IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU NATAL LOCAL DIVISION, DURBAN

Case No: 1419/2006

In the matter between:

Mondi Shanduka Newsprint (Pty) Ltd Plaintiff

and

Clive Paul Murphy Defendant

Judgment

Lopes J:

[1] This matter has a most unfortunate history, which may be summarised as follows:

(a) The plaintiff, Mondi Shanduka Newsprint (Pty) Ltd ('Mondi') issued a summons against the defendant, Clive Paul Murphy on the 13th April 2006. Mondi's cause of action was that on the 18th September 2004 a fire had started on the property of Mr Murphy, which eventually spread to, and destroyed, a forest on the nearby Linwood Estate. Mondi owned the Linwood Estate and conducted a commercial forestry enterprise from those premises. Mondi's claim was founded in delict, read with the provisions of the National Veld and Forest Fire Act, 1998, and relying on allegations that Mr Murphy had not prevented the spread of the fire as he should have done.

(b) The trial started before Ndlovu J, and was heard on the following dates:

(i) 7th March 2011 to the 18th March 2011;

(ii) 30th April 2012 to the 11th May 2012;

(iii) 23rd September 2013 to the 27th September 2013; and

(iv) 10th November 2014 to the 15th of November 2014.

(c) On the 15th November 2014 the matter was adjourned for the hearing of argument.

(d) For various reasons argument was only heard on the 13th August 2015. The record ran to some 1691 pages, and Mr Murphy's heads of argument to 290 pages.

(e) On the 19th April 2017 Ndlovu J passed away. He had not yet delivered judgment. The parties then concluded an agreement on the 30th August 2017, purporting to regulate to the future conduct of the matter. The agreement provided that:

(i) The parties would not conduct a trial *de novo*;

(ii) The Judge President of this division was to be requested to allocate a Judge, who would consider and decide the matter by reading all the available written information including the pleadings, transcripts of the evidence, expert reports, heads of argument and any notes which may have been made by Ndlovu J;

(iii) Legal argument would be presented to the allocated judge prior to his deliberations.

(f) The agreement between the parties contained various other provisions.

(g) The Judge President then placed the matter before Olsen J, who, on the 22nd September 2017 addressed the parties in writing, raising certain concerns which he had with the procedure which was suggested. Thereafter, the parties agreed that the matter would not proceed before Olsen J, because he had alerted the parties to the fact that he had previously worked with one of the experts.

(h) The matter was then handed to me, and on the 15th December 2017 I convened a meeting with the parties' attorneys in chambers. At the request of the parties, and with the consent of the Judge President, it was agreed that I would allow the parties an opportunity to address me on the proposed agreement. The parties were notified that I was available to hear argument on the 14th February 2018. Because of the unavailability of counsel from time to time, the matter was eventually heard before me on the 17th May 2018.

[2] Mr *Daniels* SC, who appeared for Mondi together with Ms *De Villiers-Golding,* recorded that the parties wish to finalise the action. The delays have distressed the parties and left them in an unhappy state. The parties have resolved that they do not wish to indulge in a reheard trial at great cost, both in terms of time and money. It is probable that some of the witness may no longer be available. Even if they are available, they would be required to recall events which occurred some 14 years' ago, and they would be cross-examined on their memory of those events, and the evidence which they gave at the trial which ended some three years' ago. Mr *Daniels* submitted that the parties have been let down by the legal system, and it was incumbent upon the court to assist in remedying the situation with the least prejudice to the parties. I am to consider whether the agreement by the parties can be implemented, in order to have the matter determined on the record.

[3] Mr *Daniels* recorded that the parties considered the option of arbitration. The problem with this approach is that the parties would have to pay the considerable costs of an arbitrator dealing with the extensive record, as well as the possibility of an arbitration appeal board having to be appointed to settle any dispute arising from the decision of the arbitrator. Those are all factors which, if dealt with by the judiciary, will not result in as much additional expenditure by the parties.

[4] The concerns raised by Olsen J include the following:

(a) The default rule where a judicial officer dies before giving judgment in a trial is that the case starts *de novo* before their replacement.

(b) Whereas an arbitrator may deal with, and decide a case, upon instructions given to him by the parties, judges are not in the same position. Judges are required, in accordance with their oath of office, to decide cases according to the law and practice of the court. There are limits to the exercise of the discretion of a judge to depart from ordinary principles and practices, because of the particularities of a case.

(c) A judge reading the record alone would have to resolve disputes of fact and conflicts between the evidence of the lay witnesses as well as the expert witnesses. This could involve the making of credibility findings in circumstances where the judge has not had the advantage of seeing the witnesses.

(d) In the normal course, findings of fact made by trial courts are not departed from on appeal save in exceptional circumstances. The reason for this is that the trial judge is steeped in the trial, and has had the benefit of seeing and hearing the witnesses at first hand. This assists in helping the judge to determine where the truth lies, and how the probabilities affect that decision. If this matter went on appeal, each judge of appeal would be in the same position as the judge who read the record. As the judge who read the record would not have had the benefit of assessing credibility, the judges on appeal will be in no different a position. The appeal court will have no decision to which to defer in the assessment of credibility, and the treatment of witnesses and their evidence.

(e) The agreement concluded between the parties does not set out how a judge is required to determine the facts of the case, or deal with issues of credibility. This may be extremely important when it comes to the assessment of experts. Findings of credibility in the case of experts

may well affect their livelihoods and the esteem in which they are held by the legal profession, if they regularly appear as experts.

(f) The ordinary rules applicable to the hearing of opposed motions do not allow for the resolution of disputed facts, save in very limited circumstances.

[5] Mr *Daniels* submitted that the difficulties raised were not insurmountable. He submitted that the agreement of the parties did not anticipate the court deciding the matter on the record by applying the rule in *Plascon-Evans Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A). He agreed that such an approach was not acceptable for resolving disputes of fact in trial matters, where *viva voce* evidence has been given. Mr *Daniels* referred to the judgment of Nienaber JA in *Stellenbosch Farmers'* Winery *Group Ltd and Another v Martell Et Cie and Others* 2003 (1) SA 11 (SCA). This judgment sets out how to resolve factual disputes by reference to credibility, reliability and the probabilities. In the event that an impasse was reached where a disputed fact could not be decided on the papers, then the onus would be applied, and would be decisive of the matter. He submitted that no different or new approach to evidence was being suggested, and that the evidence disclosed in the record must be assessed where it is necessary to do so.

[6] Mr *Daniels* submitted that plaintiff's case can be determined upon the version of Mr Murphy with only two broad factual issues requiring determination:

(a) Why did the fire start?

(b) Where did the fire start, and what happened to it?

There is a considerable area of dispute on why the fire started, specifically relating to the keeping by Mr Murphy on his property of quantities of sawdust. That is contrasted against the probabilities of the fire having been started by persons seeking honey. There was a considerable dispute between the experts on this issue. Mondi's case was based upon the negligence of Mr Murphy in not properly maintaining the sawdust pits, and the fact that the pits themselves constituted a fire

hazard. Mr *Daniels* submitted that there was no certainty as to exactly where or how the fire started, but the statute required that if the fire started on a person's property, that person was required to extinguish it or prevent it from spreading. That is the plaintiff's case, and the credibility and reliability of witnesses is less important.

[7] Mr *Daniels* conceded that there is no recorded case on all fours with the present situation. It is, however, a situation which must have arisen many times in the past. He accepted that the default position was that set out by Olsen J -ie- that the parties should start the matter *de novo* before another judge. He submitted that for the reasons set out above, it would simply be inconvenient and impractical for the parties to attempt to do so, not to mention the enormous costs which will be involved. Mr *Daniels* referred to *St Paul Insurance Co SA Ltd v Eagle Ink System (Cape) (Pty) Ltd* 2010 (3) SA 647 (SCA), as authority for the proposition that the matter could simply be decided on the papers. In that case Knoll J had presided at a trial during which reliance was placed on a policy of insurance. The learned judge had died before she could deliver judgment. By agreement between the parties a transcript of the evidence, together with the documentary exhibits, were placed before another judge who heard further argument. The Supreme Court of Appeal described the procedure which had been followed as 'eminently sensible' and referred to *Mhlanga v Mtenengari and Another* 1993 (4) SA 119 (ZS).

[8] *Mhlanga* is authority for the proposition that a record may be placed before another judge where a judicial officer is unable to complete a part-heard civil trial. His successor should commence with the trial *de novo*, notwithstanding that to do so would involve rehearing witness who had already testified and would be adducing their evidence afresh. In *Mhlanga* reliance was placed on the cases of *Philipp v Lindau* 1948 (1) SA 1033 (SWA) 1036 and *Protea Assurance Co Ltd v Gamlase and Other* 1971 (1) SA 460 (E) at 465A. In *Mhlanga*, Gubbay CJ recorded that the desirability of hearing the trial *de novo* is self-evident, because a judicial officer would otherwise be deprived of the substantial advantage of seeing and hearing the witnesses for himself, and of being able to compare their demeanour with that of the witnesses who testified in the trial before him.

[9] Gubbay J recorded that the attitude of the litigants in such a situation was of the utmost importance, and it was not for the judicial officer to dictate that the trial is to recommence at the point reached by his pre-assessor, although, this depended on the nature and extent of the evidence led, which might appear to him to be desirable in order to avoid wasted costs, time and inconvenience. Only if the parties agreed that the trial should be continued, should the new judicial officer rely on a transcript of the proceedings thus far, as evidence before him. In the absence of consent, the trial must start afresh.

[10] Gubbay J also referred to the following cases in support of his conclusion:

(a) *Samuel and Others v Seedat* 1949 (3) SA 984 (N) where a magistrate trying a case had fallen ill, and the matter was then placed before another magistrate, with the parties agreeing that the evidence already given should form part of the record. The second magistrate gave judgment for the respondent. A preliminary point was taken on appeal that the second magistrate had no jurisdiction to continue the case, because he had not heard the evidence of the witnesses who testified before the first magistrate. That contention was dismissed by Selke J, who was of the view that the parties had obviously agreed to the procedure followed. The only limitation was whether the second magistrate, by being confined to reading the notes of the evidence taken by his pre-assessor, was deprived of the benefits which he would have had by seeing and hearing the witness who gave the evidence in the notes.

Gubbay CJ did not regard that limitation as being justified. He said that he could conceive of no basis why the wishes of the parties should not hold sway, even though the trial before the original judicial officer may have reached an advanced stage. He did not believe that it was correct for the second judicial officer to override the decision of the parties and insist that the trial start *de novo*.

(b) *Greenblo v Levitt* 1914 CPD 244, was a matter which came before three different magistrates. The first one postponed it, the second one heard part of the evidence, and the matter was then postponed for the taking of interrogates in order to confirm the evidence. The parties agreed that all the evidence could be accepted before any other magistrate who might further try the case. This was because the second magistrate was a relieving magistrate, only temporarily available. The third magistrate heard the remainder of the matter and the interrogatories, and decided the disputes on the merits. On appeal there had been no suggestion that he ought to have ordered the *viva voce* evidence to be led afresh.

(c) *The Forest Lake:* Owners of the *Steamer Janet Quinn v Owners of the Motor Tanker Forest Lake* [1966] 3 ALL ER 833 (PDA). Here, a collision involved foreign ships and certain witnesses had their evidence taken fully, and were cross-examined. The case was adjourned part-heard, and in the interim the judge fell ill and retired. Pursuant to the rules of the Supreme Court an order was made that the trial be heard *de novo* before another judge. An application was then brought requesting that the trial be restored using the evidence already given by the original judge. The judge hearing the application opined that the real point needing consideration was whether the circumstances of the case compelled the court to start again at the beginning and call *de novo* all those witnesses who were still available. It was considered that to do with be both difficult and expensive. Some of them may not have been available. The learned judge decided that the correct course was to do what both counsel had asked the court to do, and accept as evidence the evidence led before the first judge.

[11] Gubbay J recorded that he was firmly of the view that if the parties agreed that the previous evidence be placed before the new judge, he should give effect to their wishes. It was not for the new judge to direct, contrary to the will of either one or both of the parties, that the record of evidence given before his pre-assessor be

produced as evidence at the hearing over which he was about to preside. In the circumstances of *Mhlanga*, neither counsel protested the ruling that the trial was not to start afresh. The defendant's counsel knew and understood that he would have had to cross-examine the second plaintiff, without having the opportunity of having cross-examined the first plaintiff and her witnesses. Gubbay decided that if either counsel had considered the procedure prejudicial to their case, that would have been communicated to the presiding judge. Both counsel, were experienced, chose not to speak out, and remained silent. They were taken to have acquiescenced in the procedure adopted by the learned judge.

[12] Mr *Daniels* conceded that what was at issue in *St Paul* was the interpretation of clauses in an insurance policy. It does not appear from the record that any assessment of the witnesses was required to be made by the learned judge a quo.

[13] In my view the present matter is distinguishable from the facts of *St Paul*. In this case six witnesses testified for Mondi and five witnesses testified for Mr Murphy. They included two experts, Mr Henderson for Mondi, and Mr Dickson for Mr Murphy. The heads of argument prepared for Mr Murphy by the late Mr Hewitt, (who passed away shortly before the hearing before me), dealt at length with the evidence of Mondi's expert. The arguments which he set forth undoubtedly call for a finding of credibility to be made. There are also other material disputes of fact which are evident on the record, and which were raised in the heads of argument. They include the exact place where the fire started, the cause of the fire, when Mr Murphy became aware of the fire, and the reasonableness of the steps which were taken in order to prevent it from spreading.

[14] What is significant about the decision of the Gubbay J in *Mhlanga* is that he was faced with a fait accompli. The parties had agreed to a procedure, had followed it, and were now on appeal, with the loser complaining that the procedure had not

been the correct one. *Mhlanga* is in any event distinguishable on the basis that the plaintiff's case had not yet been closed. The plaintiff was in a position to lead further witnesses, and they were able to be cross-examined by the defendant's counsel who could work from the record of proceedings thus far. Counsel would also have been able to raise any objections they wished to the procedure to be followed, if they concerned that their clients' case would be prejudiced.

[15] In *Philipp,* Brebner AJ considered whether the costs of an appeal, which was heard, but not decided, by a preceding incumbent of the bench, could be decided. Brebner AJ recorded that in the case of the death of a judge before giving judgment, the case must be heard *de novo* and the costs of the abortive proceedings cannot be claimed by one party against the other. In *Protea Assurance*, Hart AJ was required to consider an application for leave to continue *in forma pauperis* in an action which had already been instituted. The learned acting judge decided that he would follow the precedent in *Charmfit of Hollywood Inc v Registrar of Companies and Another* 1964 (2) SA 765 (T) in directing that the application before him proceed *de novo,* as if it has not been heard. He further ordered that the costs of the aborted hearing, before the judge who did not complete the application, should be costs in the application between the parties.

[16] In *Charmfit*, *Trollip* J was required to deal with the costs of an abortive previous hearing which came before the late Mr Justice *Kuper* who heard argument, but died before giving judgment. *Trollip* J took a different view from that of *Brebner* AJ in *Philipp.* He held that the court retained full jurisdiction and discretion with regard to the costs of the uncompleted hearing, and, in the interests of finality, was able to make any order of costs. An order was simply then made that the costs would be costs in the cause of the proceedings. *Charmfit* concerned an application to compel the Registrar of Companies to change a company's name. It did not, as I understand the matter, involve a hearing with witnesses who gave evidence on the merits.

[17] In *P Lorillard Co v Rembrandt Tobacco Co (Overseas) Ltd* 1967 (4) SA 353 (T) an appeal came before three judges. Shortly before the hearing started, counsel applied to amend his grounds of appeal, and the matter was adjourned. The matter then again came before the appeal court without the grounds of appeal having been amended. The first three judges of appeal were not available to hear the matter and it came before a differently constituted court. With regard to the question of a part-heard civil matter coming before a differently constituted court, the full court held that the attitude of the parties was of the greatest importance. As long as their agreement was not in conflict with any statutory provision or rule of law, they could agree to a new trial or hearing before a differently constituted court as well as, within limits, the production of evidence at the new trial. Relying on *Samuel* and *The Forest Lake* decisions, the court held that in the absence of the original appeal court, the parties could agree to a new hearing before the subsequently constituted appeal court.

[18] In addition to the above cases Mr *Daniels* also referred me to *Rowe v Assistant Magistrate, Pretoria and Another* 1925 TPD 361. A magistrate sought to import into a case before him, his knowledge of certain customs. In order to substantiate his view he arranged for a witness to be called, who was not an expert, but who testified to the custom. *Curlewis* JP recorded that in a civil action the parties may lay before a court what evidence they think necessary to support their respective cases. If the presiding officer is unable to decide where the truth lies, then the question of onus becomes decisive. The court may not call a witness except with the express or tacit consent of the parties to such an action.

[19] Mr *Daniels* submitted that in the event that I were to hear the matter, having read the record of the proceedings, I would be no worse off than if the matter had been decided before the late Ndlovu J. It is only where the evidence is contested that it would be necessary to assess it, and to make a decision on which version should be accepted. Credibility is but one of the aids available to a court in arriving at a proper decision. Mr *Daniels* submitted that the interests of justice demand that

the agreement concluded between the parties be given effect to, and that the matter be heard on the basis set out in the agreement.

[20] Mr *McIntosh* who appeared for the defendant recorded that he agreed with the submissions of Mr *Daniels,* and that the task which faced a judge in hearing the matter was no different to one where evidence was taken by way of a *commission de bene esse* or Interrogatories. In those matters evidence is taken from a witness who would otherwise not be able to testify at the trial. If the witness is able to testify at the trial, he has to give his/her evidence *viva voce.* An applicant for a *commission de bene esse* is required to show that it is convenient or necessary for the purposes of justice that evidence should be put before the court in that manner. A court retains a judicial discretion to decide whether in all the circumstances evidence should be obtained on that basis. As a general rule commissions are granted where the witnesses are outside the jurisdiction of the court and unwilling to attend upon the court. The taking of such evidence is usually done at the time that pleadings close in an action. With regard to interrogatories, questions are formulated for the purpose of being put to a witness by a commissioner. The same requirements as in commissions apply in the case of interrogatories.

[21] In my view none of the arguments advanced before me, nor the cases cited in favour of the matter being heard as sought by the parties, have provided a solution to the problem that matters of credibility cannot be dealt with in the manner suggested by the parties. There are numerous disputes of fact and expert opinion in the record of the proceedings, and a determination of those would be crucial to any decision.

[23] Whilst the parties may well place whatever evidence they wish before a civil court, the court still has to decide the matter on the applicable principles of law. Parties may, for example, agree that a certain fact can be accepted by the court as being true, when there is no documentary or *viva voce* evidence to support the finding of fact. In this way parties to civil actions may agree to limit, to some extent,

the role of a judicial officer in determining matters. That is a very different thing, however, to parties being able to dictate to a judge how to exercise his oath of office by restricting the judge's adherence to legal principles, statutes, and precedents. Given the number of conflicts of fact and expert opinion in this case, I am of the view that a judge would not be able properly to determine the matter upon a mere reading of the record.

[24] It is also no answer to the above to suggest that one can simply apply the tests set out in *Stellenbosch Farmers Winery* for the resolution of disputes. That is because the first two aspects referred to by the learned judge of appeal are the credibility of the factual witnesses and their reliability. The very fact that they cannot be decided merely on paper is recognised in *Plascon-Evans* and provides a limitation on the ability of judges to make such decisions, except in special circumstances. This matter is distinguishable from the situation where a case is part-heard, and the judge may recall one or more witnesses (who have recently testified) in order to clarify any per clued uncertainty.

[25] Were I merely to override those considerations, albeit with the consent of parties, I have serious doubts as to whether I would be fulfilling my oath of office by allowing the parties to a civil action to restrict the ordinary performance of my duties.

[26] The conclusion to which I have come is no doubt most unfortunate for the parties, and one which will not be welcomed by them. In the circumstances I make the following order:

(a) The application that I recognise and follow the agreement concluded between the parties with regard to the future conduct of this action is refused;

(b) Should the parties wish to continue with the trial in the High Court, they are required to start the proceedings *de novo*.

_____

Lopes J

Dates of hearing:	17th May 2018.
Date of Judgment:	2018.
Counsel for the Plaintiff:	Mr J *Daniel*s SC and Ms *de Villiers-Golding* (instructed by Allen & Overy).
Counsel for the Defendant:	Mr *K McIntosh* (instructed by Askew & Associates).