



**IN THE HIGH COURT OF SOUTH AFRICA
[CAPE OF GOOD HOPE PROVINCIAL DIVISION]**

In the matter between:

Case No.: 9958/06
"REPORTABLE"

**THUNDER CATS INVESTMENTS 49 (PTY) LTD
IZAK DANIEL PETRUS VISSER
JACQUES BRINK THERON**

**First Applicant
Second Applicant
Third Applicant**

and

**EDMOND MICHAEL FENTON
STRAND BEACH HOTEL (PTY) LTD
EMOR TRADING NO 14 CC t/a ITT CONNECT
THOMAS ALTMAN**

**First Respondent
Second Respondent
Third Respondent
Fourth Respondent**

JUDGMENT DELIVERED ON 12 DECEMBER 2008

LE GRANGE, J:

[1] This is an extended return day of a rule *nisi* granted by Yekiso J. The Applicants seek an order to confirm the rule as the Respondents contravened paragraphs 1.1, 1.3, 1.4 and 2 of an Order of this Court dated 16 February 2007 and are as such guilty of contempt of Court. The Applicants are also seeking a costs order against the First and Second Respondents' Counsel, as the principal issues in

the counter-application have been determined by other Courts, including the Supreme Court of Appeal and Constitutional Court.

[2] First and Second Respondents opposed the application and filed a counter-application and an amended counter-application. First Respondent, who is a member of Second Respondent, finds himself abroad in France. It appears that First Respondent, leaving the country, constituted a breach of certain bail conditions in a matter where he is arraigned on several counts of fraud and theft, and pursuant thereto, a warrant for his arrest was issued.

[3] Third Respondent is eMor Trading, a close corporation and trading as iTTConnect, who does business as an Internet service provider.

[4] The Fourth Respondent is Thomas Altman, the sole member of Third Respondent, who is cited in his capacity as member of Third Respondent and in his personal capacity.

[5] Third and Fourth Respondents did not file any papers, but in an e-mail to Applicants' attorney stated that they did not deem their conduct contemptuous of this Court's order.

[6] The issues for determination in this matter are firstly, whether the counter-application as amended is irregular, too late, vexatious and an abuse of the process

of this Court and secondly, whether the Respondents are in contempt of an order of this Court.

[7] On 16 February 2007 Desai J, granted an order which states the following:-

"1. *The respondents are interdicted and restrained from alleging to third parties other than persons in authority who have a legitimate interest therein:*

1.1 *That applicants obtained the Court order granted by this Court under case number 5516/2005 by fraud.*

1.2 *That the applicants are dishonest.*

1.3 *That the applicants are unlawfully conducting the hotel business known as Ocean View Hotel at 17 Beach Road, Strand.*

1.4 *That the respondents, or a concern in which they have an interest, are lawfully conducting a business which provides restaurant, breakfast, bar, room service, conference or reception facilities or any other business save that of a letting agent of sectional title units at 17 Beach Road, Strand. In particular that:*

1.4.1 *they are able to conduct a restaurant and/or conference and/or bar business and/or they are able to provide such facilities at that place.*

1.4.2 *through the use of photographic or other visual materials to advertise their business at 17 Beach Road, Strand, together with the words, "hotel", "hotel business", "conference", "conference business", "restaurant", "restaurant business", "breakfast", "bed and breakfast", "hotel service", "room service" or any combination of the foregoing in*

a manner which conveys the impression that respondents are able to supply any of the aforesaid services at the said premises.

1.4.3 to advertise by way of photographic or other visual material and in the process display the contents of section 1 of the premises, in particular the restaurant, reception and conference areas thereof.

1.4.4 by making available to the public respondents' telephone and fax numbers and/or email addresses and/or any other contact address as being the contact numbers of the hotel, conference and restaurant businesses being conducted as 17 Beach Road, Strand.

2. That the respondents are interdicted from accepting bookings or deposits in respect of the supply of conference, restaurant and bar facilities provided by the Ocean View Hotel at 17 Beach Road Strand.

3. It is declared that the respondents are guilty of contempt of court in that they breached the rule nisi issued by this Court under the abovenamed case number dated 20 September 2006 by:

3.1 representing that they are conducting hotel, conference, restaurant, breakfast, reception, bar and room service facilities at 17 Beach Road, Strand.

3.2 placing bookings in respect of inter alia the delivery of such services.

3.3 accepting deposits in respect thereof.

4. The counter-application is dismissed.

5. Respondents are ordered, jointly and severally, to pay the costs of this application and the costs of the application for contempt of court and counter-application."

[8] Pursuant to this order, the Respondents were granted leave to appeal to the Supreme Court of Appeal. On 28 March 2007 Desai J, ordered that the Court order dated 16 February 2007 be enforced pending the outcome of the appeal to the Supreme Court of Appeal. This order by Desai J, was also attacked by the Respondents.

[9] First and Second Respondents' counter-application was framed as follows:

- "(a) *that the interim relief granted by his Lordship Mr. Justice Yekiso on 11 July 2007 be set aside;*
- (b) *that the further relief set out in Applicants' notice of motion dated 11 July 2007 be refused;*
- (c) *that the interlocutory order granted in terms of rule 49 (11) by his Lordship Mr. Justice Desai under the above case number on 28 March 2007 be set aside with costs on the attorney and client scale;*
- (d) *that Applicants are interdicted from unlawfully interfering with the conduct by First and Second Respondents of Second Respondent's hotel business, by any of the following acts –*
 - (i) *interfering with guests booked and/or placed in hotel units/rooms at 17 Beach Road, Strand ("the premises") by Second Respondent, including by demanding of them, and/or suggesting to them, that they should pay any representative of First Applicant for such accommodation or for alternative accommodation offered to them in the premises by First Applicant, other than for any services other than room accommodation actually supplied to any such guest by First Applicant in terms of any arrangement made with First Applicant by*

such guest, by the unit holder of the relevant room/unit, or by Second Respondent;

(ii) disseminating false information about Respondents to First Respondents' guests and/or suppliers and/or clients and/or business contacts and/or any other third parties with whom/which Respondents may wish to do business in connection with Second Respondent's hotel business, such false information to include, but not be limited to conveying or implying to any of such parties any of the following:

(aa) that Second Respondent sold its hotel business to Applicants or any entities controlled by any of them;

(bb) that Second Respondent no longer does business at 17 Beach Road, Strand;

(cc) that Strand Beach Hotel at 17 Beach Road no longer exists;

(dd) that First Respondent has been fired;

(ee) that Respondents or either of them cannot book guests into the premises;

(ff) that either of Respondents' website is false;

(gg) that Respondents or either of them have issued or will issue fake booking confirmations;

(hh) that Respondents or either of them has, or would in the future, "set" anyone "up" and/or is dishonest;

(ii) that Respondents or either of them have made a "victim" of any prospective hotel guest;

- (jj) *that Respondents or either of them have been or would ever be guilty of "hotel booking scams"*
- (e) *that Applicants are interdicted from accepting deposits and/or bookings and/or payments for accommodation and/or providing accommodation in respect of any rooms/units booked by Second Respondent;*
- (f) *that Applicants are interdicted from holding First Applicant out to be Second Respondent for the purposes of obtaining payment of any moneys at all, including but not limited to obtaining payment of moneys due to Second Respondent and/or for the purposes of in any way diverting and/or attempting to divert to any of the Applicants or any of their agents, servants or representatives, deposits, accommodation payments and/or any other moneys due to Second Respondent;*
- (g) *that Applicants are interdicted from holding First Applicant out to be Second Respondent by flighting, either directly or through any third party, and/or allowing or encouraging any internet website or web link whose web address and/or web information contains the words "Strand Beach Hotel" or any words calculated to cause confusion in the public mind and/or create the impression that any business conducted or associated with First Applicant is linked in any way in the course of trade with First Respondent's Strand Beach Hotel business;*
- (h) *that Applicants are interdicted from making use of any of Strand's intellectual property, including but not limited to the photographs and other material uplifted from Strand's current website and incorporated into Thunder's current website;*
- (i) *that Applicants are interdicted from selling Unit 1 of the premises (whether separately or together with Unit 3 of the premises or any other unit) upon terms that do not disclose to the purchaser(s)*

that First Respondent claims to be entitled to be restored to possession of Unit 1 thereof pursuant to its rights under the provisions of the lease referred to in the evidence in Cape High Court Case No 5516/05, unless First Respondent's consent is first obtained in writing to a relaxation of this interdict upon such terms as First Respondent may agree with Second and Third Applicants on behalf of the seller;

- (j) that the said Unit 1 shall be sold together with its hotel operating contents, save that such sale shall expressly exclude all items that are the subject matter of Respondents' spoliation claims under Cape High Court Case No 6722/06 and all items that may have been left upon the premises that are not the property of the seller but owned by either of Respondents and/or any other entity in which Second Respondent has an interest, unless Respondents' content in writing is first obtained for a relaxation of this interdict upon such terms as Respondents may agree with Second and Third Applicants on behalf of the seller;*
- (k) that in the event of the said Unit 1 being sold together with Unit 3 (or any other unit), separate prices shall be stipulated for the respective units, and the price so set for Unit 1 and its said included contents shall not be less than the fair market value of Unit 1 together with the movables to be included with the sale ("the Unit 1 selling price");*
- (l) that in the event of the said Unit 1 being sold alone, the price set for Unit 1 and its said included contents shall similarly not be less than the fair market value of Unit 1 together with the movables to be included with the sale;*
- (m) that Second and Third Applicants shall be obliged to notify Second Respondent by email at Edmond@strandbeach.co.za of the proposed Unit 1 selling price in sufficient time for the purposes of the next subparagraph of this order;*

- (n) *that in the event that Second Respondent, within 72 hours of such emailed notification, disputes that the Unit 1 selling price reflects a fair market value, any such sale shall be subjected to confirmation by the Cape High Court;*
- (o) *that any such notification by Second Respondent shall be furnished by email addressed to Applicants' attorney of record, Riaan Nabal at Riaan@visservennote.co.za;*
- (p) *that in the event of a sale of Unit 1 taking place, transfer of the property into the name of the purchaser(s) shall be attended to by a firm of attorneys to be nominated by the chairperson for the time being of the Law Society of the Cape in consultation with the Registrar;*
- (q) *that the full proceeds of such sale shall be paid into an interest bearing trust account opened by the said firm in the name of the Registrar and held there, unless otherwise agreed between the parties in writing, pending a further order by the Cape High Court in the light of the final outcome of pending Case No 6756 in that court, or on appeal to any higher court from any decision in that matter until the matter has finally been determined;*
- (r) *that Applicants are directed to publish, within 72 hours of the granting of this order, in the Cape Times and The Star newspapers respectively, under the respective headings "HEARTBREAK HOTEL: RETRACTION AND APOLOGY" and "HOTEL SCAMIFORNIA: RETRACTION AND APOLOGY" (such headings to be in a font of less than the fonts of the headings to annexure JBT4 to Applicants' founding affidavit and annexure B to Respondents' Statement of Case respectively) a retraction and apology for the false and misleading statements published of and concerning Respondents in the said annexure, such retraction and apology to cover all to the false and misleading statements dealt with in Respondents' Statement of Case*

and to be upon terms to be settled between counsel for the respective parties or, failing such agreement, by the court;

- (s) that Applicants are directed to publish, within 72 hours of being furnished with confirmation of any relevant publication by email by the relevant editor, a similar retraction and apology (appropriately headed and fonted, mutatis mutandis) in any other South African newspaper in which a full or abridged version of the article comprising the said annexures may have been, or may yet be published;*
- (t) that Applicants are directed to publish the full text of the said retraction and apology (as agreed or directed by the court) upon their www.oceanviewhotel.co.za website and/or any other website operated and/or controlled by them in connection with the Ocean View Hotel business currently conducted by them;*
- (u) that such website publication(s) shall be accessed directly from the main home page of such website by way of a link "button" featured as prominently as all other main links on such home page, and bearing the words "Strand Beach Hotel: Retraction and Apology";*

or granting further and/or alternative relief."

[10] First and Second Respondents also sought to amend their Notice of Opposition and Counter-application. Applicants did not oppose the amendment in principle. The amendment is framed as follows:-

"by the insertion immediately after paragraphs (c) thereof of a paragraph (c) bis reading as follows -

'that it be declared that all judgments and order obtained by Applicants in their favour in Cape High Court Case Numbers 5516/05; 12830/05; and Constitutional Court Case No CCT34.06 were obtained by fraud and are accordingly null and void';

by the insertion, immediately after paragraphs (u) thereof of a paragraph (v) reading as follows –

'that Applicants are interdicted from executing upon any costs orders they may have had taxed pursuant to any orders made in any of the matters referred to in paragraph (c) bis above;'

and by the insertion immediately after the new paragraph (v) thereof of a paragraph (w) reading as follows –

'that CONSOLIDATED AUTONIEERS AND PROPERTY EXECUTORS CC ("Consolidated"), represented by its members, Second and Third Applicants, is joined as a respondent for the purposes of the relief sought by First and Second Respondents (as applicants) in paragraph (c) bis and paragraph (i) to (q) above, and that references to the applicants or any of them in the said paragraphs shall be deemed to include a reference to, and to bind, Consolidated for the purposes of this order.'"

[11] The Applicants' main complaint, as recorded in the founding affidavit of Jacques Brink Theron, the Third Applicant, is that despite the Respondents' compliance for a few months with the Court order of 16 February 2007, an article in a leading local newspaper exposed the Respondents' unlawful and willful breach of the said order of Court. The Respondents, according to Third Applicant, has again advertised the Applicants' hotel business at 17 Beach Road, Strand and accepted a

deposit from a customer. Moreover, First Respondent repeated the allegation that the Court order granted by Griesel J, in case number 5516/2005 was obtained by fraud.

[12] The Applicants contend that the Respondents' counter-application is irregular, too late, vexatious and constitute an abuse of the Court's process as the averment of fraudulent conduct on behalf of the Applicants were repeatedly made before Courts of this Division and the higher Courts, which was dismissed. The Applicants also filed a notice in terms of Rule 47(1) and demanded that the Respondents furnish security in respect of their counter-claim, before being permitted to prosecute their counter-claim. The application for security, in respect of the counter-claim, was also attacked by the Respondents.

[13] The papers in this matter are voluminous. First and Second Respondents' opposing papers were framed in a "Statement of Case" and consisted of more than 250 pages excluding the annexures thereto. The amended counter-application were also more than 80 pages excluding the annexures attached to it. In addition, First and Second Respondents have incorporated by reference virtually all the papers in previous proceedings between the parties, running into hundreds of pages.

[14] There is a history of litigation between the Applicants and the First two Respondents. The history of litigation has its origin in the matter which was fully ventilated before Griesel J, who on 8 December 2005, in this Division in case

5516/2005 held, that the Applicants are entitled to free and undisturbed possession of property, comprising of units 1, 2 and 3, in a complex situated at Strand Beach Hotel, 17 Beach Road, Strand. An application for leave to appeal against this judgment was refused and thereafter applications directed to the Supreme Court of Appeal and the Constitutional Court for leave to appeal against the judgment, were refused which has the effect that the judgment is final and binding on all parties.

[15] The historical background between the Applicants, First and Second, Respondents which resulted in the litany of litigation between these parties, are well documented in the judgments handed down by the various Judges. I deem it not necessary to summarize it for present purposes.

[16] Mr RS van Riet, SC, who appeared on behalf of the Applicants, argued that the Respondents' unwillingness to accept the outcome of the decision of Griesel J, including that of Desai J, dated 16 February 2007 and various other judgments of this Division, underpins First and Second Respondents' attitude as reflected in their Statement of Case and counter-application. Mr Van Riet, *in limine*, contented that First and Second Respondents' counter-application, including the application for the setting aside of the rule 49(11) order of Desai J, should be dismissed with an appropriate costs order as it is irregular, too late, vexatious and constitutes an abuse of the process of this Court. According to him the counter-application should also not be entertained until the Respondents purged their contempt of Court. He also argued that the principal issues raised in the counter-application have been determined by

other Courts, including the Supreme Court of Appeal and the Constitutional Court. Moreover, according to him the Respondents are willfully in flagrant breach of an order of this Court and accordingly are guilty of contempt of Court. He requested that the rule *nisi* be made final and that First and Second Respondents' counsel jointly be held liable for the costs incurred in these proceedings as it is evident he is the driving force behind these proceedings.

[17] Mr P Hazell, SC who according to himself, had permission from the Cape Bar Counsel to appear *pro amico* on behalf of the First and Second Respondents and without an instructed attorney, argued at length that the Applicant's contention *in limine* is without merit. He contended that when the First and Second Respondents reconstituted its website, together with its former photographic and other material referred to in the founding affidavit by Third Respondent, the entire contents of the site was accompanied and appropriately qualified by Strand's disclaimer and as a result is not contemptuous of the said order of Court.

[18] The principal arguments by Mr Hazell, briefly stated, are that the judgment of Griesel J, of 8 December 2005, is untenable and bad in law. Furthermore, the various orders of the Courts flowing from this judgment have been obtained by the fraudulent and mischievous conduct of the Applicants. Moreover, the various Judges dealing with the matters thereafter, including the Judges of the Supreme Court of Appeal and Constitutional Court did not apply their minds properly or acted in a

manner that is questionable. He accordingly requested that the relief sought by the First and Second Respondents in the counter-application as amended, be granted.

[19] The thread than runs through the Statement of Case of First and Second Respondents is that the Applicants obtained an order from this Court (Griesel, J) by fraud, and their actions are therefore justified on the basis of truth and for the public benefit available to them.

[20] The alleged fraud as contended by First and Second Respondent, and vociferously supported by Mr. Hazell, arises from the contention that the Applicants: *"had lied regarding material aspect of their cause of action"*.

[21] Gleaning from the judgment of Griesel J, it is evident that his finding was based upon an interpretation of a written agreement between the parties. Griesel J, specifically disavowed any reliance on the parties' statements as to their subjective intentions. The judgment could therefore not possibly have been induced by any fraudulent statement as the Court simply did not have regard thereto.

[22] It is not the first time, in this matter, that First and Second Respondents, including Mr. Hazell on behalf of his clients, raised the issue of fraud and misconduct on the part of the Applicants. It has been raised in papers before, in Courts of this Division, including the Supreme Court of Appeal and the Constitutional Court. Having regard to the papers before me, it is overwhelmingly evident that what underpin the

First two Respondents' attitude, including that of their counsel, is their reluctance and/or unwillingness to accept the judgments, including that of the higher Courts. Moreover, First and Second Respondents, with the support of their counsel, have persistently attacked the various Judges who previously dealt with matters between the Applicants and themselves of "mishandling" their case. The Judges are accused of being biased and displaying an uneven hand. Others are accused of acting in a manner that is arbitrary, capricious, unreasonable, inexplicable, absurd and incapable of rational explanation and contrary to the tenets of natural justice. Some are also accused of failing to applying their minds properly. The allegation has also been made, that there is a closure of judicial ranks. The following is an excerpt of some of the many bold statements upon which Mr Hazell relied in his heads of argument.

- "34. *Because this application is about fraud, it is essential for the presiding judge to remain impervious to the facts that 1 judge (Griesel, J) has found that there was a sale of Strand's hotel business; that 2 more (Scott JA and Cachalia AJA) later refused leave to appeal and that, later still, a panel of 9 Concourt judges unanimously also said "NO".*
35. *No judge or advocate worthy of his or her salt would ever reason, 'Well, 12 judge's all seem to have thought Griesel, J was right, ergo he must surely have been spot on.' This is not what legal training teaches, let alone what the laws of logic dictate.*
36. *Moreover, once the thinking mind actually confronts the clear and simple contents of the first sale agreement, even without considering the plethora of other impenetrably sound points with which Respondents' Concourt papers abound, any such mind can regrettably only be forced to wonder how much careful thinking could possibly have been done by any of the judges among the twelve.*

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41. *Despite the binding obligation placed upon judges by the rule of law, as now entrenched in the Constitution, to provide litigants with reasons for their decisions, Judge Griesel offered not one single supporting strut for his bizarre 'view' that 2 little phrases that inter many movable alia covered Tirade's saucepans and such stuff were 'wide enough' to cover the purported sale of an entire hotel, conference and restaurant business, lock, stock and barrel – including the staff and all their problems, the uncounted stock, the unmentioned liquor licence, the unmentioned lease, the unmentioned future bookings, all outstanding debts, all outstanding claims and the whole unmentioned rigmarole of the of the convoluted accommodation pool agreement and its related agreements.*

42. *Wide enough these mini-phrases indubitably were not.*

43. *Against Griesel J's total score of zero reasons for his 'wide' finding, Respondents came up with no fewer than 10 as to why he was completely wrong! And that was just regarding that one point. In addition there were a host of other sound grounds of appeal, including that other Major Mystery, the Completely Missing Section 228 Resolution for Strand.*

44. *To date hereof nobody in the whole wide world has yet come up with a single reason to suggest that even one of Respondents' host of arguments against the Griesel finding can rationally be faulted at all. This wide world includes the said 12 Judges from Griesel, J up to the Concourt 9; the 5 legal practitioners involved on Visser's legal team; Judges Van Reenen and Desai; the bar council's very senior and experienced disciplinary, committee comprising an ex-chairman of the General Council of the Bar and an ex-chairman of the Johannesburg Bar*

Council; the 9 members of the Cape Bar Council who ignored the law completely in order to find against Hazell; and the 14 members of the full bar council who refused to budge when called upon to fix their colleagues' foul-up, with chapter and verse pertaining to 2 binding constitutions, a simple bar rule and a smorgasbord of neatly potted law."

[23] In argument, Mr Hazell again contended that he is not in contempt of Court if he says that the Judges of the Supreme Court of Appeal did not apply their minds properly, as their decision to refuse his clients' application for leave to appeal was absurd. Mr Hazell also referred to the Constitutional Court's 'unseemly haste' decision to dismiss the application for leave to appeal. The contention that one of the Judges who participated in the decision of the Constitutional Court, namely Judge Yacoob, who is blind and not in a position to study and carefully consider material documents of the papers filed, surfaced again in argument. This issue was also raised on papers before Griesel, J. In his judgment in case no 4246/06 dated 20 June 2006 at paragraph 22, the following was held:-

".... Strand Beach Hotel launched its application for leave to appeal to the Constitutional Court. It maintained 'that the merits of the grounds of appeal in the material placed before the SCA are so patent that no judge, acting reasonably, could have exercised the relevant discretion conferred upon the SCA by refusing leave to appeal'. The application was dated 15 May. The opposing affidavit on behalf of Consolidated was filed with the Constitutional Court on 26 May. On 1 June, with what Gersman described as 'unseemly haste', the Constitutional Court dismissed the application with costs. One of the reasons for this startling accusation is based on her assertion that one of the judges who

participated in the decision of the Constitutional Court, namely 'Judge Yacoob' (sic) is blind. She thereupon proceeds as follows:-

'The haste with which the decision was reached becomes more disturbing when regard is had to the fact that it appears to have been in any proper position to study and carefully consider 98 pages of the material documents. The documents at pages 209 to 307 of the file are important, complex, inter-related documents. Some of them are both mind-bogglingly convoluted and confusing as to their intention and effect until very carefully sifted through and considered with extreme care....

...In this regard, counsel has been informed, so I understand, by both Stander and the learned judge's registrar that documents are sometimes read to Judge Yacoob by others. Applicants contend that a perusal of pages 109 to 307 of the file should convince the Honourable Court that any such reading as might have occurred in the interval between 25 May and 1 June 2006 is unlikely to have placed Judge Yacoob in a position properly to consider the relevant, documents, let alone to analyze what some of the Respondent's more abstruse drafting was actually intended to achieve, let alone what it in fact did achieve.'

As for the merits of the Constitutional Court's decision, namely to dismiss the application with costs, Gersman concluded by stating that 'were there a higher court to apply to, Fenton and Strand would apply to that court for leave to appeal against the decision of the Constitutional Court on precisely the same grounds as those upon which their application to that court was based.'

In my view, the allegations quoted above are not only scurrilous; they are contemptuous of the two highest courts in the country."

[24] I am in agreement with this conclusion of Griesel J.

[25] Every citizen has the right to make fair comment, even robust comment, on the conduct of Judges as matters of public interest, provided that the comment is made *bona fide*, free of malice and without sinister motives. In this regard, see S v Moila 2006 (1) SA 330 TPD at 347 A. In the present instance, it appears the only motive for the vile attack on the Judges, is them making decisions that do not suit the Respondents and their Counsel. The attack on the judiciary by First and Second Respondent supported by Mr Hazell, has been relentless and scurrilous. First and Second Respondents are clearly in contempt of this Court. Another disturbing feature of the counter-application for the setting aside of this Court's order dated 28 March 2007, is the timing thereof and the attack on Desai J, of being biased. According to the papers filed, Desai, J informed the Respondents and their counsel timeously, at the start of the proceedings, that he will recuse himself if Respondents bring such an application. Despite the Respondents and their counsel being fully aware of the facts which now appears to be an issue, they did not make such a request. The counter-application was only launched on 19 August 2007, which is six weeks after the Applicants launched their application in this matter. Moreover, the whole of the prosecution of the appeal, despite being granted on 21 February 2007, has not been filed timeously as required by the Supreme Court of Appeal rules and accordingly been delayed for approximately 6 months. The attack by the Respondents is on an interim procedural ruling pending the appeal. I am in agreement with the proposition by Mr. van Riet, that all of this constitutes vexatious conduct and should not be tolerated. Moreover, the factual basis as set out by First and Second Respondents in the Statement Case, does not entitle them to any relief.

I am therefore satisfied that the points *in limine* raised by Mr Van Riet, is justifiable and that the counter-application as amended by the First and Second Respondents is without merit and should be dismissed. The proposition that this Court should also not entertain the counter-application until the Respondents have purged their contempt, is thus not without merit. In this regard see Soller v Soller 2001(1) SA 570 at 573. I deem it therefore unnecessary to consider the application that First and Second Respondent should also provide security in terms of Rule 47(1) in respect of their counter-application.

[26] This brings me to the rule *nisi*. It is not in dispute that the Respondents made use of a website to advertised its business as stated in the newspaper article dated 2 July 2007 and accepted bookings and deposits. It is also not in dispute that a person from Johannesburg made a booking and his deposit monies were accepted by First Respondent. On the strength of the information and pictures on the website, purporting that First and Second Respondent are conducting a hotel business at 17 Beach Road, Strand the person and his family arrived at the Applicants hotel, only to be told there was no such booking. The Respondents justify their action on the basis that the website, together with its photographic and other material, was accompanied by an appropriate disclaimer.

[27] The disclaimer at the bottom of the website is framed as follows:-

"Disclaimer: In relation to all pictorial content, Strand Beach Hotel [Pty] Ltd in contradicting with individual independent unitholders does in no way hold

itself to be the owner of any portion of the Penbay Sectional Title Scheme or any other entity so depicted for the purposes of any reservations made for guests to be accommodated in individual unitholders units. Strand Beach Hotel [Pty] Ltd undertakes to provide no service other than that which it contracts specifically with its valued guests. –

Edmond M. Fenton Managing Director Strand Beach Hotel [Pty] Ltd

P.O. Box 490, Strand, 7150

Tel: +2782 490 1641

Fax: +2786 650 2415

Email: Edmond@strandbeach.co.za

www.strandbeach.co.za

[28] It is obvious and for all to see, as depicted in the extracts of the webpage as downloaded, that the pictorial content of the webpage where the disclaimer appears depicts the business of the Applicants. The introduction of the disclaimer by the Respondents cannot, in this instance, justify their flagrant disregard of the court order dated 16 February 2007. Moreover, the wording of the disclaimer does not detracts from the fact that the Respondents are advertising a hotel business at 17 Beach Road, Strand which is in direct contravention of this Court's order and the Applicants are thus entitled to the relief sought in the notice of motion.

[29] Finally with regard to costs, the Applicants seeks an order to hold First and Second Respondents' counsel jointly liable for costs, insofar as it relates to the counter-application proceedings.

[30] An order to hold a litigant's legal practitioner liable to pay the costs of legal proceedings is an unusual and far-reaching. Costs orders of this nature are not easily

entertained and will only be considered in exceptional circumstances. See Machumela v Santam Insurance Company Ltd 1977 (1) SA 660 (A) and Webb and Others v Botha 1980 (3) 666 NPD at 673 B-E.

[31] In the "Statement of Case", the affidavits filed by Respondents in case number 9958/06, has been incorporated by reference. In those proceedings, Respondents' affidavits in all the earlier proceedings likewise have been incorporated. Some of these affidavits contain allegations of the most serious order, against certain Judges, including Judges of the Supreme Court of Appeal and the Constitutional Court. The "Statement of Case" also displays a complete disregard of the legal and binding nature of the Court judgments and orders and attack the validity and binding effect of the very first judgment by Griesel, J of December 2005 and those that followed it in a contemptuous and scurrilous manner. Mr. Hazell has openly declared on several occasions that he is responsible for the formulation of certain of the Respondents affidavits and took full responsibility for the allegations made therein. Mr. Hazell was also found guilty by the Cape Bar Council for his conduct relating to the matter, where Griesel J, presided in.

[32] It needs to be mentioned that Mr Hazell has subsequently resigned as member of the Cape Bar Council. The approach adopted by Mr Hazell in this instance, is no different to matters that was previously comprehensively rejected by other Courts. Mr. Hazell has acted *pro amico*, without the instructions of an attorney, and there can be little doubt that the parties are before this Court as a

result of the legal assistance and support he has given to the Respondents. The mountain of paper generated by Mr Hazell, in this matter was significant. Unnecessary costs were being incurred by the parties for no other reason than the apparent obsessive unwillingness by Mr Hazell and his clients to accept the outcome of the decisions of the Courts of this Division, including that of the higher Courts. The First Respondent finds himself currently in France and seemingly a fugitive of justice of this Country. As an officer of this Court one would have expected, having regard to circumstances and history of this case and Mr Hazell's years of experience, to have advised his clients differently. Instead he persisted with the counter-application knowing that certain of the relief sought was comprehensively rejected by the higher Courts.

[33] The dictum of Gardiner JP, although it relates to attorney and client costs, in In re Alluvial Creek Ltd 1929 CPD 532, is in my view apposite in this case. At 535 the learned Judge held: "...There are people who enter into litigation with the most upright purpose and the most firm belief in the justice of their cause, and yet whose proceedings may be regarded as vexatious when they put the other side to unnecessary trouble and expense which the other side ought not to bear."

[34] Mr Hazell's conduct, including his clients, in these proceedings has undoubtedly put the Applicants to unnecessary trouble and expense which is they ought not to bear. I am satisfied that it will not be unjust and inappropriate to make a punitive costs order against First and Second Respondents including their Counsel with regard to the counter-application as amended.

[35] In the result, the following order is made:

1. Paragraphs 4.1 and 4.2 of the rule *nisi* granted by Yekiso J, on 2 July 2007 is hereby confirmed.
 - 1.1) First Respondent is sentenced to four (4) months imprisonment which sentence is suspended on condition that the First Respondent appears before this Court within 30 days of date hereof to show cause why he should not be committed to prison with immediate effect. Failing which, a warrant of arrest is authorized for his immediate arrest for committal.
 - 1.2) Second, Third and Fourth Respondent are Fined R 10 000 each, which is wholly suspended for a period of 3 years on condition that they are not found guilty again of contempt of Court of this Court's order, case number 9958/2006 dated 16 February 2007, committed during the period of suspension.
 - 1.3) The Respondents are ordered, jointly and severally, to pay the costs of this application and the cost of the application for the contempt of court, the one paying the other to be absolved.

- 2) The counter-application is dismissed. The First and Second Respondents and Mr. Hazell, are ordered to pay the costs jointly and severally on an attorney and client scale, the one paying the other to be absolved.

LE GRANGE, J

**IN THE HIGH COURT OF SOUTH AFRICA
[CAPE OF GOOD HOPE PROVINCIAL DIVISION]**

Case No.: 9958/06

In the matter between:

"REPORTABLE"

**THUNDER CATS INVESTMENTS 49 (PTY) LTD
IZAK DANIEL PETRUS VISSER
JACQUES BRINK THERON**

**First Applicant
Second Applicant
Third Applicant**

and

**EDMOND MICHAEL FENTON
STRAND BEACH HOTEL (PTY) LTD
EMOR TRADING NO 14 CC t/a ITT CONNECT
THOMAS ALTMAN**

**First Respondent
Second Respondent
Third Respondent
Fourth Respondent**

Dates of hearing:

**12 and 13 September 2007
18 October 2007**

Date of Judgment:

12 December 2008

Adv. for Applicants:

Adv R.S Van Riet (SC)

Attorneys for Applicants:

**Visser & Vennote
Mr PR Nabal**

Adv. for Respondents:

Adv. P. St C. Hazell (SC)
