IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CIRCUIT LOCAL DIVISION, THEMBALETHU)

Case No: 7114/2019

In the matter between

JACOBUS JOHANNES ANDRE GRIEBENOUW	APPLICANT
AND	
THE MINSTER OF LABOUR	1ST RESPONDENT
DIRECTOR-GENERAL DEPARTMENT OF LABOUR	2ND RESPONDENT
THE NATIONAL DEPARTMENT OF LABOUR	3RD RESPONDENT
THE COMPENSATION COMMISSIONER	4TH RESPONDENT
THE NATIONAL DEPARTMENT OF CORRECTIONAL SERVICES	5TH RESPONDENT
THE GOVERNMENT PENSIONS	6TH RESPONDENT

ADMINISTRATION AGENCY

THE NATIONAL DEPARTMENT OF TREASURY 7TH RESPONDENT

THE NATIONAL MINISTER OF FINANCE 8TH RESPONDENT

Heard: 02 March 2026

Delivered electronically: 17 June 2026

ORDER

(a) The *rule nisi* is discharged.

(b) The applicant to pay the costs, including costs of counsel on scale C.

JUDGMENT

THULARE J

[1] This is an opposed application for confirmation of a *rule nisi* and costs, including reserved costs. The issue turns on the admissibility into evidence, of an actuarial report attached to the applicants supplementary founding affidavit. Only the 1st to fourth respondents (the respondents) opposed the application. The respondents contended that the actuarial report should be rejected and/ or

disregarded for non-compliance with Rule 36(9) of the Uniform Rules of Court. Their case is that the actuarial report is inadmissible in which event the application should fail and the *rule nisi* ought to be discharged.

[2] The main issue between the parties is the determination of the applicant's pension in percentage resulting from his disability and the determinations in terms of the Compensation and Occupational Injuries and Diseases Act, 1993 (Act No. 130 of 1993) (COIDA). The applicant made a few amendments to is application since it was launched. In the latest amendment, he filed a supplementary founding affidavit which for the first made had an actuarial report as an annexure. For purposes of this judgment, the relevant paragraph, 2, of the notice of motion, reads:

2. In the event of any of the respondents opposing the relief sought by the Applicant on the return day, such respondents shall, in the answering affidavits, state the following in respect of the calculations by Wim Loots of WL Actuarial Consulting (Annexure X to the Applicants supplementary founding affidavit):

2.1. In what respects the basis for the calculation is disputed;

2.2. In respect of each dispute, state the amount, percentage, date or time period, as the case may be, that such respondents contends the correct amount, percentage, date or time to be;

2.3. In respect of each of the disputes referred to in the previous paragraph, the opposing respondents shall set out the basis for placing the issue in dispute with reference to a particular document, piece of legislation, decision or determination by any government official or any other from of evidence, as the case may be, and;

2.4. In what respect the calculations contained in the report are alleged to be incorrect and, in respect of each incorrect calculation, to provide the correct calculation and total;

[3] In the supplementary founding affidavit the applicant explained that he wished to place the actuarial report before the court to move the matter forward

as it will present the respondents with an opportunity to identify exactly in which respects they disputed the calculation of the compensation to which he claimed to be entitled. The actuarial report would benefit the parties and the court to identify and resolve the outstanding disputes. The respondents would not be prejudiced as they would have an opportunity to respond thereto. The payment of compensation in terms of COIDA was an ongoing matter which will have to be addressed to regulate his future compensation payments. Subsequent to the 4th respondent filing their answering affidavit and a court order, and on the basis of that affidavit and a court order, the applicant requested an actuary to calculate the difference between the compensation he had received to date and the compensation to which he had been entitled, as well as the compensation he is entitled to in future. The answering affidavit and the court order referred to dealt with the calculations of the disputed compensation. The applicant requested the court to consider the actuarial report as part of the evidence on which he relied for the relief sought.

[4] The respondents' case was that the actuarial report was not placed properly before the court as contemplated in the rules, with specific reference to rules 6(1) and 36(9)(a). It is contended that the applicant did not seek leave of the court or consent of the respondents regarding the use of expert evidence to support the relief sought. All the applicant did was to seek leave from the court to file a supplementary founding affidavit and nothing else. The applicant simply attached the actuarial report as part of the evidence he alleged supported the relief he sought, without due regard to the provisions of Rule 6(1) and 36(9)(a). The respondents case was that the supplementary affidavit failed in material terms to comply with the provisions of Rule 6(1) of the Rules in that it did not set out the facts upon which the applicant relied for the relief sought. The respondents are of the view that it was not sufficient for the applicant to

wholly rely on the actuarial report, whose introduction did not comply with the rules, and as a result the actuarial report should not be allowed.

[5] The respondents also said that the calculations in the actuarial report, at any event, were not in accordance with COIDA, and as such was misplaced. In respect of future compensation, the applicant claimed a lump sum, to which he was not entitled. It was not clear which model or formula was used to result in claiming a lump sum. Calculations of his pension was to be done in accordance with COIDA, which the 4th respondent had considered. The applicant did not set out the foundational basis of how he arrived at higher percentages than what had been determined. The applicant sought his compensation to be determined as a person would have received during June 2023, without setting out the basis. He was injured in 1998 and filed his claim for compensation in that year, and section 63 of COIDA provided for the determination of compensation with a monthly rate at which the employee was remunerated at the time of the accident. The salary scale used was his salary scale of 1998 in accordance with COIDA. The applicant did not report his injury to 4th respondent in 1997. In respect of increased compensation based on alleged negligence of an employer, the applicant was required to make an application with additional information as required by section 56 of COIDA. It was for the applicant to show that he was entitled to a higher percentage for his monthly compensation. The applicants compensation was determined and paid in accordance with the prescripts, and was annually adjusted.

Rule 6(1) of the Uniform Rules of Court

[6] Rule 6(1) of the Uniform Rules of Court reads:

6 Applications

(1) Every application shall be brought on notice of motion supported by an affidavit as to the facts upon which the applicant relies for relief.

The applicant was allowed to amend by filing supplementary affidavits so that the material disputes between the parties could be determined [*Greyling v Nieuwoudt*, 1951 (1) SA 88 (O) at 93G; *Berg v Gossyn* (1) 1965 (3) SA 702 (O) at 705E-H; *Nedbank Ltd v Hoare* 1988 (4) SA 541 (E) at 543H. The general principle that amendments to pleadings should, wherever possible, be granted to enable true disputes to be determined should not be frustrated because particulars of claim originated as an affidavit [*Nedbank* at 547F-G].

[7] Anyone who can provide the necessary material to support an applicant's claim can execute an affidavit [*Leith, NO and Heath, NO v Fraser* 1952 (2) SA 33 (O) at 36B-C]. The rule required that the applicant set out the facts upon which he relied for relief. The determination of the applicant's pension in percentage resulting from his disability is a question of fact. In *Morrison v Commissioner for Inland Revenue* 1950 (2) SA 449 (A) at 455 it was said:

A question that depends for its answer on matters of degree, on what weight is to be given to this and that variable factor, like factors of duration, repetition, scale of operations, seems to me to be ordinarily answerable only for the particular case and to be therefore a question of fact. (*Cf. Cohen v Commissioner for Inland Revenue* (1946 AD 174 at p. 179).)

[8] The amount payable to the applicant was the end finding. It can only be properly reached after consideration of all the relevant evidence, including expert evidence where necessary. Expert opinions inherently are records of findings of fact by another. The applicant annexed a summary of evidence and findings by another, to his affidavit, and sought this court to construe them as

both summaries of evidence and findings, and as relevant evidence which should be included as admissible in this matter. It is in the opinion of another, not supported by an affidavit and not under oath from that other, wherein the applicant is setting out the evidence upon which it relies to discharge the onus of proof resting on it in respect thereof. Simply annexing a report of an alleged expert to a founding affidavit did not discharge the evidential duty cast upon an applicant in motion proceedings, in the absence of an affidavit by that alleged expert, wherein amongst others they qualified themselves to express an opinion, and confirming both the facts considered, the path of travel to the opinion and the opinion itself. This is the first problem with the applicant's approach.

[9] Secondly, the respondents contend that the findings of fact by the alleged expert are assailable as there is a dispute on the evidence upon which the findings could properly be reached, and the opinion itself. The respondents' case was that the evidence upon which they relied showed that the findings of the alleged expert were findings at which no reasonable person could arrive at [*Commissioner of Taxes v Levy* 1952 (2) SA 413 (A) at 421D-E]. The credibility and reliability of the evidence of the alleged expert witness for the applicant must be determined in the light of the objective facts and inferences drawn therefrom, the probabilities and any evidence put up in contradiction thereto [*Commissioner, South African Revenue Service v Pretoria East Motors (Pty) Ltd* 2014 (5) SA 231 (SCA) ([2014] ZASCA 91) para 8; *Commissioner, South African revenue Service v Capstone 556 (Pty) Ltd* 2016 (4) SA 341 (SCA) para 30].

[10] In *Skog NO and Others v Agullus and Others* 2024 (1) SA 72 (SCA) at para 18 it was said:

[18] It is trite that in motion proceedings, the affidavits filed in the application constitute evidence. In such proceedings, the norm is that affidavits are limited to three sets. For this reason, utmost care must be taken to fully set out the case of a party on whose behalf an affidavit is filed. These being motion proceedings, the application fell to be decided in accordance with the principle laid down in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 4 (the *Plascon-Evans* principle). In terms of that principle, an applicant who seeks final relief in motion proceedings must, in the event of a dispute of fact, accept the version set up by his or her opponent unless the latter's allegations are, in the opinion of the court, not such as to raise a real, genuine or bona fide dispute of fact or are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers.

In motion proceedings the papers stand as the pleadings and evidence do in action proceedings. The relevance of the evidence offered is dependent on its cogent connection with the relief being sought which, in an application, is defined in the notice of motion [*Kouga Local Municipality v St Francis Bay (Ward 12) Concerned Residents Association and Others* 2024 (4) SA 70 (SCA) at para 15]. In *Venmop 275 (Pty) Ltd and Another v Cleveland Projects (Pty) Ltd and Another* 2016 (1) SA 78 (GJ) at 86A-B it was said:

Save in urgent applications for interim relief to restrain irremediable injury and to keep matters in status quo, where otherwise inadmissible hearsay might be permitted (*Cerebos Food Corporation Ltd v Diverse Foods SA (Pty) Ltd and Another* 1984 (4) SA 149 (T) at 157E – G), there is no authority that the admissibility of the evidence of a witness in motion proceedings is somehow different from that in a trial action.

[11] The applicants annexure, by its very nature, contain submissions which have neither evidential content nor probative value as they are not made or confirmed under oath. They are rendered argumentative matter, which is hearsay, and as such, inadmissible. They are argumentative inadmissible hearsay submissions which also amount to legal opinions on matters upon which the court is required to decide [*Venmop* para 16]. Even expert legal opinion on matters of domestic law is neither necessary nor admissible (*South Atlantic*

Islands Development Corporation Ltd v Buchan 1971 (1) SA 234 (C) at 237C – F; and *Prophet v National Director of Public Prosecutions* 2007 (6) SA 169 (CC) (2006 (2) SACR 525; 2007 (2) BCLR 140; [2006] ZACC 17) para 43).

[12] In *The Master v Slomowitz* 1961 (1) SA 669 (T) at 672B-C it was said:

In exceptional cases an application may be based on hearsay but then the deponent must state that the allegations of fact are true to the best of his information, knowledge and belief and state the basis of the knowledge or belief. Such basis may also emerge from the papers as a whole. The mere omission in the present case of an allegation that the facts are within the personal knowledge of the applicant is not conclusive - the petition and annexures must be approached as a whole. But it seems more appropriate and expedient to deal with questions of hearsay in conjunction with the respondent's application to strike out portions of the petition and the annexures referred to in such portions.

[13] The applicant has an obligation to place before the Court the best evidence of which from its nature such fact, matter or thing shall be capable [*Gibson v Arnold & Co. (Pty.) Ltd.*, 1951 (2) SA 139 (T): *R v Ferguson*, 1949 (3) SA 69 (N)); *The Master* at 673E-F]. The disputed paragraphs and annexure contain the bulk of the now essential allegations against the respondents. The general rule against hearsay and new matter, essentially in reply as they follow the answering affidavit was filed, should be applied. In *Galp v Tansley NO and Another* 1966 (4) SA 555 (C) at 558G-559H it was said that:

Mr. *Prest* went further and contended that an affidavit filed in terms of Rule 46 (2) should contain no hearsay evidence at all. He referred the Court in this connection to *Visser v Estate Collins*, 1952 (2) SA 546 (C) at pp. 552 and 553, and added, *inter alia*, that it was plain from *Silber's* case, *supra*, at p. 352, that the burden imposed upon a defendant in terms of Rule 46 (5) was one of actually proving, as distinct from merely alleging, the existence of good cause for rescission.

I do not consider that the decisions cited by Mr. *Prest* support the very wide contention advanced by him, to which I have just referred. For a considerable period, now, our Courts have recognised the need to admit and act upon sworn statements of 'information' and 'belief' in interlocutory matters (as distinct from matters in which the rights of the parties concerned are finally decided) where urgency, or possibly the existence of other special circumstances, appear to justify their doing so - see van Zyl's, *Judicial Practice of South Africa* (1921 edition), vol. 1, p. 441; *Mears v African Platinum Mines, Ltd., and Others* (1), 1922 W.L.D. 48 at p. 55; *Grant-Dalton v Win and Others*, 1923 W.L.D. 180 at p. 186; *Pountas' Trustees v Lahanas*, 1924 W.L.D. 67 at p. 70; *Levin v Saidman*, 1930 W.L.D. 256; *Harris' Executor v Weinberg*, 1938 CPD 134; *Mia's Trustee v Mia*, 1944 W.L.D. 102 at pp. 103 - 4; A Brighton Furnishers v Viljoen, 1947 (1) SA 39 (GW); *Geanotes v Geanotes*, 1947 (2) SA 512 (C). In admitting such statements our Courts cannot, of course, be said to be recognising an exception to the hearsay rule: they are merely taking cognisance of the statements in question for limited purposes and subject to certain conditions - see *Mia's Trustee v Mia, supra*. What exactly the conditions are which would justify the admission presently under discussion, do not require to be determined in detail in the instant case. In *Mears'* case, *supra*, WARD, J., commented that he did not know

'that any rule had been laid down in these Courts as to the limitation of this admission',

adding that for the English Courts (from which, it would seem, our Courts took over the practice of admitting these sworn statements of information and belief) the matter was regulated by Rule of Court, viz. by Order 38, Rule 3. In most of the other decided cases enumerated above the basis for admission mentioned was that of urgency, in the sense that the *status quo* had to be preserved if justice was to be done - see the remarks of SCHREINER, J. (as he then was), in *Mia's Trustee v Mia*. In *Levin v Saidman* and *Brighton Furnishers v Viljoen*, however - in each of which the Court had to do with an affidavit made by an attorney on behalf of his client - the Court may have been prepared to entertain the idea of other circumstances than urgency providing sufficient justification for admission. Urgency was certainly not mentioned as a requisite by van Zyl in his *Judicial Practice of South* E *Africa, supra,* and it is interesting to note that it does not feature as a requirement in the wording of the English Rule of Court dealing with the admission of such statements, viz., Order 38, Rule 3 - see *The Annual Practice* 1966, Part 1, at p. 922. As I have already indicated, it is not necessary for the purposes of the present case to define with exactitude the conditions which would justify the admission of sworn statements of information and belief. I

think I have said enough to indicate that there can be no reason why such statements should not - in appropriate circumstances - be admissible also for the purposes of Rule 46 (2) of the Rules framed under our Magistrates' Courts Act. In other words, I cannot accept without qualification Mr. G Prest's contention that an affidavit filed in terms of Rule 46 (2) should never contain any hearsay evidence.

But one important point emerging from the cases which I have enumerated in the preceding paragraph is this, viz., that our Courts have consistently refused to countenance the admission as evidence - for any purpose whatever - of any statement embodying hearsay material, save where such statement has properly been made the subject of an affidavit (or solemn affirmation) of information and belief, i.e., save where the deponent (or affirmer) has not only revealed the source of the information concerned but in addition has sworn (or solemnly affirmed) that he believes such information to be true and furnished the grounds for his belief. In this connection see particularly *Harris' Executor v Weinberg, supra; Mia's Trustee v Mia, supra;* and *Grant-Dalton v Win and Others, supra*.

[14] In his supplementary founding affidavit, the applicant did not under oath swear that he believed the information contained in the alleged expert opinion to be true nor furnish grounds for that belief. In *Passenger Rail Agency of South Africa v Swifambo Rail Agency (Pty) Ltd* 2017 (6) SA 223 (GJ) at para 21 it was said:

[21] Hearsay evidence is generally not permitted in affidavits. Once again this is not an absolute rule and there are exceptions to it. Where a deponent states that he is informed and verily believes certain facts on which he relies for the relief, he is required to set out in full the facts upon which he bases his grounds for belief and how he had obtained that information, and the court will be inclined to accept such hearsay evidence. The basis of his knowledge and belief must be disclosed, and where the general rule is sought to be avoided reasons therefor must be given. Where the source and ground for the information and belief is not stated, a court may decline to accept such evidence.

[15] The applicant did not utter a single syllable in his supplementary founding affidavit as to why the general rule that hearsay evidence is generally not permitted in affidavits was sought to be avoided and therefore did not advance any reasons for the court to accept such evidence. It does not avail an applicant in motion proceedings to depose to inadmissible evidence. His affidavit must allege facts which the Court can take account of. Annexing an alleged expert opinion with no confirmatory affidavit from the author of the opinion, and without the deponent stating that he was informed and verily believed certain facts on which he relied for the relief, what is relied on is not admissible [*Standard Merchant Bank Ltd v Rowe and Others* 1982 (4) SA 671 (W) at 676H-677A].

Rule 36(9) of the Uniform Rules of Court

[16] Rule 36(9)(a)(i) provides that:

36 Inspections, Examinations and Expert Testimony

(9)*(a)* No person shall, save with the leave of the court or the consent of all parties to the suit, be entitled to call as a witness any person to give evidence as an expert upon any matter upon which the evidence of expert witnesses may be received unless —

(i) where the plaintiff intends to call an expert, the plaintiff shall not more than 30 days after the close of pleadings, or where the defendant intends to call the expert, the defendant shall not more than 60 days after the close of pleadings, have delivered notice of intention to call such expert; and

(ii) …

Provided that the notice and summary shall in any event be delivered before a first case management conference held in terms of rules 37A(6) and (7) or as directed by a case management judge.

[17] The opinion sought to be introduced is not common cause or otherwise incontrovertible. It is not of an official, scientific, technical or statistical nature and capable of easy verification. The applicant did not set out any facts and suggest them to establish exceptional circumstances where the evidence sought to be submitted was weighty, material and to be believed. At best he purports a reasonable explanation for the late filing of the opinion. The opinion purports to be scientific evidence. The opinion is disputed by the respondent and is not capable of easy verification. A legal opinion on matters a court might have to decide is inadmissible [*Prophet* at para 43; Zeffertt *et al The South African Law of Evidence* (Butterworths, Durban, 2003) at 295]. It follows that the opinion can only an opinion on the facts.

[18] The theme of rule 36 in its entirety, and 37A to which it refers, suggest a course of action within the line of reasoning of an action and an application where a Judge President has determined that a case management through judicial intervention was appropriate. The applicant did not allege that this was such an application and that such a determination was made. The driving force behind case management is to ensure that all issues that are amenable to being resolved without a trial have been dealt with; that the remaining issues that are to go to trial have been adequately defined; that the requirements of rules 35 and 36(9) have been complied with if they are applicable; and that any potential causes of delay in the commencement or conduct of the trial have been pre-empted to the extent practically possible [Rule 37A(5)(b)]. All these measures are intended to assist in an expeditious resolution of disputes of facts. An

application is not a mechanism for resolution of disputes of facts and in appropriate circumstances an application may be dismissed where it was launched in circumstances where an action was appropriate [*Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T) at 1162; *CULLEN v HAUPT* 1988 (4) SA 39 (C) at p 40F-H].

[19] The applicant in his supplementary founding affidavit said nothing about the training, skill, competence and experience of Wim Loots (Loots), his purported expert. Except for an entry which reads: Fellow of Actuarial Society of South Africa, which is located under the name above which is a signature, Loots himself said nothing about his expertise. A court has to evaluate the expertise of the witness, to weigh the cogency of the witness's evidence in the contextual matrix of the case with which he is seized and to gauge the quality of the expert qua witness on matters falling within the purview of the expert witness's field [*S v M* [*S v M* 1991 (2) SACR 91 (T)].

[20] In *AM v MEC for Health, Western Cape* 2021 (3) SA 337 (SCA) at paragraph [17] the following was said about the role of an expert and expert evidence:

'Something needs to be said about the role of expert witnesses and the expert evidence in this case. The functions of an expert witness are threefold. First, where they have themselves observed relevant facts that evidence will be evidence of fact and admissible as such. Second, they provide the court with abstract or general knowledge concerning their discipline that is necessary to enable the court to understand the issues arising in the litigation. This includes evidence of the current state of knowledge and generally accepted practice in the field in question. Although such evidence can only be given by an expert qualified in the relevant field, it remains, at the end of the day, essentially evidence of fact on which the court will have to make factual findings. It is necessary to enable the court to assess the validity of

opinions that they express. Third, they give evidence concerning their own inferences and opinions on the issues in the case and the grounds for drawing those inferences and expressing those conclusions.'

[21] On the papers, neither the applicant nor Loots claim, under oath, that Loots possessed any knowledge dictated by any science. In the absence of such evidence, I am unable to conclude that Loots is an expert on matters he purports to express an opinion on. Against the background of the respondents answering affidavits to the earlier founding affidavits of the applicant, Loots did not take the path of travel to demonstrate why his own inferential reasoning and opinions present superior logic to that of the respondents. For these reasons I am not persuaded to confirm the *rule nisi*, and I make the order.

DM THULARE

JUDGE OF THE HIGH COURT

Appearances

Counsel for Applicant : Adv. AF Schmidt

Instructing Attorney: Mr A Van Niekerk

Counsel for Respondent: Adv. TB Hutamo

Instructing Attorney: Ms S Shaik