



**IN THE HIGH COURT OF SOUTH AFRICA
LOCAL DIVISION, JOHANNESBURG**

- (1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO
(3) REVISED

17 October 2024

DATE

SIGNATURE

CASE NUMBER: 44993/2021

In the matter between:

Hlongwani Mthandazo

Plaintiff

and

Road Accident Fund

Defendant

RULING

MNCUBE, AJ:

INTRODUCTION:

[1] This is an application lodged by the Plaintiff in terms of Rule 38 (2) of the Uniform Rules to lead experts' evidence by way of affidavits. The application is opposed by the

Defendant. Plaintiff is claiming damages for loss of earnings. Liability has been conceded by the Defendant. The Plaintiff is Mr Hlongwani who is represented by Adv. Ngobeni-Moyana. The Defendant is Road Accident Fund which is a statutory body established in terms of section 2 of the Road Accident Fund Act 56 of 1996.¹ The Defendant is represented by Ms Ameersingh.

[2] The matter is before me for trial in respect to the damages for loss of earnings after liability was conceded by the Defendant. The bone of contention between the parties is that the Plaintiff wishes to lead the evidence of his experts by way of affidavit. After hearing submissions I reserved my ruling in order to consider all facts.

SUBMISSIONS:

[3] Adv. Ngobeni-Moyana contends that the application is made in the interest of justice and convenience. The submission is that the Plaintiff exercised his rights for this application to adduce evidence by affidavits. The argument is that the Defendant was aware that the Plaintiff intends to make this application in terms of Rule 38 (2) but did nothing. The contention is that this objection is causing prejudice to the Plaintiff who now must bring all his witnesses. Counsel indicates that it was agreed between the parties that the trial will require two days to complete, and urges this Court to conclude that it is just to adduce evidence by affidavit.

[4] Ms Ameersingh argues that the actual application itself is defective on the grounds that there is no Notice of Motion filed and there is no date when the affidavit was commissioned. In respect to the merit of the application the contention is that the issue for determination on trial is a claim for loss of earning and the Industrial Psychologist had relied on facts in the report which must be tested. The argument is that there is an inconsistency with regard to the work history of the Plaintiff. The contention is that the Industrial Psychologist did not canvass other employment falling within the category of medium unskilled labourer which is relevant for contingency deduction. Ms Ameersingh contends that at the pre-trial conference, it was indicated that the contents of all documents must be proved and referred to the Minutes. The Plaintiff took a decision to make this application despite an agreement made at the pre-trial conference that evidence will not be adduced by affidavits. The submission is that the parties did not have a more recent pre-trial conference to prepare for the hearing. Ms Ameersingh contends that there are no compelling reasons advanced to deviate from the norm and urges that the Court must consider fairness to both parties and should not allow the application.

¹ Amended by Act 19 Of 2005 which came into operation on 1 August 2008.

ISSUE FOR DETERMINATION:

[5] The issue is whether or not the application to adduce evidence by way of affidavits should be granted.

THE LAW:

[6] This application is based on Rule 38 (2) which provides that-
'The witnesses at the trial of any action shall be orally examined, but a court may at any time, for sufficient reason, order that all or any of the evidence to be adduced at any trial be given on affidavit or that the affidavit of any witness be read at the hearing, on such terms and conditions as it may seem meet: provided that where it appears to the court that any other party reasonably requires the attendance of a witness for cross examination, and such witness can be produced, the evidence of such witness shall not be given on affidavit.'

[7] The word 'may' clearly show that the trial Court has a discretion to depart from the norm that evidence must be adduced orally. Where the Court has discretion, it must be exercised judicially. See **Bafokeng Land Buyers Association and Others v Royal Bafokeng Nation 2018 (3) All SA (NWM)** para [64]. The test to be applied by the trial Court in exercising its discretion in terms of rule 38 (2) is to determine whether or not it is convenient to do so and to determine whether it will further the interest of justice.

[8] In **Havenga v Parker 1993 (3) SA 724 (T)** it was stated that it is permissible in an action for damages to place before the Court the evidence of experts as this will often save costs and will eliminate the unnecessary wastage of Court time.

[9] The approach to Rule 38(2) was summarised in **Madibeng v Local Municipality v Public Investment Corporation 2008 (6) SA 55 (SCA)** para [26] as follows *'The approach to rule 38 (2) may be summarised as follows: A trial court has a discretion to depart from the position that, in a trial, oral evidence is the norm. When that discretion is exercised, two important factors inevitably be the saving of costs and the saving of time, especially the time of the court in this era of congested court rolls and stretched judicial resources. More importantly, the exercise of the discretion will be conditioned by whether it is appropriate and suitable in the circumstances to allow a deviation from the norm. That requires a consideration of the following factors: the nature of the proceedings; the nature of the evidence; whether the application for the evidence to be adduced by way of affidavit is by agreement; and ultimately, whether, in all the circumstances, it is fair to allow evidence on affidavit.'*

ANALYSIS:

[10] In deciding whether or not to grant the application, there are trite principles which must be considered and applied to the issue. First, the function of a court is to resolve disputes between litigating parties². Second, the interest of justice and the Constitutional values must be considered and applied in any matter before a Court. In trial proceedings, the norm is that evidence is adduced viva voce, however Rule 38 (2) constitutes an exception to the norm. In the exercise of the discretion conferred by Rule 38 (2), the Court must guard against sacrificing the right of cross examination for convenience. I will now consider the Defendant's grounds for opposition.

[11] The first ground for the opposition is that the application is defective. This ground is technical in nature. In my view, in as much as Courts are weary to uphold technical objections, however adhering to procedure when making applications is important (with an exception that a party seeks condonation for its failure to follow rules and procedure). Unless the opposing party takes no issue with the procedure adopted and concentrates on the substance of the issue, the Court can exercise its discretion to condone the failure to comply with the rules. The insistence to uphold litigants to this standard, the Court ensures consistency and a high regard for the legal profession. It is trite that any application must be done in terms of the rules. Regrettably, the Plaintiff has failed to do so. It follows that there is merit to this ground.

[12] The second ground is based on the contention that the affidavit is undated thereby questioning whether there was substantial compliance with the Justices of the Peace and Commissioners of Oath ACT 16 of 1963. It is settled law that the Court retains a discretion to refuse an affidavit which does not comply with the Regulations. See *ABSA Bank Ltd v Botha NO and Others* 2013 (5) SA 563 (GNP). What is important to consider is whether there is substantial compliance with the formalities of the Regulations. See *S v Munn* 1973 (3) SA (NC) at 734H. I am satisfied that there has been substantial compliance with the Regulations. It follows that there is no merit to this ground.

[13] When considering the merit of the application, the Defendant's main objection is that the report by the Industrial Psychologist does not contain an indication if the Plaintiff's employers were contacted. This omission has the effect that the report contains hearsay information and the omission will affect the contingency deductions. The Defendant in essence does not consent to adducing evidence by affidavits. I have considered the various factors.

² *Four Tower Investments (Pty) Limited v Andre's Motors* 2005(3) SA 39 (N) at para 15.

(a) The nature of the proceedings:

[14] The claim is based on the loss of earnings which is usually proved by experts who consider many factors. In view of the nature of the claim and the reasons advanced by the Defendant, I am persuaded that the interest of justice favours that the Defendant be afforded an opportunity to cross examine the Plaintiff's experts.

(b) The nature of the evidence:

[15] In as much as the experts must not usurp the duty of the Court to decide the matter, it would be amiss to ignore the fact that some of the evidence to be adduced by the Plaintiff's experts is of a technical nature. By giving viva voce evidence not only will this assist the Defendant to test the veracity of the evidence, it will also benefit the Court to make an informed decision with special reference to the issue of quantum and contingency deductions to be applied. It follows that the interest of justice permits the granting of the right to cross examine the witnesses.

(c) The presence or absence of an agreement:

[16] There is no agreement between the parties to adduce the evidence by affidavits. On interpreting the proviso, applying trite principles of interpretation³, what is clear is that where it appears to the Court that a party reasonably requires the attendance of a witness, the evidence of that witness SHALL not be given on affidavit. This goes towards the right to a fair trial. It follows that the interest of justice permits the Defendant to be given the right to cross examine any witness. There is no agreement that some of the experts may adduce evidence by affidavit. Clearly the Defendant's objection is in relation to all the experts.

(d) Consideration of fairness and the interest of justice

[17] It is in the interest of justice that the Defendant be given the opportunity to cross examine the witnesses. The right of a litigant to cross examine is the hallmark of a just legal system. In my view, the exception to the norm of evidence being adduced orally is in instances where the parties agree to the content of the affidavit because there is a waiver of the right to cross examine, which effectively means the factual allegations stand unchallenged.

(e) The balance of convenience

³ See Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 para [17] to [19].

[18] Rule 38(2) is an exception to the adducing of evidence which favours convenience as to time and costs. This however, does not mean that fairness of the trial must be sacrificed for convenience.

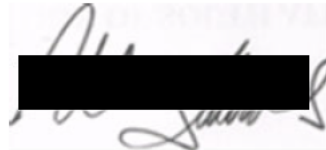
CONCLUSION:

[19] Having considered all of the relevant factors, I am persuaded that the interest of justice and the right of the Defendant to cross examine the experts far outweigh the balance of convenience to the court and the Plaintiff. For this reason the application stands to be dismissed. In the exercise of my discretion on costs, costs shall be costs in the cause.

ORDER

[20] In the circumstances the following order is made:

1. The application is dismissed. Costs in the cause.



N.C.J. MNCUBE
ACTING JUDGE OF THE HIGH COURT

Appearances:

On behalf of the Plaintiff	: Adv. Ngobeni- Moyana
On behalf of the Defendant	: Ms Ameersingh
Date of Hearing	: 16 October 2024
Date of Ruling	: 17 October 2024