all the functions of the Occupational Health Practitioner and the Superintendent's work was merely additional. This position changed at the meeting on 16 September 2003 when the applicant informed the CEO that he was no longer prepared to work as Medical Superintendent: Hospital. No affidavit to the contrary has been filed in these proceedings.

35 Based on these facts, which the respondent has conceded to be correct, the applicant was reinstated by the Commissioner to the position of Occupational Health Practitioner on terms no less favourable than those that existed at the time of his dismissal on 31 December 2003. i.e. the "unique" terms that applied to his particular position, *inter alia* guaranteeing him employment until December 2005, and not on the respondent's standard terms.

36 In its replying affidavit the respondent does aver that at the time of his dismissal the applicant was both Medical Superintendent and Occupational Health Practitioner. It, nevertheless, does not tender to reinstate the applicant in both capacities, citing "logistical" difficulties in

reinstating him to the position of Occupational Health Practitioner since the post of Occupational Health Practitioner is no longer vacant, having been filled by someone else. If this was a valid excuse one would have expected the respondent to have raised it at the arbitration and to have argued that re-employment was the practicable option. The respondent did not do so and the Commissioner explicitly determined that no evidence was adduced to show that reinstatement was not the appropriate order. The respondent cannot now, for its own logistical reasons, simply refuse to comply with the award and by its own design effect a re-employment.

37 Furthermore, the respondent's actions belie its claim that the applicant has been reinstated. It has consistently refused to pay the applicant remuneration. He is told to work as Medical Superintendent, not as the Occupational Health Practitioner, on its standard terms, which the Commissioner found to be inapplicable.

38 The truth of the matter is that the respondent's problem, which is of its own making, is that it has filled the applicant's previous position as Occupational Health Practitioner with someone else. Exactly who this person is and the terms of his or her appointment are not explained in correspondence or the papers filed in this application. If it is true, this alone cannot justify its non-compliance with the award. It appointed someone

else to the position, knowing full well that the applicant disputed his dismissal as Occupational Health Practitioner and that he would be approaching the CCMA for reinstatement to this position.

39 In the premises I made the following order on 12 November 2004:

39.1 The provisions of the rules of this court relating to the time and manner of service are dispensed with and the matter is heard as one of urgency.

39.2 The respondent is ordered to comply with the award of Commissioner CJ Wessels under CCMA case number NC 42 / 04 dated 16 August 2004 and is ordered to;

39.2.1 reinstate the applicant retrospectively on terms no less favourable that those that existed at the time of the applicant's dismissal on 31 December 2003;

39.2.2 pay the applicant an amount of R345 659,45 in respect of his salary for the period January 2004-August 2004;

39.2.3 pay interest on the aforesaid sum at a rate of 15,5% per annum from 31 August 2004 to date of payment;

39.2.4 pay the applicant an amount of R86 414,86 in respect of his salary for the period September 2004-October 2004; and

39.2.5 pay interest on the aforesaid sum at a rate of 15,5% per annum from the first day of each month in which each sum became due.

39.3 Applicant is granted leave to approach this Court on the same papers, duly supplemented, for an order for committal of the respondent's directors for contempt of Court in the event of this Court's order not being complied with within 2 days of this order.

39.4 The respondent is ordered to pay Applicant's costs on the scale as between party and party.

MURPHY AJ

Date of Judgement: 12 November 2004

Date of Reasons: 6 December 2004

Applicant's representative: Adv R Stelzner instructed by De Klerk & van Gend Attorneys.

Respondent's Representative: Mr D Cartwright of David Cartwright Attorneys