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**IN HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

CASE NO: A105/2004

In the matter between:

M K

Applicant

and

TRANSNET LTD t/a PORTNET

Respondent

Admiralty action *in personam*

JUDGMENT

Delivered on: 20 August 2018

Mbatha J

Background

[1] On or about 27 May 2001, the MSC Viviana, docked at the Durban Port, in KwaZulu-Natal. On the morning of 27 May 2001 V K ('the deceased') whilst being transported by the employee of the respondent, the vehicle they were in, collided with a gantry crane and then proceeded over the edge of the wharf side into the bay.

This accident led to the death of the deceased. As a consequence of this accident the applicant proceeded with an action for damages against the respondent.

[2] The basis of the applicant's claim for damages was that the deceased owed her a duty of support. As a result thereof, the applicant contends that she is entitled to the amount of US\$1 000.00 per month, which the deceased provided to her. Had it not been for the accident, the deceased would have continued to provide for her at the rate of US\$1000.00 per month. As a result of his death she has suffered damages for loss of support in the total sum of US\$168 000.00. Furthermore, consequent upon the contracts' of employment concluded between the second plaintiff, the deceased and one Brnovic, the second plaintiff was obliged to pay and has paid compensation in respect of the deceased, expenses incurred in Durban, expenses incurred in Yugoslavia, substitution expenses and compensation to the next of kin of the deceased, a total amount of US\$64 044.00.

[3] On 10 May 2010 the respondent conceded liability and the action was settled to the extent of seventy percent of the applicant's proven or agreed damages. The only outstanding issue is the determination of the quantum of damages in respect of the loss suffered by the applicant.

Applicant's Case

[4] The outstanding issue in respect of the quantum for damages has led to the present application that has come before this court. The application is to grant permission for the applicant to testify from the premises of DAA Montenegro LLC in Yugoslavia, by way of a video conference link, availing to the respondent an opportunity to appoint legal representatives to monitor and be present during the process. It entails that the applicant's attorneys of record will arrange for the video conference link to be set up at the offices of Shepstone and Wylie or any other place so agreed to by the court in order for the presiding officer and the legal representatives of the respondent to be present during the process.

[5] The founding affidavit to this application was deposed to by Andrew Gavin Staude, the applicant's attorney. The applicant is described as an adult female

spinster, born on [...] 1936, an octogenarian. She is resident at [...], Kotor Municipality, State of Montenegro, in the former State of Yugoslavia. It is alleged that she is the mother to the deceased, who was employed as a second engineer by the Mediterranean Shipping Company SA aboard the MV 'MSC Viviana' at the time of his death.

[6] The basis for the application is that due to old age, ill health and impecunious state of the applicant, she is unable to attend at a court in South Africa. In support of her application two medical practitioners have certified that she is not capable of long distant travel, i.e. by plane or otherwise and therefore unable to attend trial in South Africa. Lastly, she is unable to afford the cost of travelling and accommodation for herself and a chaperone / caregiver to Durban, South Africa, in order to testify.

[7] The first medical certificate indicate that she is on treatment for depression, suffers from prominent stressed anxiety, gnostic (sic) and brain potential which corresponds to her age. This diagnosis by Dr Andrija Cetkovic states that she suffers from what is termed DEPRESIO RECIDIVA, GRADUS MODERATI. Dr Andrija Cetkovic concluded that the applicant is not capable to undertake long trips, should not be exposed to any stress events like court hearings and trials, and as a result she is unable to attend the trial in South Africa. Dr Edita Starovic's conclusion also confirms that the applicant is not capable to travel the distance by plane or otherwise due to ill health. Dr Edita Starovic's, a Specialist Physician, prognosis is that the applicant was diagnosed with CARDIOMYOPATHIA CHR DECOMP, HYPERTENSIO ART, BRONCHITIS CHR. The appellant's counsel contended that this was an admiralty matter and that a proper case has been made out for the relief sought.

Respondent's case

[8] The respondent opposed the relief sought by the applicant on a number of grounds. First, on the basis that the application is not an admiralty matter, that it does not fall within the parameters of the Uniform Rules of Court and the applicant has not explicitly stated that this court has inherent power to regulate its own procedures. Lastly, that the applicant has failed to make out a case for the relief sought.

[9] The respondent's counsel restated the provisions of rule 38(2) of the Uniform Rules of Court, which require all witnesses to be examined *viva voce* and that it is only in certain circumstances that the court may authorise, in terms of rule 38(3), that the necessary evidence be taken before a commissioner. It was submitted that the applicant failed to set out such relevant factors in her application stating, the relevance of the evidence, the admissibility of the evidence, the likelihood of the evidence being lost, the inability of the witness to attend, whether the evidence is proposed by the respondent or the applicant, the opportunity for cross-examination, the expenses involved and the balance of prejudice. The respondent's counsel asserted that if the applicant's evidence is crucial, though this was not asserted by the applicant, the court will need to assess her credibility and demeanour, which can only be assessed if she gives *viva voce* evidence.

[10] The respondent's counsel asserted that these are fundamental shortcomings of the application. Furthermore, no cogent or reliable evidence has been placed before the court on the integrity of such technology and that the applicant is unable to attend trial. It was submitted that the allegations made by the applicant's attorney are hearsay evidence as no confirmatory affidavits were filed by the applicant and no reasons were given for such failure.

Admiralty Jurisdiction

[11] As to the challenge, whether the court can receive hearsay evidence in this application, the applicant's counsel, invoked the provisions of s 6(3) of the Admiralty Jurisdiction Regulation Act¹ ('the Act'), which allows the applicant to tender hearsay evidence. Section 6(3) provides as follows:

'A court may in the exercise of its admiralty jurisdiction receive as evidence statements which would otherwise be inadmissible as being in the nature of hearsay evidence, subject to such directions and conditions as the court thinks fit.'

The applicant contended that the action instituted by the applicant is an admiralty action, as defined in section 1 of the Act which reads as follows:

¹ Act 105 of 1983.

‘proceedings in terms of this Act for the enforcement of a maritime claim whether such proceedings are by way of action or by way of any other competent procedure, and includes any ancillary or procedural measure, whether by way of application or otherwise, in connection with any such proceedings.’

It was therefore incumbent upon the applicant to prove to this court that the applicant’s action was a maritime claim, which falls under the admiralty jurisdiction of this court which would entitle it to invoke the provision of s 6(3) of the Act.

[12] The judgment in *The Wave Dancer: Nel v Toron Screen Corporation (Pty) Ltd and another*² confirmed that if the question of jurisdiction was raised in the proceedings before a Local or Provincial Division of the High Court, such court has to determine the issue. This is in line with the provisions of s 7(2) and 7(4) of the Act. The peremptory provisions of s 7(2) become applicable only once the court decides that it is a maritime claim.

[13] The judgment of Binns-Ward J in *Jacobs v Blue Water and others*,³ also confirms that the question lies on the characterization of the claim as it appears in the pleadings. In that regard the provisions of s 7(2) which, deal with proceedings before a provincial or local decision in the high court, requires that when in any proceedings the question arises as to whether a matter pending or proceedings before that court is one relating to a maritime claim, the court should forthwith decide that question. Section 7(2) provides as follows:

‘(2) When in any proceedings before a provincial or local division, including a circuit local division, of the Supreme Court of South Africa the question arises as to whether a matter pending or proceeding before that court is one relating to a maritime claim, the court shall forthwith decide that question, and if the court decides that-

(a) the matter is one relating to a maritime claim, it shall be proceeded with in a court competent to exercise its admiralty jurisdiction, and any property attached to found jurisdiction shall be deemed to have been attached in terms of this Act;

(b) the matter is not one relating to a maritime claim, the action shall proceed in the division having jurisdiction in respect of the matter: Provided that if jurisdiction was conferred by the attachment of property by a person other than an *incola* of the court, the court may

² 1996 (4) SA 1167 (A).

³ [2016] ZAWCHC 17.

order the action to proceed as if the property had been attached by an *incola*, or may make such other order, including an order dismissing the action for want of jurisdiction, as to it appears just.'

[14] The plaintiff relies on s 1(1) which defines a maritime claim as:

'any claim for, arising out of or relating to

...

(f) loss of life or personal injury caused by a ship or any defect in a ship or occurring in connection with the employment of a ship.'

And or s 1(1)(s):

'the employment of any master, officer or seaman of a ship in connection with or in relation to a ship, including the remuneration of any such person, and contributions in respect of any such person to any pension fund, provident fund, medical aid fund, benefit fund, similar fund, association or institution in relation to or for the benefit of any master, officer or seaman.'

And s 1(1)(ee) and (ff):

'(ee) any other matter which by virtue of its nature or subject matter is a marine or maritime matter, the meaning of the expression marine or maritime matter not being limited by reason of the matters set forth in the preceding paragraphs; and

(ff) any contribution, indemnity or damages with regard to or arising out of any claim in respect of any matter mentioned above or any matter ancillary thereto, including the attachment of property to found or confirm jurisdiction, the giving or release of any security, and the payment of interest.'

[15] The deceased died as a result of an accident which occurred in connection with the employment of a ship, (s (1)(f)), the employment of the deceased as an officer or seaman of a ship (s 1(1)(s)) and falls within the all-embracing provisions of s (1)(1)(f), s (1)(1)(s), s 1(1)(ee) and (ff). The proceedings before this court are also in line with the provisions of s 3(1) and (2) of the Act, which state as follows:

'(1) Subject to the provisions of this Act any maritime claim may be enforced by an action *in personam*.

(2) An action *in personam* may only be instituted against a person-

(a) resident or carrying on business at any place in the Republic.'

I accept therefore that the claim to admiralty jurisdiction of this court is fully substantiated, as it falls within the definition of a maritime claim as pleaded by the plaintiff and the respondent carries on business within the jurisdiction of this court. I

therefore find that the application can be entertained in line with the provisions of s 6(3) of the Act although there is no confirmatory affidavit by the applicant. Having found that this court has jurisdiction to hear the matter in terms of the Act, the application to strike out by the respondent is dismissed and the application deposed to by the applicant is ruled to be admissible before this court.

The video link conference application

[16] I now proceed to consider the application by the applicant to adduce oral evidence by way of video link conference. In general, in civil proceedings oral testimony is given by the plaintiff in a court of law. Giving evidence through video link and other social media mechanisms is a novelty in South Africa, save to a very limited extent in the criminal courts. Technology is at this stage of our lives so advanced to a point that direct evidence can be taken from a witness in another country and cross-examination can take place whilst the witness is visible to all. The Electronic Communications and Transactions Act⁴ (the ECTA) which forms part of our legislation regulates the use of electronic communications, with the exception of video link communications. The learned authors, Zeffert and Paizes, in *The South African Law of Evidence*⁵ have this to say with regard to the evidence in general:

‘The test is essentially a practical one. The court should consider all material which may help it reach a proper conclusion. But the value of some evidence is outweighed by the problems it creates. Balancing the competing considerations is, within the limits of fairly wide principles, a matter for a discretion of the judicial officer.’

I am of the opinion that the aforementioned test should apply to applications of a similar nature to the one referred to above.

[17] Our laws do not cater for all the instances where the applicant cannot give oral evidence in court. The Civil Proceedings Act 25 of 1965 provides in s 24 for Depositions of Witnesses to be taken on a commission. Rule 38 of the Uniform Rules of Court provides for various procedures to produce evidence for trial. It also

provides for the manner in which evidence will be adduced at trial. Rule 38(3) provides for taking of evidence of a witness before or during the trial before a commissioner of the court; rule 38(5) provides that unless the court directs such

⁴ Act 25 of 2002.

⁵ DT Zeffert and AP Paizes *The South African Law of Evidence* 3ed (2017) 251.

examination to be by interrogations and cross interrogations, the evidence of any witness to be examined before the commissioner in terms of an order granted under subrule (3) shall be adduced upon oral examination in the presence of the parties, their advocates and attorneys, and the witness concerned shall be subject to cross-examination and re-examination.

[18] The granting of orders as regulated in rule 38 are within the discretion of the court, a discretion which is exercised judicially. The main consideration being whether if evidence is placed before the court in this manner; justice is likely to be done. The applicant has to depose to an affidavit, give reasons why it is necessary for the purposes of justice to depart from the norm; the nature of the evidence to be given; names of witnesses and if it is convenient and necessary for the purposes of justice. This is a jurisdictional factor: 'A party seeking to dispense with a personal appearance of a witness must show that it is "necessary for the purposes of justice that the ordinary way of taking evidence should be departed from"'.⁶ The convenience must not only be for the applicant but also for the respondent and the court.⁷

[19] Though this is not an application for a commission *de bene esse*, the guidelines given in the various judgments relating to the taking of the evidence in the commission have been considered by this court for purposes of whether it is necessary, convenient and in the interests of justice to grant relief sought by the applicant. I have considered whether it has been demonstrated that evidence sought to be adduced on video link is relevant to the issues in dispute. The applicant has to adduce evidence as to the relationship between herself and the deceased and if such relationship translated to a duty of support.⁸ The applicant, as the plaintiff in the main case, bears the onus to prove her claim for damages. In that regard I find her evidence to be relevant. However, I have to consider if there will be any undue prejudice to the other party in the presentation of the evidence in this format. The applicant's counsel submitted that there will be no prejudice to the defendant as the plaintiff will be visible to all, she can be cross-examined and can give evidence under

⁶ AC Cilliers, C Loots and HC Nel *Herbstein and Van Winsen: Civil Practice of the High Courts and the Supreme Court of South Africa* 5ed (2009) ch33-859; *Hills v Hills (II)* 1933 NPD 293 at 294.

⁷ *Myerson v Health Beverages (Pty) Ltd* 1989 (4) SA 667 (C) at 675J-676A.

⁸ *Fernandes v Fittinghoff & Fihrer* CC 1993 (2) SA 704 (W) at 708 – 709.

supervision of the attorney elected by any of the parties. It has been shown that the nature of the evidence to be adduced by the applicant is material to the real issues in the litigation and likely to contribute appreciably to their determination ⁹ And it has not been admitted by the respondent that she is the mother of the deceased and she is the main witness in that regard.

[20] I have also considered whether the court will be in a position to observe the demeanour, personality and conduct of the applicant and whether there will be an opportunity for cross-examination if the evidence is tendered through video link in a locality which lawyers cannot reach.¹⁰ In consideration thereof I have applied my mind as to whether there are other methods of obtaining evidence and the capacity of the parties to bear the expense involved and I have weighed the prejudice to the party seeking the application, if the application is refused, as against the prejudice to the respondent if it is granted.

[21] I have considered whether there is a likelihood that evidence can be lost, whether the applicant who is outside the jurisdiction of this court is likely to die.¹¹ When I weighed a number of factors, including old age, serious illness and costs of travelling and other incidental costs, it is clear to me that she will not be in a position to give oral testimony in this court due to her advanced age and serious illness.¹²

[22] The high court has powers to regulate its own processes in the interests of justice besides the powers bestowed upon it in terms of the statute. That power is now enshrined in s 173 of the Constitution, which provides, as follows:

'Section 173 The Constitutional Court, Supreme Court of Appeal and High Court of South Africa each has the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice.'

⁹ *S v Mzinyathi* 1982 (4) SA 118 (T); *Meyerson v Health Beverages (Pty) Ltd* *supra* at 678A and DE van Loggerenberg and E Bertelsmann *Erasmus: Superior Court Practice* (Revision Service – 2017) at D1-512.

¹⁰ *S v Hassim and others* 1972 (2) SA 448 (N) at 450E-G.

¹¹ *Botha v Van der Vyver and others* (1908) 25 SC 760.

¹² *Gray v Gray* 1923 OPD 111; *Erasmus supra* (Original Service – 2015) at D1-514.

This court has taken into account the dictum in *Moulded Components and Rotomoulding South Africa (Pty) Ltd v Coucourakis and another*¹³, where the court expressed itself as follows:

'I would sound a word of caution generally in regard to the exercise of the Court's inherent power to regulate procedure. Obviously, I think, such inherent power will not be exercised as a matter of course. The Rules are there to regulate the practice and procedure of the Court in general terms and strong grounds would have to be advanced, in my view, to persuade the Court to act outside the powers provided for specifically in the Rules. Its inherent power, in other words, is something that will be exercised sparingly. As has been said in the cases quoted earlier, I think that the Court will exercise an inherent jurisdiction whenever justice requires that it should do so. I shall not attempt a definition of the concept of justice in this context. I shall simply say that, as I see the position, the Court will only come to the assistance of an applicant outside the provisions of the Rules when the Court can be satisfied that justice cannot be properly done unless relief is granted to the applicant.'

[23] In *Mukaddam v Pioneer Foods (Pty) Ltd & others and Pioneer Foods (Pty) Ltd & others*¹⁴ in endorsing the provisions of s 173 of the Constitution the Constitutional Court pronounced as follows:

'It is apparent from the text of the section that it does not only recognise the courts' powers to protect and regulate their own processes but also their power to develop the common law where necessary to meet the interests of justice. The guiding principle in exercising the powers in the section is the interests of justice'.

And in *Oosthuizen v Road Accident Fund*¹⁵ stated as follows with regards to s 173:

'Jerold Taitz succinctly describes the inherent jurisdiction of the high court as follows in his book *The Inherent Jurisdiction of the Supreme Court* (1985) pp 8-9:

“... This latter jurisdiction should be seen as those (unwritten) powers, ancillary to its common law and statutory powers, without which the court would be unable to act in accordance with justice and good reason. The inherent powers of the court are quite separate and distinct from its common law and its statutory powers, eg in the exercise of its inherent jurisdiction the Court may regulate its own procedure independently of the Rules of Court.”

[24] This default position can be exercised to ensure convenience and fairness in legal proceedings, whenever the court considers it to be just and equitable in the

¹³ 1979 (2) SA 457 (W) at 462H-463B

¹⁴ [2013] ZACC 23; 2013 (5) SA 89 (CC) para 34.

¹⁵ [2011] ZASCA 118 para 14.

circumstances. The high court does not have any rules that regulate the applications for hearing of evidence through video link conferences. It would be absurd that having found that this court has jurisdiction to deal with the matter but because the rules of this court do not provide for a mechanism to deal with this application, that it should be rejected. South Africa prides itself in the rights enshrined in the Constitution. One of those paramount rights being s 34 of the Constitution which provides that

‘Everyone has a right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial forum.’

I find that the absence of such rules should not prevent this court from considering the application. The hearing with the aid of a video link conference will be a public hearing in a court of law, where all the parties will be appearing before a judge seized with the matter. I cannot see why such evidence cannot be admissible in any court of law.

[25] It is my view that the applicant has made out a case for the relief sought. The video link conference will also ensure access to the courts in terms of s 34 of the Constitution for the applicant and courts have a duty to ensure that people who have physical, financial, health and age barriers like the applicant have access to justice. The legal barriers created by the lack of rules, cannot override the right to access to justice. Video link conferencing extends and expands access to justice. Technology with the necessary safeguards enhances such a right enshrined in the Constitution.

[26] South African Criminal Courts have received evidence electronically when children give evidence through the closed circuit camera television system. This is done mostly where the victim is vulnerable or young in sexual offences cases. The applicant is no longer physically fit to travel at her age, suffers from serious ill-health and it will be very expensive for her to travel to South Africa. This is a cost effective measure, which is also convenient to all and can be used in civil proceedings.

[27] The court in *Uranium (Incorporated in British Columbia) t/a Areva Resource Southern Africa v Perie*,¹⁶ Satchwell J authorised the use of a video link to procure

¹⁶ 2017 (1) SA 236 (GJ).

evidence of witnesses who were in Dubai and Paris for business and were not able to attend court in Gauteng. Similarly in *Folley v Pick 'n Pay Retailers (Pty) Ltd and others*,¹⁷ Boqwana J found compelling reasons that the principal witnesses' evidence be procured through the employment of video link conference. Both Judges found that the use of video linkage to be appropriate in the circumstances and recognised that South African courts should use modern technology where the witness cannot attend court in the interests of justice.

[28] The right to have a person give *viva voce* evidence is not absolute. Rights of all the parties need to be considered, as long as there will be no prejudice to the other party as provided in s 36(1) of the Bill of Rights, which provides that the 'limitation [must] be reasonable and justifiable in an open and democratic society based on a human dignity, equality... '

[29] South African courts' are lagging behind in this sphere of technology. I have referred to the Electronic Communications and Transactions Act, and the Electronic Communications Act,¹⁸ as they are more or less related to the video link subject. Rule 38(3) of the Uniform Rules of Court still provides for taking of evidence on commission whether the witness is in South Africa or abroad. The disadvantages of the commission are that it cannot compel a witness to give evidence, the commissioner merely examines the witness, and he has no powers to decide on the issues of admissibility of evidence. Video conferencing is a live transmission of a communication between two or more persons, from various locations. The conferencing take place before the court, and the witness can be observed, can be requested to clarify answers and examined at the same time.

Definition of the high court in video conference link matters

[30] The high court in terms of s 1 of the Superior Courts Act¹⁹ means the high court of South Africa as referred to in s 6(1). Section 6(1) refers to the various divisions of the high courts, presided over by judges appointed to serve in those divisions. Section 6(7) of the Superior Courts Act, provides that

¹⁷ [2017] ZAWCHC 86.

¹⁸ Act 36 of 2005.

¹⁹ Act 10 of 2013.

'Whenever it appears to the Judge President of a Division that it is expedient or in the interests of justice to hold a sitting for the hearing of any matter at a place elsewhere than at the seat or a local seat of the Division, he or she may, after consultation with the Minister, hold such sitting at that place.'

[31] The sitting of a court in another place other than the designated areas in terms of the Act, do not cater for circumstances where the court has to sit as a court, at a venue with video conference facilities, like an attorney's office. It is my view that since such a sitting will be presided over by a judge of the high court, the definition of the court should be extended to cater for such a situation. Courts hold inspections *in loco*, similarly, the place where a video conference will take place should be regarded as a court.

Applications for video link conferencing in foreign jurisdictions

[32] I wish to adopt the view taken by the English Court in the civil matter of *Bremer Vulkan Schiffbau and Maschinenfabrik v South India Corpn*,²⁰ the court described the courts' inherent jurisdiction to hear any matter before it, as a general power to control its own procedures so as to prevent an injustice. It has to be used to ensure convenience and fairness in legal proceedings, prevent steps being taken that would render judicial proceedings ineffective, prevent abuses of process and act in aid of superior courts and in aid or control of inferior courts and tribunals.²¹ Plasket J in *S v Tsotsi*²² held that wherever the inherent jurisdiction of the court is in issue, the court has a discretion whether or not to invoke same. I therefore find that even if it has not been expressly relied upon by the applicant, this court has a discretion whether to invoke its inherent jurisdiction or not.

[33] Video conferencing in Australia is regulated in terms of the Federal Court of Australia Act 1976. The United States Federal Courts also use video link conferences. What is common to Australian and American courts is that leave to proceed by video conference is sought from the presiding judicial officer and certain safe guards have to be put in place in line with the provisions of the rules that govern

²⁰ [1981] 1 All ER 289.

²¹ *Bremer Vulkan Schiffbau supra* at 295.

²² 2004 (2) SACR 273 (E) para 13.

such applications. Our courts will soon need to be equipped with such facilities and develop the legal framework for the use of such technology. The Australian courts are quite advanced as the Chief Justice of the High Court, announced as early as, 15 September 1987 that applications for special leave to appeal in civil matters were soon to be heard by video link. This appears in an article by Daryl R. Williams accessed 23 July 2018; 'Use of video recordings and video links by courts and tribunals'.²³ The article refers to benefits of video link evidence, which is used in personal injury actions and other civil proceedings in Australia.

[34] The United Kingdom's Courts have also recognised the use of such facilities in civil proceedings in the courts. In an article written by Chun Wong, dated 21 October 2017,²⁴ she refers to Annex 3 of Practice Directive (PD) 32 which sets out guidance for the use of video link (known as VCT), according to which the discretion should be exercised by the court. She discusses *Barratt v Shaw & Ashton*²⁵ judgment and state as follows:

'A judgment must be made in every case in which the use of VCT is being considered not only as to whether it will achieve an overall costs saving but as to whether its use will be likely to be beneficial to the efficient, fair and economic disposal of the litigation.'²⁶

Chun Wong in her article sets out that the supporting witness statement should cover; (a) why a witness cannot attend in person (e.g. they live abroad, illness which prevents travel to court etc.); (b) why the witnesses' evidence is crucial to the case and any prejudice likely to be suffered by either parties; and (c) any other circumstances (eg short notice of a change of a trial date). These are the basic requirements which have been covered by the applicant in her application. Chun Wong further advocates that if the court does not have suitable alternative premises for such purposes, they will need to be sourced.

[35] She then lists a number of cases showcasing the courts' approach to evidence through video link, including *Kimathi v Foreign & Commonwealth Office*.²⁷

²³ (1987) 17 *Western Australian Law Review* 257 at 261ffg available at <http://classic.austlii.edu.au/au/journals/UWALawRw/1987/11.pdf>; accessed 23 July 2018.

²⁴ Chun Wong, The use of video link in civil proceedings (21 October 2017), available at <http://disputeresolutionblog.practicallaw.com/the-use-of-video-link-in-civil-proceedings/>; accessed on 23 July 2018

²⁵ [2001] EWCA Civ 137, [2001] CP Rep 57.

²⁶ Article 2 of Annex 3: Video Conferencing, Practice Directive 32 – Evidence: This practice direction supplements CPR Part 32.

In that matter the claimants who could not come to England for health reasons, were granted permission for their evidence to be given by video link. In the matter of *Falmouth House Limited v Micha'al Kamee Abou-Hamden*,²⁸ the court refused the application by the defendant who was resident in the United Arab Emirates for permission to give evidence by video link on the basis that this would contravene a previous order for attendance 'in person', and also given the delays in making the application. In *Polanski v Conde Nast Publications Limited*,²⁹ the House of Lords allowed that evidence be led through video link conference, where the applicant faced the risk of being extradited to the United States, to be sentenced for a criminal conviction, if he set foot in the United Kingdom. The House of Lords found that no prejudice would be suffered by the defendant if evidence was given by video link. Her view, which I accept, is that the court needs to achieve a balance between the convenience of giving evidence against the control that a court requires over conduct of the evidence.

[36] South Africa requires a legal framework for video link conferences, as it is the case in foreign jurisdictions within the Commonwealth. In an article dated 26 April 2016 by Dr Izette Knoetze, 'Virtual Evidence in Courts – A concept, to be considered in South Africa',³⁰ she echoes my sentiments, where she states that 'The use of technology in litigation requires that the laws of evidence recognise and provide for the various methods of taking and presenting evidence remotely.' She goes on to say that so far, in South Africa, it is only s 158(2)(a) of the Criminal Procedure Act 51 of 1977 which caters for an exception that evidence must be given in the presence of the accused. I see no reason why specific rules have not been developed for civil proceedings, to cater for exceptional circumstances, like in this case. We are still left with the antiquated commission rules.

[37] A recent Canadian Superior Court decision noted in an article by Matt Maurer, titled 'When are witnesses Allowed to Testify via Video-Conference?' dated 8

²⁷ [2016] EWHC 600 (QB).

²⁸ [2017] EWHC 779 (Ch).

²⁹ [2005] WLR 637, [2005] UKHL 10, [2005] 1 All ER 945, [2005] 1 WLR 637, [2005] EMLR 287

³⁰ This article was first published in *De Rebus* in 2016 (Oct) DR 30; available at <http://www.derebus.org.za/virtual-evidence-courts-concept-considered-south-africa/>; accessed 23 July 2018.

September 2015,³¹ discusses Rule 1.08(1) of the Rules of Civil Procedure which permits trial evidence by telephone or video conference. This rule states that if the parties do not consent to a witness giving evidence by telephone or video conference, then it is open to the court on motion or *mero motu* to make an order directing a telephone or video conference on such terms as are just. The article sets out the factors to be considered in exercising this discretion are set out in Rule 1.08(5) and are as follows:

- '(a) The general principle that evidence and argument should be presented orally in open court;
- (b) The importance of the evidence to the determination of the issues in the case;
- (c) The effect of the telephone or video conference on the court's ability to make findings, including determinations about the credibility of witnesses;
- (d) The importance in the circumstances of the case of observing the demeanour of a witness;
- (e) Whether a party, witness or lawyer for a party is unable to attend because of infirmity, illness or any other reason;
- (f) The balance of convenience between the party wishing the telephone or video conference and the party or parties opposing; and
- (g) Any other relevant matter.'

He refers to the matter of *Chandra v Canadian Broadcasting Corporation and others*³² where the court dealt with Rule 1.08(1) of the Rules of Civil Procedure, R.R.O, 1990 regulation 194 which permits trial evidence by telephone or video conferencing, where facilities are available at the court or are provided by a party.

[38] I am impressed by the open-mindedness shown by the Canadian Legislature as quoted in the *Chandra* judgment, in particular rule 1.04 which provides that:³³

'(1) These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits.

³¹ Available at <http://www.slaw.ca/2015/09/08/when-are-witnesses-allowed-to-testify-via-videoconference/>; accessed 23 July 2018.

³² 2015 ONSC 5385, a judgment by the superior court of Court of Justice and available on the CanLii database. .

³³ *Chandra supra* para 7.

(1.1) In applying these rules, the court shall make orders and give directions that are proportionate to the importance and complexity of the issues, and to the amounts involved, in the proceeding.’

The court noted the positive effects of receiving evidence by video conferencing, referring to the proceedings as ‘an electronic trial’. It noted that the picture and sound quality were excellent, mostly that the experience was entirely satisfactory. The learned judge found that the fears experienced by the plaintiff in opposing the CBC motion were, in his view, entirely unfounded.³⁴ I hold a more liberal and progressive opinion that such applications can be taken by consent between the parties. I finally find that the challenges raised by the respondent have no merit as such technology is extensively used in various countries.

[39] I therefore find that the application should succeed. Accordingly, the following order is made:

1. The applicant is authorised and directed to adduce her evidence, as plaintiff, in High Court case number 105/2004 (KwaZulu-Natal Local Division) by way of video link on a date arranged by the parties and the registrar of the Court in 2018, furthermore:
 - 1.1 The applicant will give evidence at the premises of DAA Montenegro LLC, situated at [...], Podgorica, Montenegro;
 - 1.2 The respondent is entitled and authorised to have a legal representative present when the applicant gives evidence at the premises of DAA Montenegro LLC, situated at [...], Podgorica, Montenegro;
 - 1.3 The applicant’s evidence will be transmitted via video conference link to the premises of Shepstone & Wylie or any other place agreed upon by the parties herein;
 - 1.4 The respondent will be entitled and authorised to have legal representatives in attendance at all material stages;
 - 1.5 The applicant shall ensure that a bundle of documents, agreed to by the respondent shall be delivered to the premises of DAA Montenegro LLC, situated at [...], Podgorica, Montenegro for use by the applicant in giving of her evidence;

³⁴ *Chandra supra* paras 30 – 31.

2. The respondent is directed to pay the costs of this application.
3. This matter shall be given preference by the court.

MBATHA J

Date of hearing: 14 June 2018 – C Court (Durban)
Delivered on: 20 August 2018

Appearances

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