



**IN THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION, MIDDELBURG**

CASE NO: 2890/2024

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: **NO**
(2) OF INTEREST TO OTHER JUDGES: **NO**
(3) REVISED **YES/NO**

SIGNATURE

03/09/2026
DATE

In the matter between:

MOTSAPI THABISO JOHANNES

PLAINTIFF

And

ROAD ACCIDENT FUND

RESPONDENT

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email. The date for hand down is deemed to be 3 September 2026.

JUDGMENT

Phahlamohlaka J

[1] In this matter the plaintiff sued the Road Accident Fund ("the defendant") for damages suffered as a result of the injuries sustained in a motor vehicle collision that occurred on or about 27 March 2020. The matter was set down for trial on both merits and quantum of damages.

[2] The plaintiff brought an application to adduce evidence of the experts by means of affidavits in terms of Rule 38(2) of the Uniform Rules of Court. The defendant opposes the application on the basis that the affidavits relied on are lacking in detail and that the defendant seeks to cross examine the expert witnesses.

[3] Therefore, the court has to determine the Rule 38(2) application first before dealing with the merits of the case.

[4] Rule 38(2) provides that:

"The witness at the trial of any action shall be examined *viva voce*, but a court may at any time, for sufficient reason, order not 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 to 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."

[5] From the reading of the subsection it becomes abundantly clear that the applicant in the Rule 38(2) application must satisfy the court that sufficient reason exists for the evidence of any witness, including expert witnesses, to be given on affidavit. Therefore, the privilege of adducing evidence by means of affidavits is not there for the mere taking. The applicant ought to make out a compelling case to justify why the court should depart from the default position.

[5] In *Madibeng Local Municipality v Public Investment Corporation Ltd*¹ the Supreme Court of Appeal stated as follows:

“The approach to rule 38 (2) may be summarized as follows: a trial court has a discretion to depart from the position that, in a trial, oral evidence is the norm. When that decision is exercised, two important factors will 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 the 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 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.”

[6] The plaintiff in this case relies on the confirmatory affidavits of the expert witnesses and not the affidavits themselves. The confirmatory affidavits of the experts which are similar, read in part as follows²:

“3. On or during the 14th of March 2024, I received instructions from Mashishi Attorneys, as it then was, to assess Motsapi Thabiso Johannes for the injuries she sustained during the motor vehicle accident which occurred on the 27th of March 2020 where the injured was involved.

4. After having conducted the above-mentioned assessment, I have drawn/ prepared a medical legal report which same was signed by me on the 13th of May 2024. I can confirm the contents, opinions and conclusions of my findings in the report constitute a true exposition of my expert opinion herein and I am satisfied that the report concerned may be used on the date of trial, same constituting the whole of the evidence to be presented by me, of which the copy thereof is attached hereto and marked as annexure “PTK 1”.

[7] It can be gleaned from the confirmatory affidavits of the expert witnesses that they don't deal with the evidence sought to be adduced by those experts, but relate to the confirmation of the attorney's founding affidavit. This in my view flies in the face of Rule 38(2).

[8] Counsel for the defendant highlighted some contradictions in some of the reports of the experts, which according to the defendant warrant clarity in cross examination. The subrule provides that if it

¹ 2018 (6) SA 55 (SCA) at para 25

² Caelines 012-2 Dr PT Kumbiray's confirmatory affidavit

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.

[9] In this case, it is my considered view that the defendant reasonably requires the attendance of the plaintiff's expert witnesses for cross examination because of the contradictions in some of the reports. Consequently, the application stands to be unsuccessful.

[10] In the result I make the following order:

10.1 The application in terms of Rule 38(2) is dismissed.

10.2 Costs to be costs in the cause.


K F PHAHLAMOHLEKA
JUDGE OF THE HIGH COURT
MPUMALANGA DIVISION, MIDDELBURG (LOCAL SEAT)

Appearances

For the plaintiff:	Adv Magagula
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Defendant:	Adv Thobejane
Instructed by:	State Attorney
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Date judgment reserved: 18 May 2026