REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE, GRAHAMSTOWN)

In the matter between:	**Case No: 607/2010**
ANTONIE LE ROUX	**Applicant**
And	
H. PIETERSE N.O	**1st Respondent**
THE DIRECTOR OF PUBLIC PROSECUTIONS	
EASTERN CAPE	**2nd Respondent**
TERENCE NEWBURY PRICE	**3rd Respondent**
CHRISTO SWANEPOEL	**4th Respondent**

Coram: **Chetty and Beshe JJ**

Heard: **21 September 2012**

Delivered: **27 September 2012**

Summary: ***Review*** *– Application for review in terms of section 24 of the* ***Supreme Court Act 59 of 1959*** *– Gross irregularity – Admission of inadmissible hearsay – Documentary hearsay – Representation of fact – J88 admissible in terms of section 34 of the* ***Civil Proceedings Evidence Act 25 of 1965*** *– Application dismissed*

JUDGMENT

Chetty, J

[1] The applicant was arraigned for trial in the Regional Court, Humansdorp, on a charge of raping the complainant, a 15 year old female, an offence falling within the purview of section 51 (1) of the **Criminal Law Amendment Act**[1]. The applicant, who was legally represented by the third respondent, duly instructed by the fourth respondent, (his instructing attorney), pleaded not guilty to the charge and, in a prolix written plea explanation tendered, ostensibly pursuant to the provisions of section 115 (2) of the **Criminal Procedure Act** (the Act)[2], denied, not only having raped the complainant, but that sexual intercourse with her in fact occurred. After the adduction of evidence from various witnesses, including the complainant, the applicant and his witnesses, the magistrate, after several lengthy delays, duly convicted the applicant of rape on 1 October 2008. The matter was postponed for sentence to 15 December 2008 and the applicant's bail extended.

[2] The applicant thereafter, for reasons which I shall in due course advert to, terminated the services of both the third and fourth respondents and appointed others in their stead. This precipitated further delays. Although the evidence was transcribed during the trial and a running record generated, a portion of the judgment, for reasons not germane to this judgment, could not be retrieved from the computing system and had to be reconstructed by the first respondent from his draft judgment. On 1 February 2010, the reconstructed judgment was handed down and the matter postponed to 13 April 2010 for sentence.

1 Act No 105 of 1997
2 Act No 51 of 1977

[3] On 4 March 2010, prior to the sentencing stage of the criminal proceedings, the applicant filed this application in which the relief sought was articulated thus:-

> "(a) Reviewing and setting aside all the proceedings in case no. RC24/06, including the conviction on 1.10.2008 of the Applicant on a charge of rape, held before the First Respondent in the Regional Court for the Regional Division of the Eastern Cape, sitting in Humansdorp and later in Port Elizabeth;
>
> (b) Ordering such of the Respondents as may oppose this application, to pay the costs thereof;
>
> (c) Such further or alternative relied as to the (*sic*) above Honourable Court may deem appropriate."

[4] In his founding affidavit, the gravamen of the applicant's case is articulated as follows:-

> **"24. In what follows, I intend to show (a) that a gross irregularity (within the meaning of section 24(1)(c) of the Supreme Court Act. 1959) Act 59 of 1959), alternatively, the admission of inadmissible evidence (within the meaning of section 24(1)(d) of the aforesaid Act), occurred in the proceedings; (b) that the Third and Fourth Respondents did not act in my best interest and that I did therefore not have proper representation at the trial; and (c) in general, that I did not have a fair trial."**

[5] It will be gleaned from the aforegoing that the application is predicated upon the provisions of section 24 of the **Supreme Court Act**[3] and in particular subsections 1 (c) and (d) which provide as follows:-

> "**24 Grounds of review of proceedings of inferior courts**
>
> (1) The grounds upon which the proceedings of any inferior court may be brought under review before a provincial division, or before a local division having review jurisdiction, are-
>
> *(a)* . . .
>
> *(b)* . . .
>
> *(c)* gross irregularity in the proceedings; and
>
> *(d)* the admission of inadmissible or incompetent evidence or the rejection of admissible or competent evidence."

[6] Although the grounds of review, are, rather inelegantly, in paragraph 24 of the founding affidavit framed in the alternative, they are in essence interrelated and constitute a single ground of review and relate to the admission of a medico-legal report, the J88, completed by Dr *Louise du Toit* at the local hospital during the examination of the complainant on 7 April 2005. The second and third grounds of review, the fair trial complaints, are however rooted in the provisions of section 35 (3) of the **Constitution**[4].

[7] The application is opposed by the second and third respondents, the first and

3 Act No. 59 of 1959

4 The Constitution of the Republic of South Africa Act No, 1996

fourth respondents abiding the decision of this court. Although the third respondent initially filed a notice of opposition and subsequently an affidavit wherein the extent of his opposition to the application as such was circumscribed, he nonetheless emphatically refuted any suggestion that his representation of the applicant was anything other than exemplary.

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The alleged irregularity

[8] In order to place the argument advanced on behalf of the applicant in proper perspective it is necessary to firstly consider the circumstances under which the offending medico-legal report, the J88, was introduced into the proceedings and thereafter to determine its admissibility. It is common cause that upon the complainant's admission to the local hospital on the morning of 7 April 2005, she was attended to and examined by Dr *du Toit,* who completed the J88 and appended her signature thereto. During the trial, it emerged that Dr *du Toit* had emigrated to Australia and the J88 was, after much debate[5], provisionally handed in as exhibit "C".

[9] After the adduction of evidence by the complainant, Ms *Jonker* and Inspector *Pietersen*, the state recalled the complainant and further cross-examination ensued. Prior to the next witness being called, the prosecutor informed the magistrate that on reflection, the submissions previously made by him concerning the admissibility of the J88 pursuant to the provisions of section 212 (4) of the Act were wrong and contended that its admissibility had properly to be determined in terms of what he

5 It is unnecessary to burden this judgment with the competing submissions advanced by the state and the third respondent for it is entirely irrelevant to a determination of the legal issue which falls for decision.

colloquially referred to as the hearsay Act, in truth, the **Law of Evidence Amendment Act**[6]. After much discussion between the magistrate, the prosecutor and the third respondent, the following exchange occurred[7] between the trial magistrate and the third respondent:-

> "MNR PRICE: U Edele my instruksies is om oop kaarte met die hof te speel. Ek gaan niks weerhou van die hof nie. Ek wil hê die hof moet alles sien. Daar gaan blykbaar 'n ander dokter kom getuig oor sy opinie oor daardie verslag. Laat hom kom getuig. Ek dink daar is baie belangrike vrae wat gevra moet word oor daardie verslag, so ek het nie beswaar nie, maar natuurlik die beslissing lê nog steeds by u.
>
> HOF: So ek (sic) het nie beswaar dat hy dan inkom nie, maar (tussenkoms)
>
> MNR PRICE: Wel, die waarde daarvan sal ons later maar seker oor betoog, maar ek is in u hande U Edele, u moet die beslissing maak, nie ek nie.
>
> HOF: "Okay" maar kom ons stel dit so – jy aanvaar die feite en die goed soos daar is 'n skeur gekry.
>
> MNR PRICE: Ek aanvaar dat wat sy daar skryf het sy gekry.
>
> HOF: Maar die interpretasie daarvan.
>
> MNR PRICE: "A tear is ... daar is soveel verskillende meanings vir "tear" – ek het 'n hele boekie daaroor.
>
> HOF: Ja-nee ek weet.
>
> MNR PRICE: So ja, wat daar staan is wat sy daar geskryf het.
>
> HOF: Maar die feit is jy gaan erken die skeur is gekry.
>
> MNR PRICE: Wel, ek kan nie erken dat 'n skeur gekry is nie. Ek

6 Act No, 45 of 1988
7 Record volume 1, page 95-96

> kan erken dat daar fout gekry is. Jy sien dit is die interpretasie van wat presies die woord "tear" beteken. Die mediese "jurisprudence" hieroor is wyd, maar ek sal in my vrae aan die dokter dit duidelik vir u maak U Edele wat ek bedoel daarmee. Dit is moeilik vir ons, want ek meen daar is soveel vrae wat ek graag daardie dokter wou geroep . . . vra.
>
> HOF: Dan gaan ek maar die ding steeds in die lig laat hang Mnr die Aanklaer."

[10] This exchange ushered in the testimony of Dr *Wiese*, a medical officer attached to the Kouga hospital, where the complainant had been examined by Dr *du Toit*. During his evidence in chief he was referred to the J88 and identified both the handwriting and signature thereon as that of Dr *du Toit.* It is not in dispute that the latter in fact authored the J88. In his founding affidavit, the applicant contends that "for the [p]rosecutor to have tendered the evidence of Dr. Wiese, based solely on the inadmissible hearsay evidence contained in the J88 (exhibit C), amounted to a gross irregularity". It will be gleaned from the aforegoing that the irregular act complained of is directly attributed to the prosecutor and not the magistrate. There may well be cases where an irregular act by another court official constitutes a gross irregularity and hence subject to review, but this is clearly not the case here. The mere calling of a witness to testify can never *per se* amount to an irregularity.

[11] The confusion concerning the proper basis upon which the admissibility of the J88 had to be determined continued during argument. In his judgment the magistrate considered the validity of the submission that the J88 was inadmissible hearsay. In rejecting the argument advanced he reasoned that whilst the opinion expressed by and recorded by Dr *du Toit* was inadmissible unless she testified, her factual findings were not and were admissible in evidence. Although not specifically adverted to in

the judgment is implicit from his reasons, wherein he stated, -

> "Die verdediging voer dan aan dat Dr du Toit se mediese verslag op hoorse getuienis neerkom en daar dus nie mediese getuienis oor die kwessie voor my is nie. Du Toit se deskundigheid word ook in twyfel getrek. Haar opinie is beslis nie toelaatbaar nie maar bogenoemde dit wat sy gekry het is objektief vasstelbare feite. Die verdediging het aanvaar dat daar geen probleme met die kettinggetuienis is nie." (emphasis supplied)

that the avenue of admissibility which the magistrate had in mind was the scenario postulated by section 34 (1) of Part VI of the **Civil Proceedings Evidence Act**[8]. (The provisions of sections 33 – 38 inclusive of the aforementioned Act applies, *mutatis mutandis*, to criminal proceedings by virtue of section 222 of the Act). This alternate avenue of admissibility[9] was never specifically raised nor considered in the court below nor for that matter, by the parties in their heads of argument until I raised the issue during the hearing. Mr Wessels' response was that the J88 remained inadmissible by reason of the fact that Dr *du Toit* could not be cross-examined. There is no substance in the argument.

[12] To my mind the crux of the admissibility issue falls to be determined by section 34 (1) which reads as follows:-

8 Act No, 25 of 1965

9 A term used by Brand J.A in Giesecke & Devrient Southern Africa (Pty) Ltd v Minister of Safety and Security 2012 (2) 137 (SCA) at para [28]

"**34 Admissibility of documentary evidence as to facts in issue**

(1) In any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall on production of the original document be admissible as evidence of that fact, provided-

(a) the person who made the statement either-

(i) had personal knowledge of the matters dealt with in the statement; or

(ii) where the document in question is or forms part of a record purporting to be a continuous record, made the statement (in so far as the matters dealt with therein are not within his personal knowledge) in the performance of a duty to record information supplied to him by a person who had or might reasonably have been supposed to have personal knowledge of those matters; and

(b) the person who made the statement is called as a witness in the proceedings unless he is dead or unfit by reason of his bodily or mental condition to attend as a witness or is outside the Republic, and it is not reasonably practicable to secure his attendance or all reasonable efforts to find him have been made without success."

[13] It is not in issue that Dr *du Toit* completed the J88. Dr *Wiese's* unchallenged evidence was that the J88 reflected both her handwriting and signatures. The complainant herself testified that she was taken to the hospital where she was examined by Dr *du Toit*. As the author of the contents of the J88, Dr *du Toit* thus had personal knowledge of the matters dealt with therein. It is common cause that at the trial, Dr *du Toit* had since emigrated to Australia and there can be no question that it would not have been reasonably practicable to secure her attendance at the trial.

Had she testified, her evidence concerning the observations which she recorded in the J88 would have been admissible in evidence. Consequently, there being compliance with the prescripts of section 34 (1) of the Act, the J88 was, on production, admissible as evidence of the facts thereon contained viz, that the complainant's panties were torn and that her vagina exhibited a small tear at the 12 o'clock position.

[14] Counsel for the applicant's reliance on the judgment of Mthiyane J.A in **Swanepoel v The State**[10] as authority for the proposition that the J88 was inadmissible by virtue of Dr *du Toit*' not having been called to testify, is entirely misplaced as the reference to **R v Miller**[11] therein clearly shows. In **Swanepoel** the learned Judge of Appeal drew a clear distinction between statements tendered for their testimonial value and those tendered for their circumstantial value. It is explicit from the court below's judgment that the J88 was admitted, not for its testimonial value, but as a statement of the objective facts found by Dr *du Toit*. The complainant herself testified that her panties were torn and that she had a tear on her private parts. It moreover appears from the magistrate's judgment that Mr *Maurice Wentzel*, who compiled exhibit "G" described the complainant's panties as having been torn. Both the report (save for the last page) and the panties were lost and could not be retrieved. Although Mr *Price* sought to extract an admission from the complainant that she had been appraised of the tear on her private parts by Dr *du Toit*, the affirmative answer to that and the following question posed – **"Ek meen u weet nie daarvan nie"** is ambivalent. Contextually read, the distinct impression to be gleaned

10 [2008] 4 ALL SA 389 (SCA)
11 1939 AD 106

from her evidence was that she had personal knowledge of the injury, and no others, as she immediately thereafter conceded. In my judgment therefor the J88 is admissible under section 34 (1) of the Act.

[15] Consequently, the fair trial complaint falls away and cannot be sustained. In any event the applicant's aspersions on the competency of the third respondent is baseless and without any foundation. The transcript of the proceedings proves the exact opposite. Is the third respondent nonetheless entitled to a costs order in his favour? Although an injurious insinuation concerning the professional competence/integrity of a legal practitioner is serious and invites a response, the third respondent refuted the allegations levelled against him and begs the question why he considered it necessary to brief counsel to appear at the hearing. The issue which fell for determination was the admissibility of the J88 and not the third respondent's competence. In my view, it was unnecessary for the third respondent to have briefed counsel and those costs should be borne by himself.

[16] In the result the following order will issue:-

The application is dismissed.

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D. CHETTY

JUDGE OF THE HIGH COURT

Beshe, J

I agree.

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N. G BESHE

JUDGE OF THE HIGH COURT

On behalf of the Applicant:	*Adv Wessels instructed by Wheeldon Rushmere & Cole, 119 High Street, Grahamstown, Tel: (046) 622 7005; Ref: van der Veen*
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On behalf of the 3rd Respondent:	*Adv Pienaar / Adv Ronaasen instructed by Nettletons Attorney, 118A High Street,*

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