CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 28/13
[2013] ZACC 19

In the matter between:

HUGH GLENISTER	Applicant
and	
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	First Respondent
MINISTER FOR SAFETY AND SECURITY	Second Respondent
MINISTER FOR JUSTICE AND CONSTITUTIONAL DEVELOPMENT	Third Respondent
THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	Fourth Respondent
GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA	Fifth Respondent

Decided on : 14 June 2013

JUDGMENT (For delivery)

THE COURT:

Introduction

[1] This is an application in terms of Rule 42 of the Uniform Rules of Court[1] requesting a variation of a costs order granted by this Court in *Glenister v President of the Republic of South Africa and Others*[2] (*Glenister II*) on 17 March 2011. The deponent, the applicant's attorney, requests that costs for the expert witness be added to the costs order. He believes that this omission occurred by mistake.

Background

[2] The factual background giving rise to these proceedings is to be found in *Glenister v President of the Republic of South Africa and Others*[3] (*Glenister I*) and *Glenister II*.[4] It is therefore unnecessary to repeat it in its entirety here except insofar as it is relevant for the determination of this application.

[3] The proceedings in *Glenister II* dealt with applications brought by the applicant to determine the constitutional validity of the National Prosecuting Authority Amendment Act[5] (NPAA Act) and the South African Police Service Amendment Act[6] (SAPSA Act).

[1] Rule 28 of the Constitutional Court Rules provides that Rule 42 of the Uniform Rules of Court shall, with such modification as may be necessary, apply to proceedings in this Court.

[2] [2011] ZACC 6; 2011 (3) SA 347 (CC); 2011 (7) BCLR 651 (CC).

[3] [2008] ZACC 19; 2009 (1) SA 287 (CC); 2009 (2) BCLR 136 (CC) at paras 1-2 and 10-26.

[4] Above n 2 at paras 3-15.

[5] 56 of 2008.

[6] 57 of 2008.

The applicant was successful in his challenge, and the Court ordered the respondents to pay the costs of the applicant, including costs of two counsel, in the High Court and in this Court. However, the costs order made no provision for the qualifying fees of an expert witness.

In this application

[4] The applicant points out that, in the Notice of Application and in his Heads of Argument filed in *Glenister II*, the costs of the expert witness were requested. He contends that nowhere in the majority or the minority judgments, is any reference made to the question of whether the expert witness should be paid his fee as part of the costs award against the respondents.

[5] The applicant submits that the inference is that this Court overlooked the qualifying expenses of the expert witness when it delivered its judgment and when the costs order was framed. He contends that the rule that the costs follow the event should apply, as the services of the expert were both necessary and useful.

[6] Rule 42(1) of the Uniform Rules of Court empowers a court to rescind or vary an order or judgment erroneously sought or granted, in which there is an ambiguity or a patent error or omission, or in which there is a common mistake by the parties.[7] The

[7] Rule 42(1) provides:

jurisdictional facts in subrule (1) must, however, be established by the party seeking variation before a court may exercise its discretion to set aside the order or to amend it. As this Court has said before,[8] a court may clarify its order or judgment to give effect to its true intention. This is to be ascertained from the language used, without altering the sense and substance of the judgment if, on its proper interpretation, the meaning remains unclear.[9]

[7] In essence, the function of an expert is to assist the court to reach a conclusion on a matter on which the court itself does not have the necessary knowledge to decide. It is not the mere opinion of the witness which is decisive but his ability to satisfy the court that, because of his special skill, training or experience, the reasons for the opinions he expresses are acceptable. Any expert opinion which is expressed on an issue which the court can decide without receiving expert opinion is in principle inadmissible because of its irrelevance. The rule was crisply stated in *Gentiruco A.G. v Firestone S.A. (Pty.) Ltd.*: "[T]he true and practical test of the admissibility of the opinion of a skilled witness is

---

"The court may, in addition to any other powers it may have, *mero motu* or upon the application of any party affected, rescind or vary:

(a) An order or judgment erroneously sought or erroneously granted without notice to any party affected thereby;

(b) an order or judgment in which there is ambiguity, or a patent error or omission, but only to the extent of such ambiguity, error or omission;

(c) an order or judgment granted as the result of a mistake common to the parties."

[8] *Minister for Correctional Services and Another v Van Vuren and Another: In re Van Vuren v Minister for Correctional Services and Others* [2011] ZACC 9; 2011 (10) BCLR 1051 (CC) at paras 7-8.

[9] *Firestone South Africa (Pty.) Ltd. v Genticuro A.G.* 1977 (4) SA 298 (A) at 307A-E. See also *Thompson v South African Broadcasting Corporation* 2001 (3) SA 746 (SCA) at paras 5-6 and *S v Wells* 1990 (1) SA 816 (A) at 820C-F.

whether or not the Court can receive 'appreciable help' from that witness on the particular issue".[10] Expert witness testimony on an ultimate issue will more readily tend to be relevant when the subject is one upon which the court is usually quite incapable of forming an unassisted conclusion. On the other hand the opinion of the witness is excluded not because of a need to preserve or protect the fact-finding duty of the court, but because the evidence makes no probative contribution.

[8] In addition to the above, the Court in *Ferreira* posited the rule that in certain circumstances, only with the assistance of an expert witness could the Court give proper effect to a constitutional right.[11] We were, however, not faced with those circumstances in *Glenister II*. The application before us and the issue upon which we were called to adjudicate was the constitutional validity of impugned statutes.[12] The determination of constitutional validity is well within the competence of this Court.[13] This Court sought no assistance from an expert in reaching its conclusions nor was the expert witness testimony required to give effect to the litigant's constitutional rights. The applicant's expert was therefore of no "appreciable help" on the particular issue of constitutional validity with which the Court was seized.

[10] 1972 (1) SA 589 (A) at 616H. See also *Ferreira and Others v S* [2004] ZASCA 29; 2004 (2) SACR 454 (SCA) (*Ferreira*) at 382; *Coopers (South Africa) (Pty) Ltd v Deutsche Gesellschaft für Schädlingsbekämpfung MBH* 1976 (3) SA 352 (A) at 370; and *Holtzhauzen v Roodt* 1997 (4) SA 766 (W) at 776G.

[11] *Ferreira* above n10 at para 40.

[12] See [3] above.

[13] Section 172(1) of the Constitution.

[9] Furthermore, the applicant's expert witness was not qualified as such before this Court, having no specialised knowledge that would have assisted the Court in deciding the issues. The probative weight of the expert evidence was negligible as this Court did not rely on any expert testimony in its determination.[14] Were a qualified expert to provide assistance to the Court, indeed qualifying costs would be appropriate. That is not the case here. In the light of this conclusion, there was no reason why qualifying costs should have been afforded to the applicant. Ordinarily, this Court would have dismissed this application without further reasons because Rule 42(1) has not been properly engaged in the sense that its requirements have not been met. However, it is important, to address the aspect regarding the costs of an expert with which *Glenister II* did not deal.

Order

[10] The following order is made:

1. The application in terms of Rule 42 of the Uniform Rules of Court to amend this Court's order in *Glenister II* is refused.
2. There is no order as to costs.

[14] For requirements on the qualification of an expert see Schwikkard and Van der Merwe *Principles of Evidence* 3rd ed. (Juta, Cape Town 2009) at 96-7.

For the Applicant:	Louis & Associates.
For the Respondents:	The State Attorney.