THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Not reportable
Case no: 305/07

In the matter between:

THE DIRECTOR OF PUBLIC PROSECUTIONS (KWAZULU-NATAL) **APPELLANT**

and

ALECK HENRY **1ST RESPONDENT**

PRISHIKA PILLAY **2ND RESPONDENT**

S.N. **3RD RESPONDENT**

Coram: **SCOTT, MTHIYANE, CLOETE, MLAMBO JJA *et* MHLANTLA AJA**

Date of hearing: **19 MAY 2008**

Date of delivery: **29 MAY 2008**

Summary: Power of Court of Appeal to interfere with exercise of discretion as to costs by court of first instance – only in event of misdirection, irregularity or no grounds on which court acting reasonably could have made the order it did.

Neutral citation: *Director of Public Prosecution v Henry* (305/07) [2008] ZASCA 63 (29 May 2008)

J U D G M E N T

SCOTT JA/ ….

SCOTT JA:

[1] This is an appeal against an order of costs granted against the appellant in review proceedings in the High Court, Pietermaritzburg. The order was granted by Combrinck J with whom Balton J concurred. On a subsequent occasion, in the absence of Combrinck J, Balton J, with Koen J concurring, granted leave to appeal to the full bench of that court. Later, no doubt because such an appeal would be incompetent, the order was altered and leave was granted to this court.

[2] It is well established that in awarding costs, a court of first instance exercises a judicial discretion and a court of appeal will interfere only if the exercise of that discretion is vitiated by misdirection or irregularity, or if there are no grounds on which a court, acting reasonably, could have made the order in question. Merely because the court of appeal may have made a different order is no justification for interference. See eg *Naylor v Jansen* 2007 (1) SA 16 (SCA) para 14 and the authorities there cited.

[3] Against this background, I turn to the circumstances in which the order appealed against was made. On 24 February 2003 the third respondent, a 27 year-old woman, to whom I shall refer as the complainant, consulted the second respondent who is a clinical psychologist and to whom I shall refer as the 'psychologist'. At the time the complainant was experiencing marital problems and was suffering from depression. In the course of the consultation she reported that she had been raped and indecently assaulted by the first respondent when she was 10 years old, ie 17 years previously. Thereafter, she was assessed and treated in the course of 14 further sessions. Subsequently she laid a charge of rape and indecent assault against the first respondent.

[4] In due course the first respondent was charged and given a list of witnesses the State intended to call, one of whom was the psychologist. The first respondent requested particulars from the State. He asked to be placed in possession of a copy of 'every document that [the State] intends to use at the trial'. In response, the prosecutor furnished the first respondent with a copy of the psychologist's report dated 31 October 2003. It contained details of the alleged rape and the effect it had had on the complainant. Under the sub-heading 'summary', the psychologist expressed the opinion that:

'[The complainant's] clinical picture is typical of an adult survivor of childhood sexual abuse. She has tried to block out the alleged incident, that she at the age of ten, had no control over. She was exposed to age inappropriate sexual knowledge which distorted her perception of sexual behaviour and resulted in her avoiding sexual intimacy.'

On receipt of this document the first respondent had every good reason to believe that the psychologist would be called as an expert witness to give credence to the complainant's veracity.

[5] The State was also requested to indicate to whom it would be alleged the 'so-called first report' was made. The answer given was that it was the psychologist. I mention that the psychologist's report does record that the complainant had informed her husband before their marriage that at the age of 10 she had been 'molested'. However, the request that ultimately resulted in the litigation culminating in this appeal was for the State to make available, in the event of the psychologist being called to testify, all her 'working documents/notes of the 11 sessions of psychotherapy and 4 sessions of psychological assessment'. The request was refused.

[6] The first respondent then launched an application to compel the prosecution, alternatively the psychologist, to hand over all the files and documents in the psychologist's possession relating to the 15 sessions of psychotherapy and assessment undergone by the complainant. The psychologist and the complainant gave notice of their intention to intervene

and oppose the order sought on the grounds of the latter's right to privacy and confidentiality.

[7] The matter came before the regional magistrate on 20 July 2004. Counsel for the first respondent announced that the court would be required to make a finding which would involve a 'fine balancing act' between certain entrenched rights. However, a preliminary issue that arose was the *locus standi* of the Legal Resources Centre to intervene on the grounds of the 'wider public interest' which the application was believed to entail. In the course of the argument on this issue the prosecutor made a statement which was subsequently to gain importance with regard to the question of costs. She is recorded as saying:

'The interests that are at stake here are that of the complainant of what she had disclosed to the [psychologist] and to the State, that is confidential information, which the State is basically not going to rely on Your Worship. The evidence of the [psychologist], according to the State, is basically that being the first report, because the report was initially made to the [psychologist].'

In the event, the Legal Resources Centre was recognised as having *locus standi* and the parties proceeded to argue the application on the basis that it involved balancing the first respondent's right to a fair trial against the complainant's right of confidentiality, privacy and dignity. Of significance, are the following remarks of the prosecutor made in the course of her argument:

'Your Worship, in this case a request for further particulars was made by the defence. They were afforded statements of witnesses that would testify in this matter, as well as the report by the psychologist. Your Worship, this is actually the evidence that the State will be relying on to prove the charges against the accused, which are simple Your Worship, which are that of rape as well as that of indecent assault.

Your Worship, the State views the relationship of the [psychologist] with the client, with the victim in this matter as that of a confidential relationship. Your Worship, what was discussed on a personal basis by the victim in this matter to the psychologist, the State is not relying on that Your Worship, as it is a very confidential information.'

She added:

> 'Your Worship, the interest of the complainant in this matter must be taken into consideration. My learned friend Mr Chetty, has indicated that the constitutional right of the complainant in the matter, that of privacy, dignity as well as psychological integrity must be upheld by this Court, Your Worship. Furthermore, if the Court allows that the eleven sessions that were held by the psychologist and the client in this matter, be handed to the complainant, the State will not rely on those sessions. Because as I have indicated earlier that these are treated as confidential information.'

[8] On 30 August the regional magistrate gave judgment in which she ordered copies of some, but not all, of the documents requested to be handed over to the first respondent. The psychologist and the complainant thereafter launched review proceedings in the court *a quo* to have the order of the regional magistrate set aside. The latter chose to abide the decision of the court. The first respondent opposed the application and filed affidavits. The State filed no affidavits but at the last moment filed heads of argument and was represented at the hearing. The *amicus curiae* was represented by counsel and filed a document setting out reasons for supporting the psychologist and the complainant.

[9] At the hearing the parties were ready to argue what promised to be a difficult issue relating to the tension between, on the one hand, the complainant's right to dignity, privacy and confidentiality and, on the other, the first respondent's right to a fair trial. However, at the commencement of proceedings, the learned judge presiding referred counsel for the State to the statements made by the prosecutor to which I have referred above and sought clarity as to precisely what the State's attitude was in relation to the evidence of the psychologist. It was only then that it was made clear in unequivocal terms that the State would not be calling the psychologist to give expert evidence as to the genuineness of the complaint's account of what had occurred and that the former's evidence was to be limited simply to the report that the complainant had made to her that she had been raped by the first respondent when she was 10 years old. In the result it became unnecessary for the court to decide the constitutional issue that had been raised. It was

also common cause that the regional magistrate had misdirected herself in proceeding on the basis that it was only after the 15 sessions of psychotherapy that it finally came out that the complainant had been raped. It followed that the decision of the regional magistrate had to be reviewed and set aside.

[10] On the question of costs, Combrinck J said the following:

'In my view, there was confusion as to the purpose for which the State intended calling the psychologist. In reply to the original question as to whether the State intended to make use of the evidence of the psychologist and a request for the more detailed report, the State in reply acknowledged that it intended calling the psychologist and furnished a copy of her report. It was logical to deduct from this, that the State did not intend restricting the psychologist's evidence to that of the first report but intended calling her as an expert witness to testify to her conclusions reached after the fifteen sessions with the complainant. The State should, in my view, have indicated clearly in answer to the request by the accused for further particulars, that it only intended calling the psychologist for the restricted purpose of the so-called first report. I would further have expected, after the launching of the review proceedings, that the State would file an affidavit indicating clearly the restricted nature of the evidence relating to the psychologist. It did not do so. I do not think that the portions of the prosecutrix's address before the magistrate to which I alluded earlier were sufficient to bring to everybody's knowledge that the State was only going to call the psychologist on the question of the first report. Not even the magistrate understood it as such as is clear from her judgment. I conclude therefore that the State is liable to pay the costs of the proceedings.'

[11] In this court counsel for the State submitted that the prosecutor in the proceedings before the regional magistrate had made it clear what the State's attitude was. I cannot agree. Not only did counsel for the other parties involved not understand this to be the case but the regional magistrate was similarly misled. There were several opportunities for the State to correct the misapprehension under which everyone else concerned with the case was labouring. Had this been done the application and the review would have been unnecessary. As previously stated, the court *a quo* exercised a judicial discretion in ordering the State to pay the costs of the proceedings. No acceptable ground has been advanced for interfering with the exercise of that

discretion. In my view there is no merit in the appeal and leave to appeal should never have been granted.

[12] The appeal is dismissed with costs.

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D G SCOTT
JUDGE OF APPEAL

CONCUR:

MTHIYANE JA
CLOETE JA
MLAMBO JA
MHLANTLA AJA