LEGAL ENGINE OR STEAM ENGINE?

Africa Solar (Pty) Ltd v Divwatt (Pty) Ltd 2002 4 SA 681 (SCA)

1 Introduction

> "[B]eyond any doubt the greatest legal engine ever invented for the discovery of the truth" (5 Wigmore *Evidence* par 1367 (Chadbourn rev. 1974)).

Cross-examination has long been the backbone of the Anglo-American adversarial trial system and indeed it is difficult to imagine a trial without it. Its importance has been remarked on by legal scholars and commentators, *inter alia*, Wigmore, above, and it has also been enshrined in section 35(3)(i) of the South African Constitution Act (108 of 1996) in the form of the "right to challenge evidence", which of course extends further than cross-examination, but certainly incorporates it.

2 Facts

In *Africa Solar v Divwatt* (*supra*), a contractual dispute arose about whether a signatory to a document, which the signatory understood to be an information sheet, but which was actually an application for credit, was bound by the terms and conditions contained on the reverse of the document. The application form which the signatory signed contained a clause which stated that he acknowledged reading the standard conditions of trade contained on the reverse of the form, notwithstanding the fact that the trade conditions, that is, the reverse of the application form, were not faxed to him. The Transvaal Provincial Division held that the standard terms could not in the circumstances be held to apply. This was upheld on appeal to a full bench of the Provincial Division. The appellant thus appealed to the Supreme Court of Appeal.

3 Judgment

The SCA confirmed the decision of the provincial division, dismissing the appeal, but with two of the judges dissenting. It is, however, not the court's judgment on the merits of the case that concerns us here, but its judgment on two ancillary procedural issues. In both of these issues the judgment given was that of the full bench of the SCA, with all judges concurring.

The first was the manner in which the trial was unnecessarily prolonged by the inordinately long cross-examination, by appellant's counsel, of some of the respondent's witnesses. The prolonged trial had a direct impact on the length of the record which was, as a result, voluminous. The second was the undertaking by the appellant's attorneys to restrict the record handed up to

court to that part that was strictly necessary to the determination of the point in issue. This, the appellant's attorney failed to do and thus the SCA was eventually faced with an appeal record of some 21 volumes.

With regard to the issue of the parties' non-compliance with the rules, the court, probably because the parties had somewhat belatedly attempted to reduce the record to a core bundle as required by the rules, made no special costs award against either of them.

The court did, however, turn its focus to the voluminous record. It examined it closely and established that counsel for the appellant had cross-examined two witnesses for the respondent at great length, subjecting the financial director in particular to a "prolonged, excessively repetitive and at times badgering cross-examination …, stretching over many days" (par [26] 696G). This was echoed in the dissenting judgment on the main issue, in which the cross-examination was described as "a laborious cross-examination over a number of days" which "could and should have been done in an hour or two" (par [58] 705G/H). The judge went on to describe the cross-examination as "inordinate, tiresome and protracted" (par [68] 707I/J).

Of course, protracted cross-examination, however tedious, is not in itself a cause for concern, especially the concern of the SCA. However, when it becomes so protracted that it begins to have a negative impact on proceedings it needs to be addressed, according to the court. The court thus commented, briefly, on what proper cross-examination should not contain:

> "Proper cross-examination does not consist, under the guise of testing credibility, of rehashing with a witness, repetitively and obstinately, his evidence-in-chief in an apparent attempt to wear him down so as to unearth discrepancies that can then become a source of a submission that the witness should for that reason be disbelieved. Cross-examination is not supposed to be a test of stamina" (par [37] 699B/C).

The court of first instance had not limited the cross-examination, "perhaps too indulgently" (par [26] 696G), and it was thus on record. There could therefore be no *ex post facto* limitation thereof. For that reason, the appellant clearly had an opportunity to exercise its right to challenge the other party's evidence and had discharged its obligations to cross-examine. It had just done so at inordinate length and when it could have exercised those same rights and discharged its obligations in a fraction of the time.

The court thus concluded that the trial had been unduly prolonged by the "prolix cross-examination by counsel … of some of the … witnesses" (par [36] 699A).

In order to express its displeasure at the manner in which the trial had been protracted and to sanction the appellant the court turned to a costs sanction. Traditionally this would mean punishing the relevant party either by ruling that, even if successful, they would not be entitled to recover all their costs, or, if they were unsuccessful, that they pay the successful party's costs, usually on a higher than usual scale, for example on the attorney-client scale as opposed to the lesser party-party one. The court was, however, unable to make an ordinary costs award against the appellant as the appeal was in any event dismissed with the appellant, as the unsuccessful party, to pay the respondent's costs on the standard party-

party scale. However, with the help of counsel, the court estimated that the trial had been protracted by at least a third by the appellant's unnecessary cross-examination and thus ordered a third of the costs to be paid by the appellant on the higher attorney and client scale:

> "To a significant degree this [cross-examination] contributed to an increase in both the duration and the record of the proceedings … The trial was unnecessarily prolonged by at least one third" (par [37] 699D/E).

4 The position in South African law

The right to challenge evidence plays a fundamental role in an adversarial legal system and it is indeed difficult to imagine a court case, civil or criminal, being conducted without it. In fact, cross-examination has become so much an integral part of proceedings, that a party not only has a right to cross-examine, but also bears a duty to do so, as was noted in *R v Malele* (1975 4 SA 128 (T)) and as has since been confirmed by the Constitutional Court.

In *The President of the Republic of South Africa v South African Rugby Football Union* (2000 1 SA 1 (CC)), the Constitutional Court ruled on cross-examination, describing it as an "institution" that, "not only constitutes a right, [but] … also imposes certain obligations" (par [61] 36J.) The court examined the obligations and purposes of cross-examination, stating that if a point remained unchallenged in cross-examination the party calling that witness was entitled to assume that that testimony was accepted as correct. The Constitutional Court again reiterated the importance of the duty to cross-examine in *S v Boesak* (2001 1 SA 912 (CC)) when it stated that:

> "This rule, which is part of the practice of our courts, is followed to ensure that trials are conducted fairly, that witnesses have the opportunity to answer challenges to their evidence, and that parties to the suit know that it may be necessary to call corroborating or other evidence relevant to the challenge that has been raised" (par [26] 924F).

The Constitutional Court went on to say, in the *South African Rugby Football Union (SARFU)* case, that though the rules relating to cross-examination were not inflexible, sight should not be lost of their object, the "proper observance" of which "was owed to pauper and prince alike" (par [65] 38B).

The fundamental nature of this right has been recognised and thus has become enshrined in the Constitution. Although section 35 of the Constitution applies only to arrested or detained persons, section 35(3)(i) recognises the importance of the right to challenge evidence stating: "(3) Every person has the right to a fair trial, which includes the right – (i) to adduce and challenge evidence." Section 34 of the Constitution states that: "Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court." It would be difficult to argue that the notion of a "fair public hearing" should be construed so differently from the notion of a "fair trial" that the right to "challenge evidence" would not also be an integral part of the process.

As a result of the importance of the duty to cross-examine, a failure to do so is a factor that is to be taken into account by the court when deciding a

matter, as was held in *R v M* (1946 AD 1023), and indeed it may be the decisive factor in criminal matters where an accused has not been cross-examined by the prosecution, as was the case in *S v Gobosi* (1975 3 SA 88 (E)), as the inference will be drawn that the prosecution does not intend disputing the evidence of the accused and thus cannot argue that the accused's version be rejected without being tested. Thus, any limitation on cross-examination has to walk a thin line between not allowing the overuse, or abuse, of the right and reducing, too strictly, the duty to do so.

5 Critique

Just how flexible are these rules and how then does one limit a right that is also a duty, without infringing the right to challenge evidence and also without undercutting the obligation on the cross-examiner to cross-examine?

Curtailing a right, even if legitimately, might well allow the concomitant argument that the corresponding duty has been fulfilled, albeit fictionally, or, at the very least, allow one to argue that the negative consequences of non-fulfilment (the presumption that the evidence is acceptable to the cross-examining party) should be held not to apply.

Traditionally, at common law several clear guidelines have established themselves, particularly relating to limits on questioning on collateral issues, the use of misleading statements, the use of inadmissible evidence, the rules on previous convictions and of course the rules relating to cross-examination as to credit. Recently another restriction, or, more accurately, the extension of another restriction, came under the judicial spotlight; namely that of curial courtesy. Vexatious, abusive, oppressive, or discourteous questions may be disallowed in cross-examination according to the court in *S v Sello* (1993 1 SACR 497 (O)) and overstepping these limits may result in a trial being declared unfair, or in the exclusion of the evidence so elicited.

In the present case the SCA has adopted a slightly different approach. To the list of abusive, oppressive or discourteous questioning it has added protracted questioning, and instead of going to the extreme of declaring the trial unfair or excluding such evidence, it has adopted another sanction – one related to costs.

However, can such a costs award be construed as an indirect limitation on the right to cross-examine, or if not, is it not at the very least a diminution of the duty to cross-examine? It is easier with hindsight and the benefit of a written record, especially if the protracted cross-examination does not result in any new or useful information coming to light, to find that the cross-examination was unnecessary or too long. However this does not help during the actual trial. At what point, before the cross-examination is complete, can the court decide to restrict it, to cut it short? In other words, at what point does the court decide that the right to cross-examine has been sufficiently exercised and the duty discharged?

6 Conclusion

The answer is not easy, balancing as it must, a right and a duty, and although the SCA was in this case presented with a *fait accompli*, it is submitted that its ruling sends a clear message. The decision on whether these two points have been reached rests not only with the court but also with counsel. If counsel cannot or will not curtail their cross-examination and continues to cross-examine at length, they must do so knowing that they may well have to pay, and pay handsomely, for the indulgence. This will apply even if they are successful, as the SCA made it clear that costs were awarded on the attorney-client scale because the appellant was going to have to pay costs (on the party-party scale) anyway. Had the appellant been successful it would not have been entitled to one-third of its costs. This is also apparent from the dissenting judgment, which, though disagreeing on the facts, agreed on the procedural aspect, awarding only two-thirds of the costs to the appellant. No rights are limited and no duties are curtailed except by the self-regulating knowledge of the potentially adverse cost implications. What this judgment makes clear, however, is that if counsel are not going to exercise such self-regulation, the court will step in and do so. Of course, the next logical question that may soon need to be answered will be that of deciding precisely upon whom, attorney, counsel or client, such costs should fall!

It is perhaps a lesson that although cross-examination may have been described in the past as a great and formidable legal engine, it is by no means outdated and continues to serve a valuable purpose, albeit in more streamlined, cost-efficient livery.

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