(See **Grobbelaar v Federated Employers Insurance Co Ltd en ȟ Ander** 1974 (2) SA 225 at 230H-231A.)

Grounds of appeal

1. In his application for leave to appeal, applicant relied on a number of grounds to pursue his appeal. However, at the time of arguing the application, he concentrated on two of the grounds and abandoned the rest. The first ground was that the court erred in not upholding the second defendant's (applicant's) point *in limine*, to the effect that there was no longer any justiciable dispute between the plaintiff and second defendant following the granting of an order amending the pleadings of plaintiff. The second ground was that the court erred in not holding that the Instalment Sale Agreement and the Contract of Insurance, were *void ab initio* by virtue of the fact that plaintiff traded as an insurer, either on its own or in partnership with Guardrisk in violation of the Short Term Insurance Act, 53 of 1998. In support thereof, applicant referred to the case of **Verimark (Pty) Ltd v BMG AG** [2007] SCA 53 (RSA). In my view, this case is distinguishable from the case under consideration on the facts and is no authority for the particular ground advanced by applicant.

Opposition

2. The respondent, who is the plaintiff in the action, opposed the application and submitted that there are no reasonable prospects of success on appeal. In its

judgment, the court has given reasons for making the costs order against the applicant. The court has an inherent or common law jurisdiction to join a third party to the proceedings. The court also has a discretion to make a costs order against a third party where circumstances justify such an order. (See **Law of Costs,** AC Cilliers, para 11.22 and the authorities quoted therein.)

The Law

3. The relief sought by applicant in this application is in respect of the costs order against him. It is a trite principle of our law that the award of costs is a matter within the discretion of the trial court to be exercised judiciously on consideration of all the facts and as a matter of fairness to the parties concerned (**Rondalia Assurance Corporation of SA Ltd v Page and Others** 1975 (1) SA 708 (A) at 720C). A Court of Appeal will not easily interfere with such discretion. It will only interfere with such discretion if the trial court has failed to exercise such discretion judiciously or where the order is vitiated by misdirection or irregularity or where the court, acting reasonably, would not have made the order in question.

4. **Corbett JA** (as he then was) **in Attorney-General, Eastern Cape v Blom and Others** 1988 (4) SA 645 (A) at 670D-E, held that:

> "In awarding costs the Court of first instance exercises a judicial discretion and a Court of appeal will not readily interfere with the exercise of that discretion. The power of interference on appeal is limited to cases of vitiation by misdirection or irregularity, or the absence of grounds on which a court, acting reasonably, could have made the order in question. The Court of appeal cannot

interfere merely on the ground that it would itself have made a different order."

It is in the interest of the administration of justice and of the parties, that where the merits had been determined, finality, as a rule, has been reached. A court will in exceptional circumstances grant leave to appeal against a costs order only. Exceptional circumstances are issues of law, principle or practice. In such cases leave may be granted provided the amount of costs is not insubstantial and there are reasonable prospects of success on appeal. (**Kruger Bros & Wasserman v Ruskin** 1918 AD 63 at 69; **Divine Gates & Co v Press & Co** 1931 CPD 143 and **Tsosane and Others v Minister of Prisons and Others** 1982 (3) SA 1075 (C) at 1076H).

Evaluation

5. It is common cause firstly, that the principal litigant decided, at the commencement of the trial, to abide the judgment of the court; secondly, that, at the conclusion of the trial, the merits had been determined and thirdly, that the principal litigant opted not to appeal the judgment of the court. I am prepared to accept in applicant's favour that the costs would not be insubstantial having regard to the issues involved, the length of the trial and the fact that the costs order includes the costs of the employment of two counsel. In that respect, the costs order made by the court is against the first defendant and applicant jointly and severally, the one paying the other to be absolved; applicant sought to be joined of his own volition and the substantial costs that have been incurred is directly attributable to the action and conduct of the applicant.

6. The first issue to be determined is whether the matter falls within one or more of the exceptions to which I referred earlier and if so, the second issue would follow namely, what are the reasonable prospects of success on appeal. To bring the matter within the scope of the exceptions, applicant submitted that the second ground of his appeal namely, the validity of the Instalment Sales Agreement and the Contract of Insurance, involves a matter of principle. I will examine that proposition. It is common cause that the merits of the case have been determined by the court in favour of plaintiff and against the first respondent and in respect of which there has been no appeal. There is also no appeal by first respondent in respect of the adverse costs order against her. The adverse costs order against applicant is simply an expression of the court's displeasure at the manner in which the applicant conducted the litigation both on first defendant's behalf and on his own behalf. The present application is similarly a repetition of such conduct. The applicant is trying, through the back door, to have a rehearing of the merits of the matter by utilising the appeal procedure based on the costs order.

7. On the facts and circumstances of this case, I am of the view, that there is no matter of law, principle or practice which impinges on the costs award against applicant. The matter may have been different had first defendant appealed against the judgment. This did not happen. The *dictum* of Lord **De Villiers** in **Oudaille v Lewis and Others** 1914 AD 174 at 175, in the last paragraph, is apposite:

> *"If therefore this appeal had been only as to costs or if the appeal had been brought on other points merely in order to raise the question of costs, the appeal could not proceed."*

Even if I am wrong in that conclusion, I am not convinced that there are reasonable prospects of success on appeal in respect of the second ground. Full reasons for my findings have been given in my judgment.

9. I now return to the first ground, namely, the point *in limine*, that the amendment effectively meant that there was no longer a justiciable dispute between the parties. Applicant contended that plaintiff abandoned ownership of the motor cycle when Adv **Stockwell** SC on behalf of plaintiff, allegedly informed the court, during the trial, that plaintiff no longer required the motor cycle back and moved for the amendment of the pleadings. This was disputed by Adv **Bressler** who appeared for plaintiff at the hearing of this application. The facts also do not bear out the contention of applicant. With regard to the motor cycle, paragraph 9 of the particulars of claim was amended by substituting the following clause:

> *"Notwithstanding attempts made by plaintiff to recover from defendant possession of the motor-cycle, plaintiff has not to date hereof been able to recover possession of the motor-cycle."*

The amendment was aimed at bringing the pleadings in line with clause 12 of the Instalment Sales Agreement which provided that should the motor cycle not be recovered for any reason whatsoever, the value for the purpose of calculating the damages shall be deemed to be nil. From the amendment one cannot infer that plaintiff has abandoned ownership of the motor cycle.

10. I have perused the transcript of the proceedings of 28 February 2007 relating to the proposed amendment of the pleadings. Nowhere in the transcript does it appear that plaintiff has abandoned ownership in the motor cycle or that Adv **Stockwell** made such concession on behalf of plaintiff. The contention of applicant that the sole reason for his intervention in these proceedings was to protect his interest in the motor cycle is described by counsel for plaintiff as "dishonest and disingenuous". Plaintiff contended that it was nothing more than an attempt, on the part of applicant, to extricate him from these proceedings.

The court in awarding a costs order against applicant and first defendant jointly and severally made the following observation:

> "Despite the fact that first defendant decided to abide the decision of the court, second defendant persisted unrelentlessly with first defendant's defence. It was clear that his principal objective was to ensure that first defendant avoids payment of the balance owing in terms of the Agreement."

The court went on further to say that:

> "The first defendant can also not escape the consequences of second defendant's conduct because he was acting in terms of a power of attorney given by her to him."

I am of the view that there is no merit in the first ground of appeal and likewise there are no reasonable prospects of success on appeal in respect of such ground.

Conclusion

11. Besides the two grounds I have discussed above and on which applicant relied, he also raised a number of other grounds in his application but during the hearing, he abandoned those grounds. However, in my written judgment I gave full reasons for determining those issues which formed the subject matter of the other grounds which have been abandoned by applicant. In the circumstances, I conclude that there are no reasonable prospects of success on appeal either on those grounds relied upon by applicant presently, or those grounds abandoned by him at the hearing of this application. In the premises, the application for leave to appeal is dismissed with costs.

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