IN THE SOUTH GAUTENG HIGH COURT, JOHANNESBURG

(REPUBLIC OF SOUTH AFRICA)

Case number: 28154/2011

DELETE WHICHEVER IS NOT APPLICABLE

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

In the matter between:

URAMIN INCORPORATED IN BRITISH COLUMBIA

trading as AREVA RESOURCES SOUTHERN AFRICA Applicant

and

PERIE, CAROLYN Respondent

JUDGMENT IN INTERLOCUTORY APPLICATION

Summary:

1. Interlocutory application for evidence to be led by means of video link;

2. This court had to evaluate on the one hand the claims of globalization of economies, worldwide dispersal of potential witnesses, dissemination of communication throughout many jurisdictions and in a multiplicity of formats, deployment of employees and the transitory nature of much employment and and o On the other hand, there are the responses availed by expanding and more easily available technologies of which video conferencing is only one;

3. Plaintiff was a South African based employee of a multinational whose former employees were now based in Paris and Dubai who were not available as witnesses in Johannesburg by reason of the absence of any current obligations to either party and their commitments in Paris and Dubai.

4. In a sense, the grounds of this application reflects the participation of South Africa in the greater world economies. No longer is this country a parochial backwater which is the pariah of the world; we no longer employ only white South Africans on an almost lifetime commitment in local enterprises carrying out business almost exclusively within our borders. This country may be at the tip of the continent of Africa but the economy is run by a multiplicity of nationalities of all races and both genders; the corporate sector is replete with multinationals and South African entities trade throughout the world ; personnel may be employed on one continent, based on another and carry out their duties on yet another; personnel work on contract or consultancy basis and seldom serve out a lifetime's career within the confines of one employer.

5. Evidence of witnesses clearly essential to case of defendant and to a just decision in the trial;

6. The technology of the video link is now accepted both in other jurisdictions and South Africa as *an efficient and an effective way of providing oral evidence both in chief and in cross examination*" and that this is *"simply another tool for securing effective access to justice"*

7. The procedures followed in hearing the evidence of the witness in Paris and the witness in Dubai set out and difficulties noted.

SATCHWELL J

INTRODUCTION

1. This judgment deals with one aspect of the continually developing response of our courts to the marvels of modern technology. Specifically, the use of video link to procure the evidence of witnesses based in Paris and Dubai who are not available or willing to attend at the court in Johannesburg.

2. This application was made at the commencement of the trial. I gave my ruling immediately after hearing argument in order that the trial proceedings would not be delayed and so that the appropriate arrangements could be made for the hearing of the evidence of the two witnesses who were in different countries and in different time zones. At the time I did not give the reasons for my ruling.

3. Obviously, each application for the use of video linkage procure the evidence of witnesses who are not available to a trial court must rely upon its own particular facts and circumstances. I have heard a number of such applications and heard evidence in this manner in a number of trials. My experience is that the approach of both South African courts and courts in other jurisdictions must continuously try to be relevant to and keep pace with rapidly changing demands placed upon judicial practice. On the hand, there are the claims of globalization of economies, worldwide dispersal of potential witnesses, dissemination of communication throughout many jurisdictions and in a multiplicity of formats, deployment of employees and the transitory nature of much employment and so on. On the other hand, there are the responses availed by expanding and more easily available technologies of which video conferencing is only one.

4. In now handing down this judgment, I have included reference to evidence as it emerged at the trial. Obviously, I could not have known all these factors at the time of making my ruling but the knowledge which I gained during the trial has confirmed my confidence in the ruling which I made at the commencement thereof.

5. Similarly, I have here included comment on the video conferencing procedures as they eventuated because I have been approached by other judges for information on this procedure and this may be of use to practitioners.

BACKGROUND TO THE EVIDENCE SOUGHT TO BE LED

1. Plaintiff was an employee of the defendant who brings a claim for specific performance based on contract alleged to be partly written and party oral. She avers that, when it employed her in December 2007, the defendant verbally agreed to compensate her for certain share options accruing to her from her previous employers which she would forfeit upon departure but that the defendant failed to compensate her for the loss of those benefits. The defendant disputes the claim averring that the written contract of employment is decisive of her claims and has raised a special plea that plaintiff concluded a retrenchment agreement in May 2011 which settled all claims which she now makes against the defendant.

2. Plaintiff is based in South Africa and was employed by the defendant in this country. It is common cause that the defendant, a multinational and part of the Areva Group (then 80% owned by the French Government) was, at all material times, registered in accordance with the companies laws of the Republic of South Africa with place of business and registered office in Johannesburg. The agreement of employment was concluded in South Africa. The litigation is rightly conducted within the jurisdiction of this court.

EVIDENCE SOUGHT TO BE LED IS VITAL TO THE DEFENCE AND TO A FAIR OUTCOME

3. The Vice President of Human Resources of the Mining Business Unit of Areva, David Dragone ('Dragone'), was, throughout the relevant time, based in Paris. Dragone was instrumental in the process leading to the employment of plaintiff with the defendant. He was directly involved in negotiating the terms and conditions of her employment.

4. Notwithstanding the written document concluded between the defendant and the plaintiff which purported to set out the 'Basic Terms and Conditions' of her employment, her claim for a sum ranging from 230 000 (two hundred and thirty thousand) and 340 000 (three hundred and forty thousand) Australian Dollars rests upon the agreement which she claims was reached between herself and Dragone but not recorded in writing. At the trial, most of the evidence revolved around that which plaintiff averred was discussed between herself and Dragone concerning compensation for the share options which she would forfeit if she departed from her then employer to

take up employment with the defendant. Her case rested upon their verbal discussions, emails exchanged between them and documents which she had prepared and forwarded to Dragone.

5. Dragone is clearly essential to the case of the defendant. He was the only person from the defendant engaged in certain conversations with the plaintiff. He was the author of emails to the plaintiff, the recipient of communications from her and party to certain communications with the then Managing Director of the defendant ('Macpherson') who made the offer of employment to the plaintiff and to whom she then reported but who is no longer employed by the defendant.

6. At the time of plaintiff's retrenchment in 2011, the then Vice President for Areva Mining Division for Southern Africa was Enrico Barbaglia ('Barbaglia'). It was Barbaglia who signed the settlement agreement upon her retrenchment which document specifically recorded that it *"constitutes full and final settlement of any claims whatsoever which either party may have arising ... out of the contract of employment*" and that the document *"constitutes the entire agreement between the parties…".* It was plaintiff's case at the trial that she made certain insertions and deletions to the document in the presence of Barbaglia and that Barbaglia had assented to these written amendments before the document was signed by plaintiff.

7. Barbaglia is the only person whom the plaintiff alleges was made aware of her amendments to the retrenchment agreement and consented thereto.

8. I have no doubt that, without the evidence of either of these witnesses, the defendant would be severely handicapped in the conduct of its defence and, if necessary, its counterclaim.

9. There is no doubt that the evidence of both Dragone and Barbaglia were vital to the defendant in response to plaintiff's claims. At the trial it was apparent that, if Dragone and Barbaglia did not give evidence, the defendant would have to rely only upon interpretation of the two written documents and would be precluded from rebutting the evidence of the plaintiff which would then go unchallenged.

10. If the defendant were precluded from leading the evidence of these essential witnesses, I would have grave doubts about the fairness of the trial and of any judgment which I would hand down.

<u>NON AVAILABILITY OF WITNESSES</u>

11. Neither Dragone nor Barbaglia were, at the time of this trial, still in the employ of the defendant or the Areva group and neither were based in South Africa. Neither are amenable to disruption of their working and personal lives and neither are subject to the

control of or the wishes of the defendant. Defendant's attorney made an affidavit explaining that they were *"no longer under the supervision and control of the Areva Group"*.

12. Interestingly, neither Dragone nor Barbaglia made affidavits in support of this application or setting out why they were not available to be in the court in Johannesburg. This was the subject of some discussion at the hearing of the application. I took the view that the deponent to the affidavit is a senior attorney who had stated on affidavit that she had consulted with both Dragone and Barbaglia. There was and is no reason to doubt her bona fides in any manner. I any event, the contents of her affidavit were confirmed by both witnesses when we heard their evidence.

13. As far as Dragone was concerned, it was stated in the attorney's affidavit that he no longer works for the Areva Group and is now employed by CGG, an oil exploration company, with its head office situate in Paris. He advised the attorney that he is in charge of approximately 10,000 employees and is required to travel frequently to different parts of the world. At the time of the trial he was commitment to work appointments in Paris. He *"cannot come to South Africa".*

14. Barbaglia is currently living and working in Dubai. He advised the attorney that *"he cannot travel to South Africa to give testimony in person due to his work commitments".*

15. Both the defendant and it's attorney were clearly in a somewhat difficult position. The assistance of former employees was required for this trial. But both Dragone and Barbaglia have employment and personal obligations elsewhere. It can hardly be expected that either they or their current employers would be enthusiastic about their taking time to consult with defendant's attorney and/ or counsel, making statements, deposing to affidavits and (even less) travelling to South Africa.

16. Neither potential witness can be subpoenaed to testify before this court in Johannesburg.

17. In a sense, the grounds of this application reflects the participation of South Africa in the greater world economies. No longer is this country a parochial backwater which is the pariah of the world. We no longer employ only white South Africans on an almost lifetime commitment in local enterprises carrying out business almost exclusively within our borders. This country may be at the tip of the continent of Africa but the economy is run by a multiplicity of nationalities of all races and both genders. The corporate sector is replete with multinationals and South African entities trade throughout the world. Personnel may be employed on one continent, based on another and carry out their duties on yet another. They work on contract or consultancy basis and seldom serve out a lifetime's career within the confines of one employer.

18. When I first commenced the practice of law some thirty five years ago, it was a notable feat to procure that a judge would move from his (always his) chambers or courtroom to hear the evidence of a witness confined to bed in his own home by reason of illhealth but which home was still within the geographical jurisdiction of the court[1]. It was an even greater feat to procure the evidence on commission of a witness who refused to come and give evidence in South Africa.[2]. In such cases, the grounds were based upon the absolute impossibility of procuring the attendance of the witness at court. . Today the situation is different. We are far more open to a multiplicity of situations.

19. We rightly expect and prefer that viva voce evidence in both civil and criminal proceedings be given in a courtroom at the seat of the court in the presence of the parties and their representatives and the judicial officer and the public[3]. The reasoning is obvious. The court buildings and personnel and the procedures therein are dedicated to the process of litigation. Anyone may attend. The legitimacy of the process derives, in part, from this dedication.

20. Yet within these stone walls staffed by personnel dressed as though they were clerics in the reign of Henry the Eighth, we have no difficulty in recognizing the need for accommodating witnesses to meet the interests of justice. We utilize many different ways of procuring evidence because both the Constitution and the High Court Rules permit development of appropriate procedures[4] We do so because we recognize that court procedures and the Rules which regulate such practices are devised to administer justice and not hamper it[5] . Evidence is received on affidavit[6]; closed circuit television regularly allows for evidence to be given in one room and transmitted to a courtroom[7]; inspections in loco take place[8] and judges or nominated persons take evidence on commission[9]. The test to be applied by the court in exercising its discretion is whether or not *"it is convenient or necessary for the purposes of justice".*

21. These exceptions to the general rule are not limited to situations where the witness is absolutely unavailable to attend at court. We hear from child witnesses who might be distressed if called to be physically present in court; we receive affidavits from various persons because of the nature of their evidence and because this will reduce the time

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[1] S v Mayson , 1982, TPD no reported judgment.
[2] See for instance, S v ffrench-Beytagh 1971(4) SA 426 TPD.
[3] High Court Rule 38(2)
[4] Section 173 of the Constitution conjoins the inherent power of the courts to protect and regulate their own process with the power to develop the common law, taking into account the interests of justice. Rule 39(20) provides that a court is endowed with a discretion to vary any of its procedures.
[55] See Republikeinse Publikasies (Edms) Bpk v Afrikaanse Pers Publikasies (Edms) Bpk 1972(1) SA 733 A at 783A
[6] High Court Rule 38(2)
[7] Section 158 of the Criminal Procedure Act.
[8] See High Court Rule 39(16).
[9] High Court Rule 38 (3) to (8)

expended thereon; we go on inspections in loco because only then will we comprehend what a witness has or will say; we have commissions because the court can travel while the witness cannot or will not. We have regard to both *"convenience*" and *"the interests of justice*".

22. In summary, courts cannot be ignorant of the needs of the societies and economies within which they operate. Legal procedures must comport to the exigencies of globalization and the availability of witnesses as I have discussed above. Courts must adapt to the requirements of the modernities within which we operate and upon which we adjudicate.

23. To the extent that I have previously expressed the view[10] that it would be "*an indulgence"* to grant an application to hear evidence through video conferencing, I would restate my view to be that I still consider that the norm should be to hear witnesses in the courtroom but that relaxation of this preference should neither be considered extraordinary nor be discouraged. I can envisage, though it was not an issue in the present case, situations where the costs of bringing a witness to the courtroom would be prohibitive and that reasons of economy alone might well dictate evidence received outside a courtroom which does not itself have video-conferencing facilities.

24. We do not currently limit the use of various technologies only to the dire and desperate situations where a witness cannot be physically present. We must accept that witnesses are here today and gone tomorrow and that their employers, colleagues , clients and compatriots see nothing unusual in this. Courts must accommodate this mobility or find ourselves increasingly out of synch and eventually irrelevant save for the most simple and parochial of disputes.

25. I find that it is sufficient reason that Dragone and Barbaglia are living and working elsewhere, do not desire to travel to South Africa, have no obligation to either party by which they can be enticed so to do to find that this court should consider receiving evidence by video link.

TECHNOLOGY TO BE EMPLOYED

26. It has been suggested that the form in which evidence is tendered is not finite. [11] After all evidence was originally only received viva voce in person and then accepted by way of affidavit and now is received through video conferencing. No doubt other means will be discovered in due course.

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[10] See Kidd v Van Heeren 27973/98 W unreported judgment of 3 September 2013

[11] See S v Ndhlovu and Others 2002(2) SACR 325 SCA at 340; S v Van Der Sandt 1997(2) SACR 116 W at 132.

27. At the time that the Rules of Court were first formulated, witnesses from beyond the jurisdiction of the then Transvaal courts travelled by train from the coast and then by motorcar and then by aeroplane. They may even have arrived at the coast after week-long voyages by steamship from another continent. Urgent messages arrived at this court by way of telegrams whose contents and authors were difficult to authenticate.

28. Neither the Rules of the High Court or the Civil Proceedings Evidence Act expressly stated that more modern technologies than pen and paper or living, breathing persons are permitted in the High Court. The legislation has not needed so to do. The Constitution and the Rules enjoin us to make the necessary developments on a case by case and era by era basis.

29. This court does not have WIFI throughout as may other courts in South Africa and other jurisdictions; we do not yet have electronic lodgment of pleadings and documents in the office of the Registrar nor do we have electronic archives; we do not have closed circuit television in every courtroom; we do not have any video conferencing facilities in any conference room for holding case management meetings or hearing evidence. We intend to have these facilities. It is budgetary constraints not opposition to technological which is holding us back.

30. It is now almost trite that video conferencing *"is an efficient and an effective way of providing oral evidence both in chief and in cross examination*" and that this is *"simply another tool for securing effective access to justice"* (see paragraph [10] of the speech of Lord Carswell in Polanski v Conde Nast Publications [2005] UKHL 10). This process has been utilized in numerous South African courts[12]

31. Where video conferencing has taken place witnesses have been viewed in person, have been heard without intermediaries, have been viewed at the same time and in the same manner by all litigants and legal representatives and the judicial officer. The only barrier to observation has been the exigencies of the electronic medium itself where one or both of the audio or the video may be problematic to make out. In such case all parties are equally entitled to require reconnection or repair of the technology or repetition of the evidence. The witnesses can be supervised in a number of ways. They can be required to present themselves to an agreed venue, may be secluded from other persons, may be monitored by an officer of the court of the jurisdiction in which they are present, may not view documentation without notification of the monitoring court officer.

32. In short, I remain of the view (as previously expressed the Kidd v Van Heeren judgment) that *""Our Rules of Court did not initially refer to anything other than pen and paper, they advanced to encompass the concept of the typewriter then the computer*

[12] See S v McLaggan CC70/2011 [2012]; S v Staggie & antoher [2002] JOL 10399 C; S v Grandhomme & another SS 18/97 C; Kidd v Van Heeren 2797/98 W.

thereafter the telefax and now email. Why video conferencing or other technology should be excluded is beyond me".

PROCEDURES FOLLOWED IN THIS TRIAL

33. The court reconvened in the offices of the defendant's attorneys. Proceedings were held in a conference chamber where myself, my clerk, counsel and attorneys for both plaintiff and defendant were present as well as several technology boffins.

34. A large screen was placed against the wall at the end of the conference table. All of us in the room could see ourselves on the screen for much of the time. We could see the witness and the monitoring court officer in both Paris and Dubai. The audio component could be heard by everyone in the room.

35. There were problems with technology. Several times we lost he audio or the visuals. One of the witnesses and his monitor changed rooms to improve the technological message.

36. Before any evidence was heard I asked the person accompanying the potential witness to identify himself or herself and surroundings. In Paris, Ms Marianne Kecsmar, an independent lawyer who is a member of both the Paris and the New York Bars, was present with Dragone in one of the conference rooms of solicitors Linklaters. Sometimes an IT assistant was present. In Dubai, Mr Hamid Tayseer, a Jordanian Legal Consultant in Dubai, was present in the offices of an independent company in Dubai Internet City. Legal representatives were offered the opportunity to question both these supervisors or monitors as to their status, independence and understanding of their duties.

37. I asked both Kecsmar and Tayseer as to the procedures for giving evidence under oath in their jurisdictions. Both indicated an absence of any particular format. Accordingly, I administered the oath to Dragone and Barbaglia in accordance with South African procedure.

38. Both Dragoen and Barbaglia then were led through their evidence in chief and were cross examined.

39. At conclusion of their evidence I placed on record observations made by myself. Firstly, there was considerable audio interference prior to Dragone taking the oath. This was resolved and when he did give evidence there were no time delays or lapses in the video/audio. Both the verbal and visual evidence was clear. Secondly, the verbal evidence of Barbaglia was less clear but where there was lack of clarity he was asked to repeat his evidence. There were occasions where the whole of his face did not appear on the screen – this was by reason of the way he was sitting and he was asked to move over.

Thirdly, Dragone spoken quickly and with an accent and I sometimes missed out certain words but I did not ask him to repeat himself because his meaning was clear. The same problem did not occur with Barbaglia. Plaintiff's counsel recorded his comments that the visual problems pertained to a 'frozen screen' and sometimes he missed out on contemporaneous visuals with the audio.

40. The evidence was recorded and has been transcribed. The discs are placed by me in the court file.

CONCLUSION

41. I granted the application for the evidence of Dragone and Barbaglia to be heard through video conferencing.

42. I made no order as to costs in respect of the opposed interlocutory application because I believed this was an issue which should be ventilated,

43. I ordered that the costs of the video link was to be borne by the defendant. After all these were their witnesses. Although the plaintiff must have known that any witnesses upon which the defendant might rely would either have had to travel from abroad or give evidence via video link, I saw no reason why she should bear these costs merely because she having obtained employment in her own country with a multinational whose former employees are dispersed throughout the world.

Dated at Johannesburg on this day the 9th of December 2013.

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K.SATCHWELL

Counsel for Plaintiff: Adv. N.J. Graves SC

Counsel for Defendants: Adv F.A. Bhoda

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Date of hearing: 4th November 2013

Date of Judgment: 11th December 2013