

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO: 34502/2010

In the matter between:

GRAND VALLEY ESTATES (PTY) LIMITED	First Plaintiff
EDGE TO EDGE 17 (PTY) LIMITED	Second Plaintiff
MONTVIEW PROPERTIES (PTY) LIMITED	Third Plaintiff
MOTIFPROPS 1021 CC	Fourth Plaintiff
CRADLE OF LIFE INVESTMENTS (PTY) LIMITED	Fifth Plaintiff
WILDERNESS CONSERVATION PROJECTS (PTY) LIMITED	Sixth Plaintiff
MOUNTAIN VIEW INVESTMENTS (PTY) LIMITED	Seventh Plaintiff
FREDERICK COENRAAD DANIEL NO	Eighth Plaintiff
HENNING WILLERS NO	Ninth Plaintiff
JOHAN VOORHOVEN NO	Tenth Plaintiff
FREDERICK COENRAAD DANIEL	Eleventh Plaintiff
SIMON HUBA	Twelfth Plaintiff

and

(1)	<u>REPORTABLE:</u>	<u>YES / NO</u>
(2)	<u>OF INTEREST TO OTHER JUDGES:</u>	<u>YES / NO</u>
...01/11/24.....		
DATE		SIGNATURE

MPUMALANGA TOURISM & PARKS AGENCY	First Defendant
DIRECTOR-GENERAL OF DEPARTMENT OF ENVIRONMENTAL AFFAIRS & TOURISM, NATIONAL GOVERNMENT	Second Defendant*
MINISTER OF ENVIRONMENTAL AFFAIRS, NATIONAL GOVERNMENT	Third Defendant*
REGIONAL LAND CLAIMS COMMISSIONER, MPUMALANGA PROVINCE	Fourth Defendant
NATIONAL COMMISSIONER OF SA POLICE DIRECTOR OF DEPARTMENT OF AGRICULTURE & LAND AFFAIRS, MPUMALANGA PROVINCE	Fifth Defendant
MEMBER OF EXECUTIVE COUNCIL: DEPARTMENT OF AGRICULTURE & LAND AFFAIRS, MPUMALANGA PROVINCE	Sixth Defendant*
ALBERT LUTHULI MUNICIPALITY	Seventh Defendant
ABE SIBIYA	Eighth Defendant
JAN MULLER	Ninth Defendant*
DRIES PIENAAR	Tenth Defendant
DR DELANIE TIBA	Eleventh Defendant*
SOLLY MOSIDI	Twelfth Defendant*
ANDRÉ COETZEE	Thirteenth defendant
CHARLES NGOBENI	Fourteenth Defendant*
MAUREEN SITHOLE	Fifteenth defendant*
NCEBA NQANA	Sixteenth Defendant*
HARRY MABOA	Seventeenth Defendant*
	Eighteenth Defendant

LINDA MABATHA	Nineteenth Defendant*
SIBUSISO RADEBE	Twentieth Defendant*
BONGANI MWALI	Twenty-first Defendant*
PRO KHOZA	Twenty-second Defendant*
SUPERINTENDENT PHILLIPUS LOURENS KRITZINGER	Twenty-third Defendant
DR FERREIRA DU PLESSIS	Twenty-fourth Defendant*
GREATER BADPLAAS LAND CLAIMS COMMITTEE	Twenty-fifth Defendant*

JUDGMENT

Tuchten J:

- 1 This is an application for procedural directions. The application arises because the original trial judge, Sardiwalla J, was removed from judicial service for medical reasons, which I understand were related to a cognitive deficit. This was after he had heard, according to the plaintiffs, roughly twenty-five days of testimony. All of that testimony was heard by remote platform, during the Covid pandemic. I returned to the Bench from retirement to hear this case.
- 2 The testimony before the original trial judge was that of all the plaintiffs' witnesses and, after the plaintiffs' case had been closed,

some of the evidence in chief of the defendants' first witness. In addition, there was an inspection in loco, at which photographs were taken but no recordal was made by the original trial judge of what, if anything, was pointed out at the inspection.

3 I heard an earlier application for procedural directives on 13 May 2024 (the May 2024 application). The plaintiffs, who were the applicants in the May 2024 application, as they are in this present application, sought procedural directions for the further conduct of the trial. In a helpful joint practice note, the parties described the central issue in the May 2024 application to be whether the trial should proceed before the new trial judge where Sardiwalla J left off on the basis of the transcripts and video recordings of evidence, or whether the trial should start *de novo*.

4 After some argument was presented, the May 2024 application was resolved and the parties put up a draft which I made an order on 24 May 2024 (the May 2024 order). This order provided that the trial would commence *de novo* and be postponed to dates in 2025, running over the best part of the first two court terms, that a further interlocutory would be brought and heard on 21 and 22 October 2024 on the questions whether the pleadings for the trial should remain as they were as at the date of the May 2024 order, subject to any further

applications for leave to amend (as contended for by the plaintiffs), or whether the pleadings for the *de novo* trial should revert to their form or status before the start of the aborted trial (as contended for by the defendants). The order further recorded that the plaintiffs intended to apply for the admission of certain evidence in terms of s 3 of the Law of Evidence Amendment Act,¹ (the Hearsay Act). The order stated that the contemplated interlocutory hearings and the trial itself would be regulated by para 15 of the Consolidated Practice Directive, 1 of 2024. The costs of the earlier application were made costs in the cause.

5 I have been appointed to hear the *de novo* trial.

6 In the present application, the plaintiffs seek orders that the transcripts of the evidence given by fourteen named witnesses at the aborted trial, together with the documents to which they made reference in their testimony, be admitted into evidence for the purposes of the *de novo* trial;² that the affidavits of two further witnesses be admitted into evidence;³ that the joint minutes and photographs of an inspection *in loco* held during the aborted trial and the video recording of the inspection be admitted into evidence;⁴ that it be declared that certain

¹ 45 of 1988

² Prayers 1 and 2

³ Prayer 3

⁴ Prayer 4

admissions made by the defendants remain binding;⁵ and finally that the defendants be directed to file summaries of [the evidence of] the witnesses they intend to call.⁶

7 During argument, the plaintiffs largely focussed on the claims that the evidence of the named witnesses in prayers 1 and 2 be admitted and the claim in prayer 6 that the defendants be directed to file summaries of the evidence of the witnesses they intend to call. Counsel for the plaintiffs accepted that in that case, the plaintiffs should also be required to submit summaries of the evidence of the plaintiffs' witnesses.

8 At the hearing on 21 October 2024, clarity was achieved on the status of certain defendants who had either died or for some reason were not represented before me on that date. After some debate, the plaintiffs withdrew, or confirmed previous withdrawals, against all such defendants. I have identified the defendants against whom the plaintiffs have withdrawn by asterisks marked against their names in the heading to this judgment. The result is that all the remaining parties to the action are represented before me by counsel.

⁵ Prayer 5

⁶ Prayer 6

- 9 I must say something about the nature of the case brought by the plaintiffs. I do so, in this judgment, for present purposes only, conscious that I am perhaps over-simplifying a relatively complex history of commercial negotiations and associated litigation. The case for the plaintiffs is that the plaintiffs sought to utilise certain properties in the Badplaas Valley, Mpumalanga for a project which they called the Cradle of Life Nkomazi Wilderness. These properties, the plaintiffs say, were acquired with the project in mind. The commercial essence of the project was the creation, on land owned or controlled by the plaintiffs, of a game reserve with associated high end tourism facilities
- 10 The plaintiffs say that during or about October 2007 and thereafter, a collusive corrupt, fraudulent and unlawful relationship (which the plaintiffs label the collusive agreement) came into being to force the plaintiffs “out of Nkomazi”, which I understand to mean out of the project.
- 11 During the exercise of the collusive agreement, say the plaintiffs, certain of the defendants withheld the “Big Five Permits” from the plaintiffs. This, the plaintiffs say, crippled the project. In addition the defendants “colluded and some were manipulated” to damage the plaintiffs’ reputations and all their business and commercial interests. The defendants who are not organs of state are said to have acted in

a manner which rendered the organ of state defendants, in addition to their direct liabilities, vicariously liable.

- 12 Once the plaintiffs had been driven from the project, the plaintiffs say, Big Five permits were then granted to a firm called Dubai World. This is said to have been an “unauthorised, and/or *mala fide*, and/or biased, and/or *ultra vires* exercise of power by the first and/or one or more of ninth to fifteenth defendants”, thereby also infringing certain of the plaintiffs’ constitutional rights.
- 13 The 1st, 4th and 9th to 25th defendants colluded, the plaintiffs say, to place the plaintiffs under duress and, ultimately, certain of the plaintiffs sold Nkomazi Wilderness to Dubai World for a much lower price than would have been realised if “the reserve” had been issued with Big Five and large predator permits. The alleged acts of duress included “[h]ijack[ing] the Msauli Village” after large sums had been spent to rehabilitate it, withholding crucial permits, procuring the destruction of a fence, victimising the 11th plaintiff who acted as a whistle blower, presenting fictitious land claims, arranging violent public actions, bribing and misleading the press to spread false information about the 11th plaintiff to discredit him and ruin his reputation, instigating violence and intimidation against the 11th plaintiff, his family and his business to drive him out of the Badplaas

Valley, threatening to liquidate the 1st plaintiff, instigating an unlawful raid on the Cradle of Life Rehabilitation Centre, laying criminal charges against the 11th plaintiff, informing prospective investors in Nkomazi that the 1st plaintiff would be replaced by Dubai World and promising to issue to Dubai World permits which had been refused to the 1st plaintiff.

14 All these actions, the plaintiffs say, caused them to suffer damages derived from the diminution of the values of their land, the loss of corporate opportunities and loss of profits. They assess their damages, which they have calculated in relation to each plaintiff individually, at the sum of R1,78 billion, for which they seek to hold “one or more or all of the defendants” jointly and severally liable. The plaintiffs claim delictual damages.⁷

15 In addition, the 2nd plaintiff seeks damages from the 1st, 5th, 10th, 11th, 23rd and 24th defendants for an allegedly unlawful search and seizure in June 2008 of certain animals, which caused the 2nd plaintiff damages in the sum of R550 000.

⁷ I am told that the original trial judge was not required to make a finding on damages because that issue was separated for later adjudication.

- 16 The 1st plaintiff claims damages of R80 000 from the 21st, 22nd and 25th defendants arising from the destruction of the 1st plaintiff's boundary fence in 2008.
- 17 The 7th plaintiff claims damages of R720 000 from the 21st, 22nd and 25th defendants arising from the destruction of its boundary fence in 2008.
- 18 The 6th plaintiff alleges that it was responsible for managing and controlling the boundary fences of 1st and 7th plaintiffs and was obliged to incur expenses of R980 740 to provide protection of these properties from further damage.
- 19 All these allegations have been denied by the defendants. These denials raise the issues of what actually happened and why they happened, in the sense of the motives that precipitated those actions alleged to be linked to the alleged collusive agreement. In addition, the defendants raise defences by way of special pleas. Some of these are legal defences but others raise factual issues which, as the plaintiffs point out in their replication, will require evidence to resolve. For instance the defendants allege that they, or some of the defendants, are protected from liability in this action by a settlement agreement. In yet another special plea, the defendants allege that

actions alleged to have been committed under the collusive agreement were susceptible to PAJA review, a course which was not followed, and that the plaintiffs are therefore not entitled to consequential damages.

- 20 The plaintiffs replicated to the defendants' special pleas. The plaintiffs say in their replication that many of these special pleas will require evidence to resolve.
- 21 The case was brought by the plaintiffs by summons taken out in 2010. Sardiwalla J began hearing evidence in 2020. The first, narrow question that arose from the unfortunate incapacity of the original trial judge is what was to happen next.
- 22 The plaintiffs proposed that the trial should proceed from where the original trial judge left off. I, as the learned judge's replacement, they submitted, would be in the same position as he was, because there are video recordings of all the testimony of the plaintiffs' witnesses.
- 23 The defendants did not agree that the trial should simply proceed before me from where the original trial judge left off. The plaintiffs submit that this would be inconvenient and wasteful, duplicating many

days of testimony, wasting judicial resources and further delaying an already delayed trial.

24 In seeking to justify their decision to refuse to agree that the record of the evidence led should simply stand as evidence in the trial before a new judge, the defendants argued that the original trial judge made numerous rulings in relation to the admissibility of evidence which the defendants assert were clearly wrong; that the time which would be taken up by a new trial judge having to absorb the record of what went before will result in no judicial resources being conserved; that the new trial judge would be denied the opportunity of asking the witnesses who have already testified questions in clarification; that the approach of the original trial judge to the case led to a trial that was not fair to the defendants; that amendments were irregularly allowed to the plaintiffs' pleadings.

25 I have left till last two fundamental objections by the defendants to the trial proceeding on the record of the case thus far before the original trial judge. The first is that on that basis the new trial judge will be deprived of the benefits of seeing the plaintiffs' witnesses in the witness box.

26 The second is that the original trial judge was effectively declared medically unfit to proceed with the trial after some 119 days of proceedings. But, say the defendants, cognitive impairment in the elderly is a progressive condition. When, they ask, did the cognitive impairment arise, to such an extent that the learned trial judge was unable, cognitively, to apply himself to the case to an extent adequate to ensure a fair trial? It would be astonishing, the defendants say, to believe that the learned trial judge was fully capable of understanding and running a trial between May and June 2023, and even before that, but that in July 2023 he was required to be medically boarded because he suffered from a cognitive deficit.

27 I was relieved of the burden of deciding what was to happen next by the provisions of the May 2024 order, which I granted by consent.

28 In my view, however, the law in this Division is clear and is disposed of by the following passage from the judgment of Cillie J in *P Lorillard Co v Rembrandt Tobacco Co (Overseas) Ltd*,⁸ in which Boshoff and Marais JJ concurred:

On the question of a part-heard civil matter coming before another Court, the attitude of the parties appears to be of the greatest importance. As long as their agreement is not in

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1967 4 SA 353 T at 355

conflict with any statutory provision or rule of law, e.g. one relating to territorial jurisdiction, they may agree not only to a new trial or hearing before a differently constituted Court, but also, within limits, to the production of evidence at the new trial. In *Samuel and Others v Seedat*, 1949 (3) SA 984 (N), the facts were that a magistrate trying the case took ill and that the case was then placed before another magistrate; the parties agreed that the evidence which had already been given should form part of the record. The Court held on appeal that this agreement did not deprive the judgment of its validity as such nor render it the mere award of an arbitrator. SELKE, J., referred in his judgment to South African and English cases and, at p. 987, states the principle that -

' . . . in civil cases, the parties may, by consent or contract, depart to some extent from the usual procedure, more especially in the direction of relaxing the strict rules of evidence'.

To the cases quoted may now be added *The Forest Lake case*, (1963) 3 All. E.R. 833.

In all the cases considered the presiding judicial officer or one of the members of the Court hearing a matter became permanently or temporarily unable to be present at the trial and by agreement the trial was conducted in a particular manner before a Court differently constituted.

For the purpose of this appeal it may be said that, as it has become relatively impossible to constitute the Court as it was constituted at the original hearing, the parties could agree to a new hearing before a differently constituted Court.

In view of the absence of the JUDGE-PRESIDENT and the other Judges, and the agreement by the parties to a new hearing, there can be no objection to this Court hearing the appeal.

29 This is a judgment of the full bench of this Division and thus binding on me. It holds that in the absence of an agreement between the parties to depart from the default rule,⁹ where a judicial officer becomes incapacitated before giving judgment in a trial, the case starts *de novo* upon his replacement.

30 The case for the admission of the transcripts was based on the provisions of the Hearsay Act. Section 3(1)(c) provides that hearsay shall not be admitted unless

the court, having regard to-

- (i) the nature of the proceedings;
 - (ii) the nature of the evidence;
 - (iii) the purpose for which the evidence is tendered;
 - (iv) the probative value of the evidence;
 - (v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;
 - (vi) any prejudice to a party which the admission of such evidence might entail; and
 - (vii) any other factor which should in the opinion of the court be taken into account,
- is of the opinion that such evidence should be admitted in the interests of justice.

31 The purpose of the Hearsay Act is

⁹ A phrase used by Lopes J in *Mondi Shanduka Newsprint (Pty) Ltd v Murphy* 2018 6 SA 230 KZD at para 4(a)

to permit hearsay evidence in certain circumstances where the application of rigid and somewhat archaic principles might frustrate the interests of justice. The exclusion of the hearsay statement of an otherwise reliable person whose testimony cannot be obtained might be a far greater injustice than any uncertainty which may result from its admission. Moreover, the fact that the statement is untested by cross-examination is a factor to be taken into account in assessing its probative value... . There is no principle to be extracted from the Act that it is to be applied only sparingly. On the contrary, the court is bound to apply it when so required by the interests of justice.¹⁰

- 32 Counsel for the defendants submitted that the testimony be admitted is not hearsay but direct evidence and, thus the argument, the Hearsay Act does not apply in the present case. I do not agree. While the testimony was direct evidence in the aborted trial, it would be hearsay in the *de novo* trial if it were tendered by the transcriber of the record or other such witness to the fact that the record contained what was said at the aborted trial. The Hearsay Act is therefore engaged. Having found that the testimony *could* be admitted, I proceed to the question whether it *should* be admitted.

¹⁰ *Metedad v National Employers' General Insurance Co Ltd* 1992 1 SA 494 W at 498I-499G, approved in *Makhathini v Road Accident Fund* 2002 1 SA 511 SCA para 27

33 Counsel for the plaintiffs submitted that the testimony as a whole should be admitted on the strength of the following:

33.1 The transcripts are reliable in the sense that any transcript of evidence given in court is accurate unless some challenge is successfully mounted to the content of the transcription.

33.2 The demeanour of the various witnesses can, if necessary, be assessed by viewing the video record.

33.3 The testimony is material to issues which will arise in the *de novo* trial.

33.4 The testimony is of high probative value, given as it was in a court of law and subject to cross-examination.

33.5 Requiring the witnesses to appear once again to give their evidence will result in unnecessary or inappropriate additional stress to the witnesses. Some of the witnesses testified to having been threatened or “unduly pressurised directly” in relation to giving evidence or spoke of an “intimidatory and threatening environment surrounding the issues raised in this litigation”.

33.6 Generally, the transcript is an acceptable substitute for the full fair trial rights which the defendants would otherwise enjoy in the *de novo* trial.

33.7 Allowing the testimony in would result in significant costs savings to plaintiffs who have already funded the prolonged abortive trial and would potentially shorten the duration of the *de novo* trial. The plaintiffs began proceedings almost fifteen years ago, a very long time when measured against the judicial norm presently in place that high court cases should generally be resolved within one year from the date of issue of summons.

34 There is force in some of these submissions. Against them, however, there are other considerations. The first, and to my mind most fundamental, is that it is the task of the trial judge to assess the calibre of the witnesses whose testimony he is called upon to evaluate. The thirteen witnesses identified in prayers 1 and 2 of the notice of motion are all available to testify *de novo*.

35 The calibre of a witness is not merely evaluated in relation to demeanour. Although the assessment of demeanour is a difficult task in many cases, it remains the duty of a trial judge to consider this

element of the testimony in relation to each individual witness, where called upon to do so. Demeanour is, in the time honoured phrase, a tricky horse to ride but that does not mean that it is one which should be put out to pasture or sent to the knacker's yard. There is the highest authority for the proposition that demeanour, carefully and skilfully evaluated and not over-emphasised, is potentially a significant tool available to a trial judge in his evaluation of the evidence given before him.¹¹

- 36 Indeed, the process of evaluation of the evidence by the trial judge is wider than the mere consideration of whether the witness appeared at ease and confident in the witness box or was, say, flustered and ill at ease. The trial judge, to use another time honoured phrase, is steeped in the atmosphere of the trial. In my respectful opinion, the advantages potentially enjoyed by the trial judge have never been put better in our jurisprudence than by Van den Heever J, sitting in the South West Africa Division of the then Supreme Court, where the learned judge said the following:

... the word demeanour does not merely signify the appearance of a witness in the box; whether he gives his testimony with assurance, sometimes amounting to impudence, or whether he has the sheepish look which one

¹¹ *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 1 SA 1 CC paras 78-79

would expect from a liar; it means much more; it signifies that which distinguishes the living word from mere written records and it includes such matters as a momentary hesitation and an intonation of the voice and a thousand considerations which one may enumerate ...¹²

37 Van den Heever J wrote those words before video recordings of trial proceedings had become commonplace, but to my mind the video recording, with its restriction on what is being visually recorded generally to the face of the witness and its disruptions due to loss of connectivity and electronic anomalies like image freezing, is generally a poor substitute for the ability of the trial judge to observe the entire course of interactions between witness and counsel or even sometimes between witness and another person present in court.

38 The May 2024 order called for the trial to begin anew. This was reinforced by the provision of the order which required that the *de novo* trial be conducted in accordance with para 15 of the Consolidated Practice Directive, 1 of 2024. The relevant provision in this measure reads:

15.1 The following policy considerations inform the directives about modes of court hearings set out hereunder:

¹²

R v Haefele 1938 SWA 21 at 22

15.1.1 The general principle is that all courts shall conduct physical hearings in public as the default mode ...

39 The Practice Directive quoted gives expression to an important constitutional consideration: that disputes should be decided in a fair, *public* hearing (my emphasis).¹³ The ability of the member of the public interested in these proceedings to follow and form her own judgment of the cogency of the cases of the disputing litigants will be retarded if a substantial chunk of the evidence is to be found and evaluated, not in the words of the witnesses in open court but in an archive which the member of the public would have to access and digest.

40 The trial judge in the *de novo* trial will suffer a similar disability, although it is true that judges are trained to evaluate such archives. This is because, in my judgment, to echo Van den Heever J, the written word is not of the same quality as, and in certain instances will give the trial judge a picture of the events testified to less clear, less vivid, in the context with which I am dealing, than the spoken word.

41 Counsel for the defendants made the following point: the trial judge has a duty to make evaluations of the witnesses for the benefit of a

¹³

Section 34 of the Bill of Rights

potential court of appeal. This was recognised in *S v Dhlumayo and Another*¹⁴ and affirmed, with caution as to the limits of the dictum, in *SARFU, supra*. The third paragraph in the headnote of *Dhlumayo* reads:

The trial Judge has advantages - which the appellate court cannot have - in seeing and hearing the witnesses and in being steeped in the atmosphere of the trial. Not only has he had the opportunity of observing their demeanour, but also their appearance and whole personality. This should never be overlooked.

42 Counsel submitted that if I were to accede to prayers 1 and 2 in the present application and let in the evidence, I would disable myself from carrying out my task of seeing and hearing the witnesses, in the context of the trial as a whole and deprive any potential appeal court of the perspective of the trial judge in this regard.

43 I agree. This is a weighty factor against allowing in the transcript evidence.

44 A related concern is that I as *de novo* trial judge am being asked in this application to treat the defendants' witnesses differently from the plaintiffs' witnesses. If I granted prayers 1 and 2, I would largely be

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1948 2 SA 677 A.

disabling myself from taking into account the manner in which they gave evidence. Yet because the defendants' witnesses would appear before me, I would either have to ignore the manner in which they gave evidence (whether my impression was favourable or unfavourable to them) or subject the defendants' witnesses to a standard by which I was largely disabled from measuring the plaintiffs' witnesses.

45 The transcript that has been placed before me is deficient. It omits, except in the case of one witness, Mr Hutchinson, the cross-examination of the witnesses. This means that I am simply unable to evaluate the force of the allegation in the founding affidavit that the demeanour of the witnesses was not criticised in the answering affidavit or the general allegation that their credibility is not in issue.

46 Moreover, in the case of at least two of the witnesses, their testimonies were given by reference to documents that are not presently before me and to statutes, both categories of which I should need to evaluate as the testimony progressed. After reading what was put before me, I found that I did not grasp the significance of much of their testimonies. It would be entirely wrong to allow in transcripts, against opposition, where I would not grasp the import I was being asked to give to the testimony until it was elucidated in argument,

potentially many months later. I am not here criticising counsel who led these witnesses. The point I make is that after reading the transcripts, I was left with the impression that I did not understand the inwardness of the evidence presented.

47 Regarding the testimony that witnesses had been threatened or placed under pressure not to testify: this is of course most concerning and, if found to be true, may be of significance in the *de novo* trial. But the fact remains that the witnesses so threatened or placed under pressure did testify. They are all, according to the founding affidavit, available to testify *de novo*.

48 As to the threats or pressures themselves:

48.1 Mr Steyn, an attorney, testified that he was threatened, while carrying out his professional duties, with arrest for interfering with police work. The threat did not materialise.

48.2 Mr Ndabeni, a former CEO of the first defendant, testified that he had received unspecified death threats. The founding affidavit alleges¹⁵ that the witness was “pressurised” by counsel for the first defendant to sign an affidavit but I can find no

¹⁵

In para 126.18

justification for that allegation in the record of Mr Ndabeni's evidence before me.

48.3 There was an "attempt to intimidate" Mr Modipane, a former MEC in charge of the provincial treasury and finance in Mpumalanga by urging him not to give evidence against the "leaders of the ANC".

48.4 Mr Spoor testified to a "lot of threats and ... a lot of violence" in relation to Mr Spoor's work in land reform and land restitution but Mr Spoor never felt endangered himself.¹⁶

48.5 Mr Pienaar, a dealer in game and a wildlife capture specialist, testified that he was asked by the tenth defendant and by a senior counsel formerly acting for the some of the defendants to give evidence which "would have been false, but he was not asked outright to give false evidence".¹⁷

49 None of these five witnesses has himself expressed any reservation about again giving evidence *de novo*.

¹⁶ Transcript p1499

¹⁷ Founding Affidavit para 160.5

50 In the result, I am not persuaded that the requirement that the trial should be conducted by physical hearing, in public, should be abridged as sought by the plaintiffs. Prayers 1 and 2 of the notice of motion must be dismissed.

51 In regard to prayer 3, one of the witnesses mentioned is deceased and the other has refused to consult with the plaintiffs without an instruction from the defendants to do so. The plaintiffs seek the admission of affidavits made by these two witnesses but no such affidavits are before me. Prayer 3, it is fair to say, was not pressed by counsel for the defendants. Absent the affidavits, I cannot grant the relief sought. Prayer 3 must be dismissed.

52 Prayers 4 and 5 were not pressed by counsel for the plaintiffs. They are dismissed.

53 Prayer 6 is for a direction that the defendants be required to file summaries of the evidence of the witnesses they intend to call. Counsel for the plaintiffs submitted that trial by ambush is no longer acceptable and our procedures are evolving so that parties are required to show their hands well in advance of the trial date.

54 In the founding affidavit,¹⁸ the plaintiffs argue that a direction to file witness summaries will lead to a narrowing of the issues, enable the plaintiffs adequately to prepare cross-examination and limit the ability of the defendants to ambush the plaintiffs. In answer, the defendants argue that a trial court has no power to make such an order. In oral argument, counsel for the plaintiffs referred to rule 37A, which deals with judicial case management, and submitted that a judge appointed under rule 37A to manage a case before it goes to trial is vested with power to require the parties to disclose, at a pre-trial meeting to be held in terms of rule 37A(7), the “identity of the witnesses they intend to call and, in broad terms, the nature of the evidence to be given by each such witness.”¹⁹ But, argued counsel for the defendants, rule 37A(15) provides that unless “the parties agree thereto in writing, the case management judge and the trial judge shall not be the same person.” As I was appointed to conduct the trial and not manage the case under rule 37A, (thus counsel) I as trial judge have no power to act under rule 37A(10)(e).

55 Counsel for the plaintiffs placed considerable reliance on *HAL obo MML v MEC for Health Free State*,²⁰ para 199. In that case the parties

¹⁸ Para 171

¹⁹ Rule 37A(10)(e)

²⁰ 2022 3 SA 571 SCA

had neglected to define the issues in a medical negligence case with the requisite precision, giving the impression that even at the stage the case served before the appeal court, the precise basis of the claim was uncertain. The judgement proceeds, at para 199:

The remedy is straightforward. In any case where the pleadings and pre-trial procedures have not resulted in a clear statement of the issues, the trial judge should require the parties to deliver a statement of the issues in accordance with rule 37A(9)(a), that is, a statement of what is not in dispute and a statement of what is in dispute, setting out the parties' respective contentions on those issues. If the matter is subject to judicial case management under that rule such a detailed statement is a requirement. If it is not, it is within the judge's powers, **under rule 38(8)(c)** and their inherent power to regulate the proceedings, to require that such a statement be provided. (Own emphasis)

56 I must diffidently point to a difficulty with the passage I have just quoted. There is no rule 38(8)(c). I raised the problem with counsel after I had declared my intention to take time to consider and promptly received helpful notes from counsel on both sides. Counsel for the plaintiffs pointed me to the work of *Erasmus* on Procedure where, in commentary on the Rule, the learned author suggests that the reference should rather have been to rule 37(8)(c).

57 Rule 37(8) empowers a judge, who need not be the judge presiding at the trial, if such judge deems it advisable, at any time at the request of a party or of own accord, to call upon the attorneys or advocates for the parties to hold or to continue with a conference before a judge in chambers.

58 The context of rule 37(8) makes it clear that the judge referred to in rule 37(8)(c) is the “judge before whom a conference is held”. That judge may, under rule 37(8)(c),

... **with the consent of the parties** and without any formal application, at such conference or thereafter give any direction which might promote the effective conclusion of the matter, including the granting of condonation in respect of this or any other rule. (own emphasis)

59 The rule makes clear that the direction, given “at such conference or thereafter” may only be given by consent. No such consent has been given by the defendants. On the contrary, they oppose the claim for a direction.

60 Given all that, I do not think that *HAL, supra*, is authority for the proposition that the Rules confer on a trial judge (as opposed to a judge before whom a conference is held under rule 37(8) or a trial judge acting under rule 38A) a power, without more, to impose upon

a litigant, against his will, an obligation to provide his opponent with summaries of the evidence of the witnesses he intends to call. In my respectful view, *HAL* is authority for no more than that the trial judge is empowered to direct, in any case where the pleadings and pre-trial procedures have not resulted in a clear statement of the issues, the parties to deliver a statement of what is not in dispute and a statement of what is in dispute, setting out the parties' respective contentions on those issues.

61 Counsel for the plaintiffs submitted further, however, that *HAL* also grounded the power of a trial judge to regulate the proceedings before him in the inherent power of the court to regulate the proceedings and that this power of regulation would include, in a proper case, the power to order the production of witness summaries. I agree.

62 The question then resolves to this: is it in the interest of justice, given the history of the case and the context in which the direction is sought, to compel the defendant to file witness summaries?

63 In *Take and Save Trading CC and Others v Standard Bank of SA Ltd*²¹ at par 3, the SCA observed:

²¹ 2004 4 SA 1 SCA

Fairness of court proceedings requires of the trier to be actively involved in the management of the trial, to control the proceedings, to ensure that public and private resources are not wasted, to point out when evidence is irrelevant, and to refuse to listen to irrelevant evidence. A supine approach towards litigation by judicial officers is not justifiable either in terms of the fair trial requirement or in the context of resources.

And at para 4:

A balancing act by the judicial officer is required because there is a thin dividing line between managing a trial and getting involved in the fray.

64 In *Technology Corporate Management (Pty) Ltd and Others v De Sousa and Others*,²² valuable guidance in this regard is provided. This was a case which counsel described as most unpleasant and the trial judge at one stage called it a war. The SCA had this to say:²³

It is desirable nonetheless to make a limited number of observations for the guidance of judges who have to deal with long and complex matters such as this. In more leisurely times courts, while not acting as 'silent umpires', to use Lord Denning's expression, were more inclined to leave the conduct of the case to counsel and to limit interventions to

²² 2024 5 SA 57(SCA)

²³ Paras 264-265; footnotes omitted

elucidating evidence, making procedural rulings and rulings on admissibility, and preventing long-winded and unnecessary evidence-in-chief or abusive or repetitive cross-examination. With courts under far greater pressure than in the past, a more active case-management role is expected of the judge. ... In a trial of the length of this one, with copious documents and a good deal of technical evidence on financial matters, the task of the judge is an onerous one. A balancing act is required because 'there is a thin dividing line between managing a trial and getting involved in the fray'.

65 I have come into this case at a late stage. Counsel for the plaintiffs, said in their heads of argument that the preceding trial proceedings were acrimonious and prolonged. I can only say that the proceedings in the two separate applications which I heard were not acrimonious and counsel did not waste time; indeed the proceedings were conducted in the proper spirit I have come to accept from experienced members of the Bar.

66 I take into account that in the lengthy pre-trial meeting and case management proceedings that proceeded my appointment as trial judge, none of the parties has previously contended that the provision of witness summaries was necessary or desirable for the proper conduct of the trial. The parties earlier agreed during this process to exchange lists of witnesses and did so. In the earlier application for directions which came before me in May 2024, no such contention

was advanced. In the May 2024 order, no issue of witness statements was foreshadowed.

67 The plaintiffs have made clear that they intend at the trial *de novo* to call the same witnesses who testified in the aborted trial. They are not of course obliged to call all or indeed any of those witnesses and may call other witnesses. Leading counsel for the defendants submitted in court in oral argument that the plaintiffs should also be directed to file summaries if the defendants were made to do so. But the plaintiffs have never suggested previously that it would be in the interest of justice to require the plaintiffs to file witness summaries. The case was declared trial ready on 28 May 2019 at a meeting over which Raulinga J presided. What has changed since then?

68 What has changed is that the aborted trial has been held and in the May 2024 order the parties were directed to proceed to trial, impliedly on the pleadings as they then stood, *de novo*. The parties have the transcript of the testimony led at the aborted trial which, I am told, includes cross-examination of all the witnesses who testified for the plaintiffs.

69 It has not been suggested that the defendants' versions were not put to the plaintiffs' witnesses, where appropriate. As this is the almost

invariable practice in trial actions and the defendants were represented by senior counsel, it would be startling if versions were not put.

70 That being the case, the plaintiffs are in possession of a record of what their witnesses said (and, it is anticipated, will say at the trial *de novo*) and, through what was put to them in cross-examination, a record of, in broad terms, the nature of the evidence to be given by each witness to be called by the defendants.²⁴

71 It follows, then, that a direction requiring the parties to file witness summaries will not advance the finalisation of the trial *de novo*.²⁵ Such a direction will simply add to the voluminous paper already generated in this case but will not, in my view, shorten the proceedings. The claim for relief in prayer 6 cannot succeed.

72 I must make it clear that my rulings in this judgement are purely interlocutory. If circumstances change, or additional information becomes available, any party may approach the court to renew the application for the relief I have declined to grant or for other

²⁴ I deliberately echo the provisions of rule 37A(10)(e).

²⁵ Compare rule 37A(2)(b).

interlocutory relief. This judgment and the substantive orders I make will be no bar to any subsequent application for interlocutory relief.

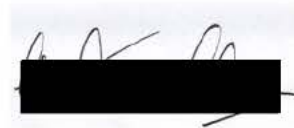
73 Finally, before I get to costs, the defendants contended in their answering affidavit that certain amendments to the plaintiffs' pleadings granted by Sardiwalla J should be set aside. There was however no application, no notice of motion, in which such relief was sought. Furthermore, there was nothing put before me which demonstrated that the faculties of the learned judge were impaired at the time he allowed the amendments, nor do there appear to me to be any grounds on which the decisions to grant the amendments can be faulted. As there was no counter-application, no order on the impugned amendments is competent. The amendments must stand, subject to the rider in the preceding paragraph. The argument on the amendments took up very little time.

74 As to costs: this is a commercial case and the general rule is that costs must follow the result. The defendants have been substantially successful. I see no reason why the general rule should not apply in the present application. The defendants must get their costs.

75 I shall publish this judgment by signing it electronically and sending it by email to my Registrar, who will distribute it to the parties. The date and time of publication is recorded immediately below my signature.

76 I make the following order:

The application is dismissed with costs in favour of those respondents who were represented before me, including the costs of two counsel to be taxed on scale C, to be paid by the applicants, jointly and severally.



NB Tuchten
Judge of the High Court
1 November 2024
08h35

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