

IN THE HIGH COURT OF SOUTH AFRICA
(NATAL PROVINCIAL DIVISION)

Case No : 8652/2008

In the matter between :

ASHIN ASHOK KUMAR SINGH

Applicant

to be admitted as amicus curiae in the matter
between:

THE STATE

and

JACOB GEDLEYIHLEKISA ZUMA

Accused No 1

THINT HOLDINGS (SA) (PTY)LTD

Accused No 2

(as represented by
PIERRE JEAN-MARIE ROBERT MOYNOT)

THINT (PTY)LTD

Accused No 3

(as represented by
PIERRE JEAN-MARIE ROBERT MOYNOT)

J U D G M E N T

NICHOLSON J

1. The applicant in this matter seeks the following relief in this notice of motion:

"1. Admitting the Applicant into the proceedings as an amicus curiae.

2. Granting the Applicant leave to lead evidence in limine in the matter of the question of whether the Court should not order that Adv W J Downer SC is interdicted from taking any further part in the criminal trial of State v Zuma and three others (NPD case number CC8652/08).

3. Granting the Applicant leave to make written and oral submissions to the Court in limine in the matter on the same question.

4. To the extent that condonation is necessary, granting Applicant condonation for the late filing of this application.

5. Granting the Applicant such further and/or alternative relief as the above Honourable Court may deem fitting."

2. The notice of motion then requests that the matter be placed before the Court on 12 September 2008 for hearing accordingly. It is dated 5 August 2008. The application was issued by the Registrar of this Court on 1 September 2008 and served on the Director of Public Prosecutions in Pietermaritzburg on the same date. The applicant filed an affidavit in support of the application and annexed a number of documents thereto.
3. On 5 September 2008 the application was withdrawn by notice and such notice tendered the costs of the State (if any). On the same date the State filed a detailed notice of opposition which sought to dismiss the application and costs on the scale as between attorney and client, including the costs of two counsel (where used). Subsequently the

State has filed a number of affidavits in answer to the application. The applicant has declined to file any replying affidavits.

4. The matter was set down by the State which was represented by Mr Marnewick SC. Mr Hunt SC and Mrs Hunt appeared for the applicant.
5. The applicant was initially a prosecutor and later a magistrate from 1994. He was seconded by the then Minister of Justice to the Investigating Directorate for Organised Crime (IDOC). This unit was tasked with dealing with organised crime and was headed by Mr Chris MacAdam. IDOC investigated certain killings in the Richmond area, including what became known as the Ndabazitha massacre, which occurred as a revenge attack for the killing of Sifiso Nkabinde on 23 January 1999.
6. The applicant alleged in his founding affidavit that he received information as to the real killers of the Ndabazitha family and shared this information with MacAdam who was dismissive of it. In the event, the applicant alleges, the information he supplied was correct and the persons he suspected were the real culprits, who were charged, convicted and given life sentences.
7. The applicant maintains that two days after bringing the information to the attention of MacAdam he was dismissed from IDOC on the orders of the National Director of Public Prosecutions. He was also

suspended from his post as a magistrate without a hearing and only returned at the beginning of 2000. The applicant's home and offices were searched and he was charged with a number of offences, including defeating the ends of justice and breaches of the Protection of Information Act, No 84 of 1982. Applicant maintains that these charges were brought maliciously and he consequently brought an application for a permanent stay of the proceedings brought against him which was granted by the Regional Court. The net result of this finding was equivalent to him being acquitted of all charges.

8. The applicant brought a civil claim for damages and instituted criminal proceedings against various persons including Mr William John Downer. During his trial the applicant maintains that false evidence was led by MacAdam, which Downer, who prosecuted in the case knew to be false. One of the grounds of dishonesty related to whether the charge sheet was drafted by Downer or MacAdam. Applicant avers that it was drafted by MacAdam and that Downer lied by saying he was the author. Applicant also alleges that, in allowing the charges to continue against applicant, when he knew there was no case, amounted to a breach of his duties as a prosecutor. The applicant, as I have mentioned, laid a criminal charge against MacAdam and others and when the State declined to prosecute, he brought a High Court action to obtain a nolle prosequi certificate which would enable him to bring a private prosecution. That High Court application was dismissed.

9. The applicant sets out the grounds for his application to be joined as an amicus at paragraphs 29 - 33 which read as follows:

- "29. I respectfully submit that the criminal trial in which I seek leave to intervene as an amicus curiae is a very important one. I seek that leave for the limited purpose of apprising the presiding judge of the facts I have set out above in this affidavit. The public has a considerable interest in the case. It is a case which may affect the future of the RSA. Of course, in every criminal case the public has an interest in ensuring that accused persons are given a fair trial. However, in this particular criminal trial, by its very nature, the public has a considerable interest in ensuring that the accused are given a fair trial. Accused No 1, JACOB GEDLEYIHLEKISA ZUMA, is a person who might be a future President of the RSA. His prominence in government is a fact that is notoriously known, and of which the Court may take judicial cognizance. This particular criminal trial and its outcome will have consequences and repercussions that extend beyond the narrow confines of the trial itself, and beyond the narrow question of whether the accused are criminally liable for the offences they are charged with. The outcome of this trial and how it is perceived by the general public is likely to have a far reaching and significant impact on the course of history and the future of the RSA. I respectfully suggest, therefore, that in a criminal trial of such a nature and dimensions, the public has an immeasurable interest in being assured that the trial will be absolutely fair, that every member of the prosecuting team in such a case is a person who is beyond reproach, and that there is no threat to the fairness of the trial posed by the composition of the prosecuting team.
30. I respectfully submit that in the light of what I have set out above regarding Mr Downer's conduct in relation to my own trial, together with the fact that the criminal trial in question is a very important one in which the public has a considerable interest in ensuring that justice must clearly be seen to be done, it is highly undesirable that Mr Downer should continue as one of the prosecuting team. Mr Downer is presently in a situation where a serious allegation has been made in regard to his conduct of another trial (my trial) that he attempted to defeat the course of justice in that trial by misleading the presiding Regional Magistrate, and also that he persisted with that prosecution knowing it was ill-founded

31. I respectfully submit that in the circumstances I have locus standi to bring this application. I am in a position to bring the information to the attention of the Court regarding Mr Downer's suitability or otherwise to be included in the prosecution team. I am able to do so because of my own personal experience and knowledge. I therefore respectfully submit that allowing my proposed intervention as an amicus curiae would be competent, as it would enable the Court to be given information concerning one of the prosecution team that might be found by the Court to raise a reasonable apprehension that there is a risk that the accused would not receive a fair trial if Mr Downer were to remain one of the prosecution team. I respectfully submit that if such a risk exists it is a matter which the Court needs to consider and address, because ultimately, it is the Court that is responsible for ensuring that the trial of the accused is conducted fairly. I respectfully submit that I have an interest in these proceedings by virtue of the fact that I have the information described above and my conscience requires that I should draw it to the attention of the Court in the interests of the general public.
32. I respectfully submit that an application for intervention as an amicus curiae may be brought either on the basis of common law principles and practice and not only in terms of Rule 16A of the Uniform Rules of Court; and that the whole purpose of permitting a person to participate as an amicus curiae in proceedings is to enable the Court to obtain the benefit of background information which the aspirant amicus curiae can supply and which information can not be supplied by the original parties. In such circumstances where the aspirant amicus curiae can supply such relevant information which the original parties lack, permitting intervention by the amicus curiae enables the Court to make decisions more confidently in the sense that it has fuller information upon which to make the decision. I furthermore respectfully submit that where the relevant information which the amicus curiae can supply touches on the social consequences of the decisions to be made by the Court, permitting intervention by the amicus curiae becomes all the more important.
33. I respectfully submit that in the light of the constitutional guarantee that any accused will receive a fair trial, and in the light of the public interest in these particular accused receiving a fair trial in this case, the evidence which I can give and the submissions which I can make to the Court are particularly important and should be given proper consideration."

10. There is an application for condonation of the late filing of the application to be joined as an amicus and in that application a further ground is advanced as to the dishonesty of Downer. It is alleged that in Downer's Heads of Argument, the latter claimed that the instruction to prosecute the applicant came from the NDPP and the DPP whereas it was drafted by MacAdam and did not emanate from the NDPP and the DPP conceded he had no part in the decision to prosecute the applicant.
11. In his founding affidavit the applicant sets out various provisions enunciating the duties of a prosecutor and the integrity required of them. The affidavit of applicant concludes with the following :

"The conduct of Adv Downer reveals that he has scant regard for honesty and integrity, and that he will wilfully mislead a Court in breach of his legal obligations as a prosecutor. I do not make these averments lightly, but it is necessary to ensure the integrity of the administration of justice."
12. A number of affidavits have been filed on behalf of the State by Downer, Petrus Karel Coetzee and MacAdam. In these affidavits the allegations concerning the alleged conduct of Downer and MacAdam are denied and accounts are given which reveal no moral blameworthiness at all. It is not necessary to detail all these matters but it suffices to say that answers are provided to all the facts and allegations concerned.

13. MacAdam points out that the applicant as a magistrate was seconded to the prosecution side of IDOC and not the investigation side. The applicant was not empowered to conduct police work and it is alleged that he acted improperly in interviewing the informer in the absence of his police handler and without the consent of MacAdam or Senior Superintendent Marion. The applicant illegally recorded a meeting of IDOC personnel which was later broadcast on national television. The applicant also conducted a clandestine operation in the Richmond area which was not part of his duties. These are some of the reasons for the cancellation of his secondment and these facts and others formed the basis of his criminal prosecution. It follows that any malicious basis for his prosecution is strongly refuted.
14. An explanation is also provided for the alleged false statements with regard to the charge sheets, and the authorisation of the charges against the applicant by the NDPP and DPP. MacAdam explains that he compiled a draft charge sheet which Downer used and later changed. The final product was Downer's and not MacAdam's and it is on this basis that Downer denied that MacAdam had anything to do with this final product.
15. Insofar as the authorisation of the NDPP, Mr Ngcuka and the DPP, Mr Mpshe MacAdam explains that the letter was not falsified but was a draft of the authorisation for Ngcuka to send back to the Natal office. The covering letter to Ngcuka to prove this is put up by MacAdam.

Authorisation required by section 24(1)(d) of Act 84 of 1982 was signed by Mpshe. On 14 April 2000 Mr D'Oliviera, a Deputy National Director of Public Prosecutions informed the Chairman of the Magistrate's Commission (the Judge President of the Transvaal) that the decision to prosecute the applicant (a magistrate) was taken by Mr Sonn the Deputy National Director in conjunction with Mr Mpshe.

16. It is clear from the papers that the applicant is not prepared to withdraw the allegations he has made, and he apparently intends to launch his application again later. In a letter dated 8 September 2008 the applicant refuses to withdraw his allegations unequivocally. His attorney states "Nowhere in our notice of withdrawal did he indicate that our client does not intend to pursue these allegations in another forum. It is therefore unreasonable to expect our client to withdraw the allegations unequivocally when he believes them to be true."
17. It is clear that there are serious disputes of fact in the papers. In addition the applicant has not seen fit to reply to the respondent's affidavits
18. Where there are conflicts of facts and the applicant seeks final relief, the Court applies the test in *Plascon-Evans Paints Ltd v van Riebeeck Paints (Pty) Ltd* 1984(3) SA 623 (A), which provides essentially that the matter must be decided on the respondent's version.

19. Mr Hunt on behalf of the applicant, submitted that these very allegations and counter-allegations between the same individuals are already the subject matter of part heard litigation before the Honourable Ms Justice Balton under case no 2316/04. That being so, he argued, it is highly undesirable that this Court should make a separate parallel assessment of those facts and allegations which may well not accord with the ultimate findings of Balton J. I do not believe such a course would be desirable. That trial has run for many days, the issues and parties are not identical and it would not be in the interests of justice to burden that Court with the dispute in casu.

20. Mr Hunt argued that the State's reliance on the *Plascon Evans* principle is misconceived as the applicant has withdrawn his original application, and the matter is only before Court because the State has insisted on setting it down for a punitive order as to costs. Mr Hunt submitted that the *Plascon Evans* principle should operate in the applicant's favour, and the Court should approach factual disputes on the basis of the applicant's version. I do not believe that this submission is correct. The Court is still dealing with the application and the respondent is seeking attorney and client costs in that application. The applicant caused the matter to be set down and hauled the respondent before Court. The onus was on him to persuade the Court that it should grant the relief on the allegations he made. The fact that the respondent seeks punitive costs does not change the situation.

21. As I have mentioned the applicant issued the papers on 5 August 2008. He allowed access to them by the press before he served them. Mr Hunt conceded this fact but alleged that the State had also involved the press. He served the papers only on 1 September 2008 and set the application down for hearing on 12 September 2008. That was the date judgment was to be given in the Zuma application. Given the serious allegations this was unacceptably short notice. It was also calculated to obtain maximum publicity given the national interest in the Zuma matter. Because of the unusual nature of the application, the lateness thereof and the fact that judgment was to be given on 12 September I asked the counsel to come to my chambers to discuss the application.
22. After the State had already instructed an attorney and counsel and arrangements had been made for a pre-hearing conference on 9 September 2008 in my chambers, the applicant purported to withdraw the application.
23. Argument was advanced as to the propriety of the applicant's withdrawal of his application. Reference was made in argument to Rule 41(1)(a) of the Uniform Rules of the High Court which provides as follows :

"A person instituting any proceedings may at any time before the matter has been set down and thereafter by consent of the parties or leave of the Court withdraw such proceedings ..."

24. Mr Hunt submitted that the proceedings in which the applicant sought to intervene as amicus were criminal proceedings and that his application was interlocutory in those proceedings. He submitted that rule 41 does not apply to criminal proceedings and referred to *De Lange v Provincial Commissioner of Correctional Services, Eastern Cape* 2002(3) SA 683 (SE) at page 686.
25. It is clear that the Court's remarks were obiter in that case. The Court held that rule 41 envisages proceedings in which a costs order inter partes is competent : there is no provision for costs orders inter partes in criminal proceedings. Mr Hunt argued that an application to intervene as amicus in criminal proceedings is interlocutory to criminal proceedings, and it is not competent to award costs in respect of such an application. I would venture to suggest that these proceedings are sui generis and more in the nature of ancillary proceedings than interlocutory. Interlocutory proceedings are between principal protagonists in litigation and usually deal with some procedural issue. In *De Lange's* case a convicted criminal sought to challenge the withdrawal of proceedings in terms of section 276A(3) of the Criminal Procedure Act, 51 of 1977. The parties in the matter were the accused and the Provincial Commissioner of Correctional Supervision, and they were clearly criminal proceedings. That case can be clearly distinguished from the present matter.

26. Mr Hunt suggested that there is no lis between the parties and no-one sought redress or the enforcement of rights against the other. I do not agree. There was a lis in the ancillary proceedings between the applicant and Downer in which very strong allegations of dishonesty were made which attacked the most important virtues of an advocate - his honesty and integrity. The proceedings were not criminal as no crime was alleged and no prosecution instituted. Even if they were not civil proceedings in the normal sense the provisions of rule 41(1)(a) probably represent what the common law used to be prior to the rules. Given the press publicity and the tender of ordinary costs it would seem to me to be unjust to simply allow the applicant to withdraw the application. The respondent was surely entitled to fight the costs issue alone and file affidavits to explain why attorney and client costs were justified.
27. Mr Hunt argued that a Court usually does not investigate the reasons for abandoning or wishing to abandon a case or application. He referred to *Levy v Levy* 1991(3) SA 614 (A) at 620 for this proposition. An exception recognised by that Court, though said to be "one difficult to visualise" would be where the withdrawal of an action amounts to an abuse of the Court's process. Kumleben JA referred in that regard to De Villiers JA's dictum in *Hudson v Hudson and Another* 1927 AD 259 at 268 that "Where ... the Court finds that an attempt is made to use for ulterior purposes machinery devised for the better administration of justice it is the duty of the Court to prevent such abuse. But it is a

power to be exercised with great caution, and only in a clear case." It seems to me that this application was brought for ulterior purposes to pursue a long-standing feud between applicant and Downer.

28. Mr Hunt submitted that it is highly unusual for costs to be awarded either against or in favour of an amicus curiae. He referred to *Hoffman v The South African Airways* 2001(1) SA (1)(CC) at para [63] where the Court held as follows:-

"An amicus, regardless of the side it joins, is neither a loser nor a winner and is generally not entitled to be awarded costs. Whether there may be circumstances calling for departure from this Rule is not necessary to decide in this case. Suffice to say that in the present case no such departure is warranted."

29. Mr Hunt argued that it is only in exceptional circumstances that an order of costs for or against an amicus will be made. Cf *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd (Agri SA and Others, amici curiae)* 2005(5) SA3 (CC) at paragraph [67]. That case is authority for the proposition that it is unusual and rare to make costs in favour of an amicus. The corollary must also apply, that costs can be made against an amicus where the circumstances warrant it, though it would similarly be unusual. In this matter the issue of costs was conceded. It was simply the question of the scale of such costs and whether the applicant should be responsible for the costs occasioned by the filing of the opposing papers.

30. I accept that participatory democracy disposes Courts to listen to the voices of persons other than the parties to a particular dispute and that constitutional litigation often affects a range of people and interests that go well beyond those of the parties already before the Court. I am of the judgment, however, that it remains a privilege to be joined as an amicus and such amicus has a duty to the Court to draw its attention to relevant matters of law and facts to which its attention would not otherwise be drawn. It should not be used as a vehicle to continue a long-standing vendetta against a legal practitioner.
31. When an application is withdrawn costs almost invariably follow. In *Reuben Rosenblum Family Investments (Pty) Limited and Another v Marsubar (Pty) Limited (Forward Enterprises (Pty) Limited and Others Intervening)* 2003(3) SA 547 (C) at 550 van Reenen J said the following:

"It is only in exceptional circumstances that a party that has been put to the expense of opposing withdrawn proceedings will not be entitled to all the costs caused thereby ... The intervening parties' Counsel ... contended for costs on a punitive scale as the Applicants, by having failed to ascertain the correctness of their factual averments, made incorrect and misleading statements. Although there may be merit in that contention, I prefer to base the exercise of my discretion in awarding attorney and client costs to the intervening parties in respect of the intervention application on the unfairness of their being out-of-pocket in respect of their attorney and client costs for having sought to intervene in proceedings of such questionable merit that the applicants withdrew it as soon as opposition manifested itself."

32. As I have mentioned the applicant's allegations are comprehensively denied in the answering affidavits and his attack upon Downer is effectively refuted. I accept that the State has a right and obligation to protect the integrity of the legal process and its officers. The applicant's allegations had to be answered, given the seriousness of the imputations of dishonesty and impropriety. I accept that the Zuma case had national and international interest and that the applicant's plan was to obtain the maximum publicity adverse to Downer. These allegations were far reaching and amounted to an accusation that Zuma will not be afforded a fair trial if Downer were to be allowed to be part of the prosecuting team.
33. Applicant alleged that Downer had misled a Court and continued with a prosecution which he knew to be unfounded and for which he had no lawful instruction. It is further applicant's case that Downer knew that there was no prima facie case but persisted with a malicious prosecution of the applicant. It was further averred that MacAdam perjured himself and Downer knew that when he led such evidence. Downer was also guilty of attempting to defeat the ends of justice.
34. I am of the judgment that the application was vexatious and an abuse of the process of the Court and of the amicus procedure. The applicant is pursuing his rights in the civil action and that was the correct avenue not the amicus provisions.

35. The Courts have dealt in a number of cases with the question of attorney and client costs. In *Ernest & Young and others v Beinash and others* 1999(1) SA1114 W at 1148 the Court awarded attorney and client costs in the following circumstances:

"The respondents have evinced an intention and a determination to litigate persistently and vexatiously to such a degree that I feel that it would be unfair for the harassed applicants to be out of pocket in respect of their own attorney and client costs...

The respondents have demonstrated a lack of bona fides in the litigation concerned. The avalanche of unmeritorious applications, action and private prosecutions was indulged in for the purpose of furthering the respondents' own ulterior motives mentioned earlier. The respondents had imputed fraud, dishonesty and criminal acts to the applicants and others. They suggest that the applicants have been involved in the theft of the proceeds ... They have made accusations of perjury followed by private prosecutions. They have persisted in making unsubstantiated and groundless attacks on the applicants... Furthermore, they have taken the attitude that virtually every judgment against them is wrong and they repeat insulting allegations concerning Taxing Masters and Registrars of this Court, as well as officials at the Master's office."

- 36 Applicant's allegations and accusations in the present application are in similar vein. In attacking Downer's honesty and integrity they strike at the heart of the justice system.
37. In *Engineering Manufacturing Services v South Cape Corp* 1979(3) SA at 1344 - 5 (WLD) Nicholas J (as he then was) dealt with the attorney and client costs and held that these should be ordered also where the other side is put to unnecessary trouble and expense which the other side ought not to bear. This occurs where the actions are

unreasonable and reprehensible. Examples cited include where scandalous allegations were made or where mala fides was alleged without proper foundation.

38. The applicant has taken his complaints or threatened to do so, to numerous persons and bodies including the President and Deputy President, the National Commissioner of Police, the Public Protector, the Minister of Justice and Constitutional Development, Parliament, Cosatu, the United Nations and the Bar Council. He has the right to do so.
39. Each of those persons and institutions will, no doubt, deal with his complaints on their merits. In this application I am of the view that his allegations are so reprehensible that they justify attorney and client costs. The respondent was entitled to reply otherwise the Court would have not known what the version of Downer and MacAdam was.
40. The application is dismissed with costs including the costs of two Counsel (where employed) on the scale as between attorney and client.

Date of hearing : 26th February 2009

Date of judgment : 16th July 2009

Counsel for the Applicant : C P Hunt SC with P D M Hunt (instructed by Sangham Inc)

Counsel for the State : C G Marnewick SC (instructed by Mason Inc)