

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

CASE NUMBER: 19126/18

In the matter between:

**ZOOLAKHA ISHMAIL**

[...]

PLAINTIFF

and

**G L EVENTS OASYS CONSORTIUM**

(REG NO: 2008/007826/07)

DEFENDANT

**ZL CLEANING SERVICES CC**

THIRD PARTY

**JUDGMENT**

**TSATSI AJ**

**INTRODUCTION**

1. This is an opposed Rule 38 (3) read with Rule 38 (4), (5), (6) and (7). This application has been heard in a virtual hearing via Microsoft Teams.

2. The purpose of the application is to have the evidence of the Applicant recorded by way of commission in the main action. The Plaintiff is the Applicant in this application. The Applicant is said to be 89 years old, suffers from leukemia and is in a state of ill -health.

3. For the sake convenience the Plaintiff will be addressed as the Applicant in this application.

4. The Second Respondent is opposing the application.

### **FACTS**

5. The application is to have the Applicant (Zoolakha Ishmail) record her evidence on commission as provided for in Rule 38.

6. The reasons advanced for the application is due to old age and ill- health of the Applicant. The Applicant is diagnosed with blood cancer as per the report of Dr DJM Frantzen, attached to the application.

7. The Applicant's evidence is relevant in the main action between the parties.

### **ISSUES**

8. The main issue is whether or not it is necessary for the Applicant to record her evidence on commission at her trial during the time when Court proceedings are conducted through Microsoft Teams due to Covid- 19 pandemic.

### **SUBMISSIONS**

#### **Submissions on behalf of the Applicant**

9. Counsel for the Applicant submitted that the Applicant is old and weak. As a result it would not be possible for the Applicant to be expected to travel to Court to give evidence in the trial in which she is the Plaintiff. Counsel for the Applicant contended that the Applicant may not survive to testify at trial.

10. It was further submitted on behalf of the Applicant that the Applicant deserves a day in Court. There will be cross examination and objections will also be

recorded.

11. A further submission on behalf of the Applicant was that in order to cause least invasion for her, evidence had to be recorded by a Magistrate of Pretoria, where the Applicant is residing, alternatively evidence to be commissioned before an advocate of at least ten (10) years' experience be appointed as a Commissioner.

12. If the above fails evidence can be recorded at the place which is least invasive for the Applicant.

13. The submission was made that time is of essence as the Applicant's prognosis is limited to support in care while awaiting the inevitable results.

14. Counsel for the Applicant referred the Court to Dr DJM Frantzen medical report. The said medical report indicated that the Applicant is diagnosed with CLL(blood cancer), sustained a right hip fracture in 2017.

15. According to the said medical report the Applicant is allegedly wheelchair bound and has got shortening of her right leg due to the previous fracture. The Applicant is not in a position to travel or sit in Court and it would be advisable to have her conduct consultations at her home.

16. It was submitted on behalf of the Applicant that the opposition by the Second Respondent is unreasonable and unnecessary.

17. When the Court asked Counsel for the Applicant why did the Applicant not apply for a preferential trial date, Counsel for the Applicant submitted that it would not make a difference to apply for a preferential trial date as this process may also take long.

18. Counsel asked the Court to grant the order and reserve costs for the trial Court.

#### Submissions on behalf of the Second Respondent

19. Counsel submitted that an allegation that the Second Respondent is obstructive

is denied.

20. It was further submitted on behalf of the Second Respondent that all the evidence given does not proof the Applicant's case.

21. Courts have facilities for persons who are wheelchair bound and this should not be a reason for depriving the Second Respondent the opportunity to having this matter finalized speedily.

22. The medical report indicates that the Applicant cannot sit for long but still she is able to sit on a wheel chair.

23. A further submission on behalf of the Second Respondent was that if the Applicant is able to instruct an attorney she can as well be able to make use of her faculties and give evidence in Court.

24. The Applicant is dragging her feet and the case is taking too long to be finalized. The Applicant never responded to the Second Respondent's emails. No pre-trial conferences were held, three years post institution of summons.

25. The appointment of an advocate was never discussed with the Second Respondent.

26. A further submission on behalf of the Second Respondent was that the Applicant failed to exhaust all remedies available to her.

27. This application will be costly for the Second Respondent as the Second Respondent has to appoint an advocate for purposes of prosecuting the Rule 38 application.

28. The convenience must be of both the Applicant and the Respondents not only for the Applicant.

29. The Rule 38 application is redundant in that our Courts conduct proceedings

through Microsoft Teams or Zoom due Covid- 19 pandemic. The Applicant can still make use of these communication means.

30. Counsel for the Second Respondent submitted that the application be dismissed with costs and the Applicant apply for a trial date forthright.

## **THE LAW**

31. Plasket J in *Plascon v Tsotsi*<sup>1</sup>, the Court held that wherever the inherent jurisdiction of the Court is in issue, the court has a discretion whether or not to invoke it. This court has a discretion whether to invoke its inherent jurisdiction or not.

a. In *Bremer Vulkan Schiffbau and Maschinenfabrik v South India Corpn*<sup>2</sup>, the Court described the Courts' inherent jurisdiction to hear any matter before it, as a general power to control its own procedures so as to prevent an injustice. It has to be used to ensure convenience and fairness in legal proceedings, prevent steps being taken that would render judicial proceedings ineffective, prevent abuses of process and act in aid of superior courts and in aid or control of inferior courts and tribunals.

32. In *Chandra v Canadian Broadcasting Corporation and others*<sup>3</sup>, the Court dealt with Rule 1.08(1) of the Rules of Civil Procedure, R.R.O, 1990 regulation 194 which permits trial evidence by telephone or video conferencing, where facilities are available at the Court or are provided by a party.

33. The witnesses at the trial of any action shall be examined *viva voce*, 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 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,

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<sup>1</sup> 2004 (2) SACR 273 (E) para 13

<sup>2</sup> [1981] 1 All ER 289

<sup>3</sup> 2015 ONSC 5385, a judgment by the superior court of Court of Justice and available on the CanLii

the evidence of such witness shall not be given on affidavit<sup>4</sup>.

34. Rule 39 (20) provides that *“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”*.

35. Section 173 of the Constitution provides that .... *High Courts have the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice”*.

36. In **Salojee Development 1965 (2) SA 135(A) at 140**, Steyn CJ [as he then was], remarked: “This Court has on a number of occasions demonstrated its reluctance to penalize a litigant on account of the conduct of his attorney.

### **APPLICATION OF THE LAW**

37. I am of the considered view that the Applicant took long to apply for a trial date. The submission by Counsel for the Applicant that applying for a preferential trial date is going to take too long is not correct and misplaced.

38. The time spent by the Applicant making a Rule 38 application should have been spent bringing the action to speed and applying for a trial date. The Rule 38 application may have been more costly than applying for a preferential date.

39. I agree with Counsel for the Second Respondent that the Applicant is dragging her feet to finalize the matter.

40. At the same time the Applicant is elderly and sickly and left this matter in the hands of his legal team to do something about it. In my view, there is not much that the Appellant could have done herself as a person.

41. In addition, the use of video conferencing, zoom and Micro soft teams in our

Courts have become the new normal. One can say that the Rule 38 application may not have been necessary.

42. However, it is not known how long this practice of using video conferencing, zoom and or Microsoft teams is going to last. It is also not known how long this Covid- 19 pandemic is going to be around.

43. It is a fact that presently the use of video conferencing/zoom and or Microsoft teams is the new normal, things may change if the world is able to rid itself of the virus. Whether the world can rid itself of the Covid -19 virus is a scientific debate and is beyond the scope of this judgment.

44. However, if by the time the trial start things have changed and the Applicant is expected to appear in Court in person, this may be cumbersome for her. This statement is informed by her age and medical report. It is true that a person of her age suffers from old age illnesses.

45. Besides the question of whether to conduct proceedings virtually or physically falls within the discretion of the presiding judge. It will be the prerogative of the judge presiding over the trial whether or not to conduct the trial virtually or physically.

46. Courts have to be accommodating of the needs of litigants where possible. Courts must adapt to the requirements of the times we live in and circumstances upon which the Courts adjudicate.

47. As mentioned above, the High Court has the inherent power to protect and regulate its own process, develop the common law taking into account the interest of justice.

48. I am of the view that although the Applicant dragged her feet to finalize the matter, this Court can still accommodate her request. This is based on her age and state of ill-health, not forgetting *ubuntu*. Since **S v Makwanyane**: (CCT3/94) [1995]

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<sup>4</sup> Rule 38 (2).

ZACC 3; 1995 (6) BCLR 665, *ubuntu* has become an integral part of the constitutional values and principles that inform interpretation of the Bill of Rights and other areas of law. Basically *ubuntu* means “I am because you are” or “humanity towards others”.

49. This Court has inherent jurisdiction to hear any matter before it, as a general power to control its own procedures so as to prevent an injustice. It has to be used to ensure convenience and fairness in legal proceedings, prevent steps being taken that would render judicial proceedings ineffective.

50. In light of the above I accordingly make the following order:

50.1 The Applicant is authorised and directed to lead evidence, as Plaintiff, to record the evidence in terms of the provisions of Rule 38 (3) read with Rule 38 (4) (5) (6) (7) before an advocate of at least ten (10) years’ experience to be agreed upon by the parties within thirty (30) days from date of this order, alternatively to be appointed by the Chairperson of the Pretoria Bar Council within thirty (30) days from the date of this order.

50.2 The Respondents are entitled and authorised to have a legal representative present when the Applicant gives evidence.

50.3 The Respondents will be entitled and authorised to have legal representatives in attendance at all material stages;

50.4 The Applicant shall ensure that a bundle of documents, agreed to by the Respondents shall be delivered to the Respondents and the Advocate before whom evidence is going to be led.

50.5 No order as to costs with regard to the opposed Rule 38 interlocutory application because it was necessary for parties to ventilate issues.

50.6 Costs with regard to the commissioning of evidence be reserved.



**TSATSI EK**  
**ACTING JUDGE OF THE HIGH COURT**

**DELIVERED:** This judgment was handed down electronically by circulation to the parties' representatives via email and by uploading on case lines.

**APPEARANCE:**

For the Applicant: Adv. GJ Scheepers SC

Instructed by: Barnard & Patel inc.

For the Second Respondent: Adv. JL Khan

Instructed by: Singh Attorneys

**DATE OF HEARING:** 2 June 2021

**DATE OF JUDGMENT:** 18 June 2021