



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, GQEBERHA)**

Of interest

CASE NO. 3223/2017

In the matter between:

RENNIE CHARLES BLAINE PRICE N.O.	First plaintiff
MICHAEL LOWELL BLAINE PRICE N.O.	Second plaintiff
ROBIN OWEN JEFFERSON	Third plaintiff
TORTELO INVESTMENTS NO. 20 (PTY) LTD	Fourth plaintiff
EQUISTOCK PROPERTIES 7 (PTY) LTD	Fifth plaintiff

and

SUN CITRUS PACKERS (PTY) LTD	Defendant
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JUDGMENT

LAING J

[1] This is an interlocutory application pertaining to the presentation of evidence at the commencement of the defendant's case. In this regard, the defendant indicated that its director, Dr Cecil Brummer, intended to testify about the electronic databases that inform much of the present dispute by using a laptop and a data projector to display the information on a screen placed inside the courtroom. The plaintiffs initially agreed to the proposal, provided that the information comprised data

that had already been supplied on flash drives to their attorneys and the experts involved. At a short demonstration given in court prior to the commencement of Dr Brummer's testimony, it was clear that the proposal was somewhat more expansive than anticipated. Concerns were raised by the plaintiffs, as well as the court. These gave rise to the present application.

[2] The defendant seeks a declarator that it be permitted to provide demonstrative evidence, as it was termed, in the manner described above. It also seeks to refer to the data contained in the electronic files stored on a flash drive ('the Mulder *stokkie*') that was previously furnished to the plaintiffs' accountants, represented by Mr JP Mulder; the Sun Citrus Packers (SCP) database; and the Sun Citrus Export (SCE) database. Furthermore, the defendant seeks an order that the resulting audio-visual screen recordings need not be certified and that they be retained for safekeeping by the Registrar, alternatively the court clerk, at the end of each court day.

[3] In his founding affidavit, Dr Brummer emphasised that the purpose of the application was chiefly to obtain an order that prescribed the methodology to be used for the presentation of the evidence in question. He went on to say that the DiPar system used by the defendant during the period, 2013 – 2016, together with the Excel database to which the relevant information was exported, constituted the foundation of the defendant's accounting to the plaintiffs. The defendant required an opportunity to demonstrate, to the court, the following: the content and extent of the SCP database, which comprised the equivalent of 60 788 pages of information; the process used to access such information; how the SCP database can be used to prepare various reports, already supplied to the plaintiffs and other citrus producers for accounting purposes; how it can be used to perform reconciliations; how it can be matched to the documentary evidence already discovered, and contained in the boxes made available and eventually given to the plaintiffs' accountants; and how the SCP database can be used to evaluate the reports and evidence of the defendant's witnesses. Dr Brummer pointed out that he could not perform the above demonstration by using printed extracts from the data. The sheer volume of information, 60 788 pages, made this impossible. The demonstration was necessary for the court to grasp, sufficiently, the oral and documentary evidence that the

defendant intended to present; it was fundamental to a proper understanding of the defendant's accounting systems — and its defence to the plaintiffs' claim. The same imperatives applied in relation to the SCE database, already discovered, and the Mulder *stokkie* itself. Dr Brummer reiterated that the databases and records, in general, have always been available to the plaintiffs for inspection, but they had evidently not understood how the defendant's systems worked in practice.

[4] In the answering affidavit of Mr Rennie Price, the plaintiffs made it clear that their primary concern was the defendant's proposed methodology for the presentation of evidence. The resulting record had to comply with the rules of court. Furthermore, the evidence sought to be introduced had to be admissible; amongst other things, it had to be relevant to the issues set out in the pleadings, specifically whether the defendant had provided a proper accounting to the plaintiffs, accompanied by the necessary supporting vouchers.

[5] From the submissions made by counsel, it was apparent that the present matter lent itself to further issues, not initially envisaged when the question of the proposed methodology for the presentation of the defendant's evidence first arose. These will be addressed, but only to the extent that they are properly before the court. Otherwise, the main issue for determination is simply whether the proposed methodology is acceptable.

[6] It is trite that, in terms of section 173 of the Constitution, a court has inherent power to protect and regulate its own process, and to develop the common law, considering the interests of justice. The procedure for the conduct of a trial already exists, however, as laid down in terms of rule 39 of the Uniform Rules of Court (URC). The relevant portions thereof read as follows:

'(16) A record shall be made of –

- (a) any judgment or ruling given by the court;
- (b) any evidence given in court;
- (c) any objection made to any evidence received or tendered;
- (d) the proceedings of the court generally (including any inspection *in loco* and any matter demonstrated by any witness in court); and

- (e) any other portion of the proceedings which the court may specifically order to be recorded.
- (17) Such record shall be kept by such means as to the court seems appropriate and may in particular be taken down in shorthand or be recorded by mechanical means.
- (18) The shorthand notes so taken or any mechanical record shall be certified by the person taking the same to be correct and shall be filed with the registrar. It shall not be necessary to transcribe them unless the court or a judge so directs or a party appealing so requires. If and when transcribed, the transcript of such notes or record shall be certified as correct by the person transcribing them, and the transcript, the shorthand notes, and the mechanical record shall be filed with the registrar. The transcript of the shorthand notes or mechanical record certified as correct shall be deemed to be correct unless the court otherwise orders.
- (19) Any party to any matter in which a record has been made in shorthand or by mechanical means may apply in writing through the registrar to a judge to have the record transcribed if an order to that effect has not already been made. Such party shall be entitled to a copy of any transcript ordered to be made upon payment of the prescribed fees.
- (20) If it appears convenient to do so, the court may at any time make any order with regard to the conduct of the trial as to it seems meet, and thereby vary any procedure laid down by this rule.
- (21) Every stenographer employed to take down a record and every person employed to make a mechanical record of any proceedings shall be deemed to be an officer of the court and shall, before entering upon his duties, take the following oath . . .’

[7] Van Loggerenberg remarks that everything that is relevant to the proceedings or the merits of a case must be ‘fully, carefully, and clearly recorded’.¹ The record is, ultimately, the only trustworthy source upon which reliance can be placed to determine what took place and what was said at trial.² It must be as accurate as possible a report or account of the proceedings, ensuring that the evidence presented is correctly preserved. At a practical level, the record serves as an essential tool for the purposes of cross-examination and re-examination of

¹ D E van Loggerenberg *Erasmus: Superior Court Practice* RS 27 (2025), at D1 Rule 39 – 25.

² *S v Maxaku; S v Williams* 1973 (4) SA 248 (C), at 257E.

witnesses, and the preparation of argument; it serves as the basis upon which the court adjudicates a dispute and upon which an appeal court decides whether the decision was correct.³ Overall, the record serves as the means for deciding whether the proceedings were conducted fairly and in accordance with the proper administration of justice. It is an indispensable element of the trial — and it is the duty of the presiding officer to ensure that it is kept in an appropriate manner and form to serve the purposes described above.

[8] Regarding the nature of the evidence to which the defendant in the present matter referred, rule 39 (16) (d) envisages the recording of ‘any matter demonstrated by any witness in court’. The erstwhile Appellate Division dealt with the subject in *Arthur v Bezuidenhout and Mieny*.⁴ The following extract from the judgment, although lengthy, illustrates the risks associated with a record that is incomplete or otherwise inadequate. Ogilvie Thompson JA stated as follows:

‘At this point it is apposite to refer to the very unsatisfactory state of the record as placed before this Court on appeal, of which mention was made by the presiding Judge at the commencement of the hearing. The transcript of the mechanically recorded evidence is far from perfect. In a few instances what is transcribed is quite unintelligible; while in others what was said by the witnesses is not reproduced at all, as appears from the following illustration: “*By the Court.* What is on the Pitman arm? (Mr Protheroe explains to the Court.)” Paying due regard to the disadvantages inevitably attendant upon the mechanical recording of evidence, this record nevertheless falls short of the required standard . . . An even more serious deficiency in the record is, however, attributable to the manner in which the expert evidence was, without comment by the trial Judge, led by counsel on both sides. Neither counsel nor the learned Judge observed the ordinary practice — and, indeed, elementary precaution — of causing the various metal exhibits referred to by the expert witnesses in their evidence to be lettered or numbered. In consequence, the record abounds in statements — wholly unintelligible on appeal — which are the equivalent of “this fits into that, and there is a mark here”. In addition, the frequent demonstrations given by the expert witnesses during their evidence were not translated into words and incorporated in the record, the latter merely mentioning the fact of the demonstrations being made. Furthermore,

³ In this regard, the Supreme Court of Appeal, in *S v Chabedi* 2005 (1) SACR 415 (SCA) para 5, stated that the record of the proceedings in the trial court is of ‘cardinal importance’. It does not have to be a perfect recordal of everything that was said at the trial, but it must be adequate for proper consideration of the appeal.

⁴ 1962 (2) SA 566 (A).

and perhaps most important of all, portions of the expert witnesses' testimony were frequently not recorded at all — the record merely containing entries such as the three following examples, viz: "Witness explains and demonstrates to the Court." — "Witness shows pieces of metal to Court and explains." — "Discussions between the Judge and the witness regarding fatigue."

As the result of all the foregoing, not only has the task of this Court been unnecessarily rendered more difficult, but the evidence of the experts is incompletely reflected in the record to the potential detriment of the parties. All of which could have been avoided had counsel — and, indeed, the learned Judge — at the trial followed the conventional course of ensuring that all material evidence, including demonstrations, was properly and intelligibly incorporated in the record.⁵

[9] Case law is replete with other examples of an unsatisfactory record.⁶ Admittedly, the authorities cited are from the 1960s, two generations ago. Significant advances in information communication technology regarding the generation, sending, receiving, and storage of information have revolutionised human communication in every corner of society, including the courtroom. Resort to a virtual platform, using software such as Microsoft Teams or Zoom, has become an acceptable method of conducting a trial. Nevertheless, the applicable principles remain unchanged. To ensure an intelligible reception and understanding of any matter demonstrated by a witness, the evidence presented must, conventionally, be conveyed orally and stored electronically as an audio recording, to be transcribed as and when circumstances require.

[10] Turning to the present matter, the proposed methodology will entail a separate audio-visual recording of the demonstration. The defendant's intention is to have it incorporated into the record, eventually, as an exhibit. The immediate red flag is that the recording will potentially run to hours, if not days, presumably resulting in a batch of electronic files that have been created, identified, and stored by the defendant's key witness, Dr Brummer himself. The ability of the average person to manage the rigours of giving evidence is tested in even the most advantageous of circumstances;

⁵ At 571A – G.

⁶ See, for example, *R v Karg* 1961 (1) SA 231 (A), at 234B – C; and *S v Nkombani and Another* 1963 (4) SA 877 (A), at 894B – D.

to manage this over a protracted period, while simultaneously keeping a satisfactory audio-visual record of the proceedings, is a very tall order indeed. How such a methodology will permit effective cross-examination and re-examination, as well as the preparation of argument, has also not been sufficiently explained. The court's concerns, moreover, about how this would allow or facilitate the adjudication of the dispute were simply not addressed, to say nothing of how an appeal court would deal with the record. Another red flag, amongst a substantial collection of red flags, is that Dr Brummer is neither a stenographer nor an officer of the court, as contemplated by rule 39 (21). The proposed methodology is self-evidently unacceptable.

[11] Insofar as rule 39 (20) permits the court a certain degree of latitude regarding the conduct of a trial, to the extent that it may vary a procedure, convenience remains the underlying principle. This extends to the convenience of the parties, the witnesses, and the court itself.⁷ Whatever methodology is intended by the defendant for purposes of Dr Brummer's demonstration, be it conventional or otherwise, it must, without difficulty, allow access to the report or account thereof, an understanding of what took place and what was said, and ensure that it serves the purposes previously mentioned. Provided that the demonstration is limited in nature and extent, it must, at the least, result in a proper audio recording that is readily capable of transcription and complies with the provisions of rule 39 in general. Furthermore, data to which reference is made during the demonstration must be supported by a printed document so that it can be readily identified and described as an exhibit that forms part of the record, subject of course to its admission into the general body of evidence in accordance with the usual principles.

[12] Amongst the remaining issues that have emerged is the extent to which reference can be made to the data contained on the Mulder *stokkie*, as well as the SCP and SCE databases. Counsel referred to recent case law and the Electronic Communications and Transactions Act 25 of 2002 (ECTA) to argue that the data is admissible. Section 15 (1) of ECTA is clear enough:

⁷ *Rail Commuters' Action Group v Transnet Ltd* 2006 (6) SA 68 (C), at 88B.

- ‘(1) In any legal proceedings, the rules of evidence must not be applied so as to deny the admissibility of a data message, in evidence –
- (a) on the mere grounds that it is constituted by a data message; or
 - (b) if it is the best evidence that the person adducing it could reasonably be expected to obtain, on the grounds that it is not in its original form.’

[13] There is no prohibition, in general, against the admission of data such as contemplated in the present matter. In *Spring Forest Trading CC v Wilberry (Pty) Ltd t/a Ecowash and Another*,⁸ the Supreme Court of Appeal, per Cachalia JA, remarked that one of the aims of ECTA was to promote legal certainty and confidence in relation to electronic communications and transaction. When interpreting the legislation, courts were enjoined to recognize and accommodate electronic transactions and data messages in the application of any statutory law or the common law.⁹ Section 15 (2) stipulates, furthermore, that the information must be given due evidential weight; section 15 (3) indicates the factors to be considered when carrying out an assessment in that regard. Importantly, section 15 (4) provides that a data message ‘made by a person in the ordinary course of business’ is, on its mere production, admissible in evidence. Whether the data mentioned by the defendant is indeed admissible, however, falls outside the scope of the immediate matter. This will depend on, amongst other things, its relevance, considering the issues arising from the pleadings.

[14] An important distinction made by the plaintiffs is that Dr Brummer intends to use the data, during the demonstration, to create a new ‘illustration’, ‘reconciliation’, ‘outcome’, or ‘result’ that never previously existed. Presumably this would be achieved by relying on the search or filter functions (or their equivalent) available in the software used. The plain answer to this is that such a product or data message, to use the language of ECTA, cannot be presented for admission unless it was properly discovered beforehand.

⁸ 2015 (2) SA 118 (SCA).

⁹ Para 16.

[15] Counsel invited the court to make a finding on whether Dr Brummer was qualified as an expert to demonstrate access to the data and use of the software in question. This is not, however, a question that is properly before the court. Neither the application itself nor the heads of argument indicate that the parties intended this to be an issue for immediate determination. Although the defendant's explanation for why a demonstration is necessary suggests that an expert will be required, Dr Brummer has yet to commence his testimony. A finding in this regard would be premature. At best, the court can merely refer to the following passage from Schwikkard's work:

'The party seeking to adduce the opinion of a witness as an expert opinion must satisfy the court that the opinion is not supererogatory, that is, not irrelevant. For this purpose the court must be satisfied: (1) that the witness not only has specialist knowledge, training, skill, or experience but can furthermore, on account of these attributes or qualities, assist the court in deciding the issues; (2) that the witness is indeed an expert for the purpose for which they are called to express an opinion; and (3) that the witness does not or will not express an opinion on hypothetical facts, that is, facts which have no bearing on the case or which cannot be reconciled with all the other evidence in the case.'¹⁰

[16] In conclusion, the defendant sought a departure from the conventional methodology used in the making and keeping of the record, as envisaged under rule 39. For the reasons already stated, the proposed methodology is unacceptable. The plaintiffs are entitled to the costs of the application on scale C. Whereas they also sought the wasted costs of the trial proceedings, the defendant was invited or directed to bring the application at the instance of the court; it should not be saddled with the additional burden for which the plaintiffs contend.

[17] The following order is made:

- (a) the application is dismissed; and
- (b) the defendant is ordered to pay the plaintiffs' party-and-party costs, including those of two counsel, on scale C.

¹⁰ P J Schwikkard (et al) *Principles of Evidence* 5 ed (2023), at 95.

JGA LAING
JUDGE OF THE HIGH COURT

Appearances

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