REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

RULING ON THE APPLICATION TO LEAD EVIDENCE VIA VIDEO LINK

Case no**:** HC-MD-CIV-ACT-OTH-2021/01143

In the matter between:

NATIONAL FISHING CORPORATION OF NAMIBIA APPLICANT /PLAINTIFF

and

AFRICAN SELECTION FISHING (NAMIBIA) (PTY) LTD	**1ST RESPONDENT / 1ST DEFENDANT**
SEAFLOWER PELAGIC PROCESSING (PTY) LTD	**2ND RESPONDENT / 2ND DEFENDANT**
MINISTER OF FISHERIES AND MARINE RESOURCES	**3RD RESPONDENT / 3RD DEFENDANT**
MINISTER OF PUBLIC ENTERPRISES	**4TH RESPONDENT / 4TH DEFENDANT**
THE GOVERNMENT OF THE REPUBLIC OF NAMIBIA	**5TH RESPONDENT / 5TH DEFENDANT**

Neutral Citation*:* *National Fishing Corporation (Pty) Ltd v African Selection Fishing (Namibia) (Pty) Ltd & Others* (HC-MD-CIV-ACT-OTH-2021/01143) [2022] NAHCMD 580 (21 October 2022)

Coram: SIBEYA J
Heard: **23 September 2022**
Delivered: **21 October 2022**

Flynote: Civil procedure – Application brought on Notice of Motion for leave to lead the evidence of a witness in another country (Mr de Klerk) at the trial by way of video link – Leading evidence via video link during the trial is not provided for in the rules of court – A court can, in the exercise of its discretion, where it is in the interests of justice, on good reason proffered non-attendance in court, allow a witness in a foreign country to testify via video link, provided that other parties will not be unfairly prejudiced – The applicant is found not to have shown that it is in the interests of justice to lead the evidence of Mr de Klerk via video link – The applicant further failed to show good reason why Mr de Klerk cannot be in court attendance to physically testify. The application to lead evidence via video link is refused.

Summary: This is an interlocutory application where the issue for determination is whether the applicant should be granted leave to lead the evidence of Mr Maren de Klerk who is outside the jurisdiction of this court and who is said to be in South Africa, via video link, as he is not willing to attend court in person. Mr de Klerk claims that it is unsafe for him to attend to this court in person.

Held: The doors of the courtroom should not be shut to key witnesses who find themselves to be geographically beyond the jurisdiction of the court, particularly in view of the purpose of the courts, being to deliver justice. It is incumbent on the courts to ensure, not only that justice is delivered to those in physical court attendance, but also that all persons have access to justice. This includes enforcing a person's right to a fair trial which encompasses the right to call witnesses wherever they may be.

Held that: The fact that the statutes, rules and common law do not make provision for the court to receive evidence during the trial via video link, should not be a barrier to so receive such evidence via the said video link where, on application, good cause is

shown that it is in interests of justice to grant such order and further that another party will not be unfairly prejudiced thereby.

Held further that: The administrative and technical facilities and arrangements made at the place where the witness is expected to give evidence should be laid bare for the court to satisfy itself of the process that it is about to approve.

Held further that: The applicant failed to set out the details of the proposed video link. The court is in darkness as to the nature of the technology sought to be utilised, the reliability of the audio-visual equipment sought to be used, and the connectivity thereof.

Held further that: The applicant failed to establish that it is in the interests of justice to grant leave to lead the evidence of Mr de Klerk at the trial via video link. The applicant further failed to show good reason why Mr de Klerk cannot be physically present in court to give *viva voce* evidence.

The applicant's application is refused.

ORDER

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1. The applicant's application for leave to lead the evidence of Mr Maren de Klerk at the trial of the matter by way of video link is refused;

2. The applicant must pay the first and second respondents' wasted costs for the period 19 to 23 September 2022, including costs of one instructing and two instructed legal practitioners, not capped in terms of 32(11);

3. The interlocutory application is regarded as finalised and removed from the roll;

4. The Registrar is directed to bring this ruling to the attention of the Judge-President.

5. The wasted costs for 26 to 30 September 2022 shall be costs in the main action;

6. The main action is postponed to 24 November 2022 at 08:30 for status hearing and possible allocation of trial dates;

7. Parties must file a joint status report on or before 22 November 2022.

RULING

SIBEYA, J:

Introduction

[1] Court processes should not remain ancient but should embrace the change of time and adapt to the prevailing living conditions of the people. Technology evolves all the time and should not be rebuked as constituting a hindrance to attain justice. Courts should not resist change that may result in swift, cost effectiveness and convenience to the parties and to the court in order to deliver justice.

[2] Where technology can enhance the speedy delivery of justice, while being fair to the parties, without compromising on the purpose of the court, such technology should be embraced. Courts should be reminded of their purpose, namely: to do justice, enhance social order, resolve disputes, maintain the rule of law and ensure due process of the law.

[3] This is an interlocutory application where the issue for determination is whether the applicant should be granted leave to lead the evidence of Mr Maren de Klerk who is outside the jurisdiction of this court and who is said to be in South Africa, via video link,[1]

[1] Video link is an electronic facility that enables audiovisual communication between people in different locations. Sometimes referred to as audio visual connection. Oxford English Dictionary.

as he is not willing to attend court in person. Mr de Klerk claims that it is unsafe for him to attend to this court in person.

Parties and representation

[4] The applicant is National Fishing Corporation of Namibia, a company established in terms of s 2(1) of the National Fishing Corporation of Namibia Act, No. 28 of 1991 and registered in terms of the company laws of the Republic with its principal place of business situated at Industry Road, Luderitz.

[5] The first respondent is African Selection Fishing (Pty) Ltd, a private company duly registered in terms of the company laws of the Republic with its principal place of business situated at 98 Ben Amadhila Avenue, Walvis Bay.

[6] The second respondent is Seaflower Pelagic Processing (Pty) Ltd, a private company duly registered in terms of the company laws of the Republic with its principal place of business situated at 98, Ben Amadhila Avenue, Walvis Bay.

[7] The third respondent is the Minister of Fisheries and Marine Resources, duly appointed in terms of article 32(3)(i)*(bb)* of the Namibian Constitution whose address of service is c/o Office of the Government Attorney, 2nd Floor, Sanlam Centre, Independence Avenue, Windhoek. The third respondent shall be referred to as the 'Minister of Fisheries'.

[8] The fourth respondent is the Minister of Public Enterprises, duly appointed in terms of article 32(3)(i)*(bb)* of the Namibian Constitution whose address of service is c/o Office of the Government Attorney, 2nd Floor, Sanlam Centre, Independence Avenue, Windhoek.

[9] The first and second respondents are the only ones who opposed this application and for convenience, where reference is made to the first and second respondents jointly, they shall be referred to as 'the respondents'.

[10] The applicant is represented by Mr Corbett SC while the respondents are represented by Mr Fitzgerald SC.

Background

[11] The genesis of the main action, appears to be the remarks of this court made on 27 August 2020, where Angula DJP in *Seaflower Pelagic Processing (Pty) Ltd v The Minister of Fisheries and Marine Resources*,[2] said that the Designation Agreement and the Co-operation Agreement entered into between the former Minister of Fisheries and the applicant did not compel the Government to provide the 50 000 mt of horse mackerel to Fishcor. Angula DJP remarked further at para [59] that:

> '…the undertaking by Fishcor to make available 50 000 mt every year for 15 years would only be possible under a corrupt environment and would not be viable under a regime where there is strict compliance with the law, particularly with the provisions of the MRA.'

[12] On 21 September 2020, the Minister of Fisheries terminated the Co-operation Agreement and Addendum No. 1 thereto effective immediately. The applicant alleges that the purpose of the Shareholders Agreement, where the first respondent holds 60% shares while the applicant holds 40% shares in the second respondent, is for the applicant to provide 50 000 metric ton (mt) per annum of horse mackerel for the initial period of 15 years, subject to renewal for another 15 years.

[13] The applicant alleges further that the objective of the Quota Agreement is for the applicant to make available a minimum of 50 000 mt per annum of horse mackerel quota to the second respondent for the period ending 31 December 2033. The applicant claims that the Shareholders Agreement and the Quota Agreement are dependent on the Co-operation Agreement and Addendum No. 1 thereto.

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[2] *Seaflower Pelagic Processing (Pty) Ltd v The Minister of Fisheries and Marine Resources* (HC-MD-CIV-MOT-GEN-2020/00283) [2020] NAHCMD 384 (27 August 2022).

[14] The applicant claims further that the above-mentioned agreements were entered into in the context of a corrupt environment, are *contra bonos mores*, not in good faith and *in fraudem legis* and thus unenforceable. The applicant, as a result, seeks an order to declare the said Co-operation Agreement, Addendum No. 1 to the Co-operation Agreement, the Shareholders Agreement and the Quota Agreement *contra bonos mores*, not in good faith and *in fraudem legis* and consequently null and void and unenforceable.

[15] The claim by the applicant, in the main action, is defended by the respondents who deny participating in any corrupt scheme.

[16] On 8 September 2022, the applicant filed an interlocutory application where it sought the following relief:

> ‘(a) that the applicant be granted leave to lead evidence of Mr Maren de Klerk at the trial of this matter by way of video link ;
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> (b) that the costs of the video link be borne by the applicant;
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> (c) that the applicant be ordered to bear the costs of this application;
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> (d) that – should the first and second respondents elect to oppose this application the first and second respondents be ordered to bear the costs of this application.’

[17] As alluded to above, the application is opposed by the respondents.

Audio and visual link

[18] The High Court Act and the rules of court do not make provision for evidence to be led during the trial via video link.

[19] The applicant claims that the evidence sought to be provided by Mr de Klerk is key to prove its case. The respondents disagree. The applicant further claims that Mr de Klerk is committed to give evidence regarding the corrupt environment in which various agreements mentioned above were entered into. Mr de Klerk provided an affidavit to the Anti-Corruption Commission (the ACC) where the alleged corrupt environment is discussed and further deposed to another affidavit in support of the present application to have his evidence in this matter heard via video link. The court must now determine whether or not it is permissible to hear the evidence of Mr de Klerk via video link in our courts as sought by the applicant.

[20] The applicant laboured extensively in an effort to convince the court that it is competent for this court to hear evidence in a trial through video link. Mindful of the fact that receiving evidence via video link is not part of the Rules of Court, Mr Corbett argued, in reference to article 12(1)*(a)* of the Constitution, that fair trial encompasses any consideration to procure and receive evidence during a trial which is in the interests of justice. Mr Corbett invited the court to exercise its inherent powers to regulate its procedures in the interests of justice. He relied, for this contention, on the decision of *Moulded Components and Rotomoulding South Africa (Pty) Ltd v Coucourakis and Another*,[3] where Botha J remarked as follows:

'I would sound a word of caution generally in regard to the exercise of the Court's inherent power to regulate procedure. Obviously, I think, such inherent power will not be exercised as a matter of course. The Rules are there to regulate the practice and procedure of the Court in general terms and strong grounds would have to be advanced, in my view, to persuade the Court to act outside the powers provided for specifically in the Rules. Its inherent power, in other words, is something that will be exercised sparingly. As has been said in the cases quoted earlier, I think that the Court will exercise an inherent jurisdiction whenever justice requires that it should do so. I shall not attempt a definition of the concept of justice in this

[3] *Moulded Components and Rotomoulding South Africa (Pty) Ltd v Coucourakis and Another*, 1979 (2) SA 457 (W) at p. 462-463.

context. I shall simply say that, as I see the position, the Court will only come to the assistance of an applicant outside the provisions of the Rules when the Court can be satisfied that justice cannot be properly done unless relief is granted to the applicant.'

[21] Mr Corbett argued further that this court is faced with a novel issue which had not been traversed in our jurisdiction where evidence is sought to be led via video link. He further argued that the application constitutes an exceptional matter where only Mr de Klerk, amongst the persons who participated in the conclusion of the concerned agreements, is willing to testify. This is understood from the premise that the other persons who are said to have taken part in the process of reaching the said agreements face related criminal charges and they declined to testify in this matter, so Mr Corbett argued. He concluded this line of argument by inviting the court to come to the aid of the applicant and grant the order for the evidence of Mr de Klerk to be heard via video link.

[22] Mr Fitzgerald argued the contrary. He argued that the general approach provided for in the Rules of Court is that the evidence of a witness must be adduced in open court in the presence of all parties, including the legal representatives and the presiding judge.[4]

[23] Mr Fitzgerald argued further that the said approach finds support from the often cited matter of *Stellenbosch Farmers' Winery Group Ltd and Another v Martell at Cie and Others*,[5] where it was held that the approach to be adopted by a court in order to resolve factual disputes is to make findings on the credibility of factual witnesses, their reliability and the probabilities. The finding on the credibility depends on the court's impression about the veracity of the witness, which, in turn, depends on several factors including witness' candour, and demeanour in the witness box, his or her bias and the calibre and cogency of his or her performance compared to other witnesses. Mr Fitzgerald argued that the credibility of a witness cannot be assessed when such witness does not attend to court and physically testifies. He argued further that the

[4] Rule 92 and 93.
[5] *Stellenbosch Farmers' Winery Group Ltd and Another v Martell at Cie and Others* 2003 (1) SA 11 (SCA).

applicant failed to advance cogent reasons for the court to depart from the said well-beaten path.

[24] As correctly pointed out by the parties, the rules of court make no provision for the court to hear evidence of witnesses via video link.

[25] This court has inherent powers which can be sparingly exercised where the common law and statutory law do not come to the aid of the court in its quest to deliver justice in a particular matter. The Supreme Court of South Africa in *Oosthuizen v Road Accident Fund,*[6] quoted with approval the following description of inherent jurisdiction by Jerold Taitz in his work titled: The Inherent Jurisdiction of the Supreme Court:[7]

> '[14] … This latter jurisdiction should be seen as those (unwritten) powers, ancillary to its common law and statutory powers, without which the court would be unable to act in accordance with justice and good reason. The inherent powers of the court are quite separate and distinct from its common law and its statutory powers, e.g. in the exercise of its inherent jurisdiction the court may regulate its own procedure independently of the Rules of Court.'

[26] The Supreme Court of India in the matter of *The State of Maharashtra v Dr. Praful Desai,*[8] was faced with the question to determine whether or not a witness who was in the United States of America and who was required and willing to give evidence but refused to travel to India for purposes of giving evidence, could provide such evidence via video conference. This witness was a medical doctor. Upon examining the complainant' spouse, who suffered from terminal cancer, the medical doctor opined that she was inoperable and should only be treated with medication. The complainant and his wife later consulted the respondent, a surgeon. The surgeon, who, notwithstanding the opinion against surgery that was within his knowledge, carried out the operation which led to the deceased's suffering and ultimate death. The evidence of the witness in the United States was critical to the complainant's case.

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[6] *Oosthuizen v Road Accident Fund* [2011] ZASCA 118.
[7] Jerold Taitz: The Inherent Jurisdiction of the Supreme Court (1985) at 8-9.
[8] *The State of Maharashtra v Dr. Praful Desai* [(2003) 4 SCC 601].

[27] Section 273 of the Criminal Procedure Code of India provides that:

'Evidence to be taken in the presence of the accused. Except as otherwise expressly provided, all evidence taken in the course of the trial or other proceeding shall be taken in the presence of the accused, or, when his personal attendance is dispensed with, in the presence of his pleader.'

[28] The Supreme Court of India found that there is a dispensation allowed from personal attendance but the pleader must be present, which includes the accused. Actual is, therefore, not a must. The Supreme Court in marking its approval to hear evidence via video conference remarked as follows at para 19:

'Video conferencing is an advancement in science and technology which permits one to see, hear and talk with someone far away, with the same facility and ease as if he is present before you i.e. in your presence. In fact he/she is present before you on a screen. Except for touching, one can see, hear and observe as if the party is in the same room. In video conferencing both parties are in presence of each other.'

[29] In the United States of America, the Supreme Court in *Maryland v Santra Aun Craig,*[9] found that recording of evidence via video-conferencing did not violate the Sixth Amendment. The Sixth Amendment includes the right to a public trial and the rights to a fair trial.

[30] In Singapore, hearing evidence via video link is permitted, with leave of court, where just cause is shown on application. This approach is provided for in s 62A of the Evidence Act (Chapter 97 Revised edition 1997), original enactment: Ordinance 3 of 1893, where it is stated that:

'Evidence through live video or live television links

62A.—(1) Notwithstanding any other provision of this Act, a person may, with leave of the court, give evidence through a live video or live television link in any proceedings, other than proceedings in a criminal matter, if —

[9] *Maryland v Santra Aun Craig* [497 US 836] delivered on 27 June 1990.

(a) the witness is below the age of 16 years;

(b) it is expressly agreed between the parties to the proceedings that evidence may be so given;

(c) the witness is outside Singapore; or

(d) the court is satisfied that it is expedient in the interests of justice to do so.

(2) In considering whether to grant leave for a witness outside Singapore to give evidence by live video or live television link under this section, the court shall have regard to all the circumstances of the case including the following:

(a) the reasons for the witness being unable to give evidence in Singapore;

(b) the administrative and technical facilities and arrangements made at the place where the witness is to give his evidence; and

(c) whether any party to the proceedings would be unfairly prejudiced.

(3) The court may, in granting leave under subsection (1), make an order on all or any of the following matters:

(a) the persons who may be present at the place where the witness is giving evidence;

(b) that a person be excluded from the place while the witness is giving evidence;

(c) the persons in the courtroom who must be able to be heard, or seen and heard, by the witness and by the persons with the witness;

(d) the persons in the courtroom who must not be able to be heard, or seen and heard, by the witness and by the persons with the witness;

(e) the persons in the courtroom who must be able to see and hear the witness and the persons with the witness;

(f) the stages in the proceedings during which a specified part of the order is to have effect;

(g) the method of operation of the live video or live television link system including compliance with such minimum technical standards as may be determined by the Chief Justice; and

(h) any other order the court considers necessary in the interests of justice.

(4) The court may revoke, suspend or vary an order made under this section if —

(a) the live video or live television link system stops working and it would cause unreasonable delay to wait until a working system becomes available;

(b) it is necessary for the court to do so to comply with its duty to ensure that the proceedings are conducted fairly to the parties thereto;

(c) it is necessary for the court to do so, so that the witness can identify a person or a thing or so that the witness can participate in or view a demonstration or an experiment;

(d) it is necessary for the court to do so because part of the proceedings is being heard outside a courtroom; or

(e) there has been a material change in the circumstances after the court has made an order…'

[31] In the Court of Appeal in the matter of *Anil Singh Gurm v J S Yeh*,[10] an application for an order to hear evidence from a witness who was in another country via video link, who was not willing and able to travel to Singapore, was granted. In this matter, the witness declined to travel to Singapore as he feared that he would be arrested in connection with an unrelated criminal investigation against him. The court, in grating the order, reasoned, *inter alia*, that:

(a) The witness was not a party to the lawsuit and did not stand to gain anything from it;

(b) The witness had relevant material evidence that would not be considered if he does not testify via video link;

[10] *Anil Singh Gurm v J S Yeh* [2020] SGCA 5.

(c) If the witness is not allowed to testify, the party calling him will be prejudiced (as such party will be denied an opportunity to call a key witness), while granting the application, to the contrary, will not prejudice the other party in the lawsuit;

(d) The witness had not been charged with or convicted of any offence in Singapore. As such, he was not attempting to evade justice by testifying via video link, instead of returning to Singapore to face the music.

[32] In another matter from Singapore of *Wang Xiaopu v Koh Mui Lee and Others*,[11] the High Court remarked that, when faced with an application to hear evidence via video link, there should be good reasons to lead evidence remotely. In the process, the court should consider the following:

(a) The reasons for the witness not being able to give evidence physically in court;

(b) The administrative and technical facilities and arrangements made at the place where the witness is to give his or her evidence;

(c) The prejudice that is likely to be suffered by any party to the proceedings as a result of granting or refusing the order sought.

[33] The court in the *Wang Xiapou* matter, found, *inter alia*, that: the witness in a foreign country whose evidence was sought to be led via video link was technically able to travel to Singapore and the only handicap was that it would be very inconvenient and expensive to do so on account of the COVID-19 related travel restrictions; and that the applicant failed to provide evidence of the technical and administrative arrangements that would have required to have been made in order to facilitate the witness giving evidence video link. On the basis of the aforesaid, amongst others, the court refused the application to have the witness testify via video link.

[11] *Wang Xiaopu v Koh Mui Lee and Others* [2022] SGHC 54.

[34] In Canada, rules were promulgated in order to permit trial evidence by video link. In line with their rules, the courts in Canada welcomed receiving evidence during the trial by video conference. They have termed this process 'an electronic trial'.[12]

[35] Close to home, in South Africa, the courts have not been spared from the challenge to consider whether or not to allow the use of video link to adduce evidence during the trial. In *Uramin (incorporated in British Columbia) t/a Areva Resources Southern Africa v Perrie*,[13] the court had occasion to consider an application to hear evidence via video link during the trial. The court remarked that it is preferable during civil trials to hear *viva voce* evidence in court, but courts had to modernise in order to meet the interests of justice.

[36] The court in *Uramin (supra)* further remarked that:

'[20] Yet within the stone walls staffed by personnel dressed as though they were clerics in the reign of Henry the Eighth, we have no difficulty in recognising the need for accommodating witnesses to meet the interests of justice. We utilise many different ways of procuring evidence because both the Constitution and the High Court Rules permit development of appropriate procedures. We do so because we recognise that court procedures and the Rules which regulate such practices are devised to administer justice and not hamper it. Evidence is received on affidavit; closed-circuit television regularly allows for evidence to be given in one room and transmitted to a courtroom; inspections in loco take place and judges or nominated persons take evidence on commission. 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"'

[37] In *M K v Transnet Ltd t/a Portnet,*[14] the Kwazulu Natal High Court granted an application to hear evidence via video link during the trial and went on to remark that:

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[12] *Chandra v Canadian Broadcasting Corporation and Others,* 2015 ONSC 5385.
[13] *Uramin (incorporated in British Columbia) t/a Areva Resources Southern Africa v Perrie* 2017 (1) SA 236 (GJ).
[14] *M K v Transnet Ltd t/a Portnet* (A105/2004) [2018] ZAKZDHC 39; [2018] 4 All SA 251 (KZD) (20 August 2018). See also: *Rand Gold and Exploration Co. Ltd and Another v Gold Fields Operations Ltd and Others,* 2020 (3) SA 251 (GJ) at para [147] – [148] and *Caesar Stone Sdot – Yam Ltd v World of Marble and Granite 2000 CC and Others,* 2013 (6) SA 499 (SCA).

'[25] It is my view that the applicant has made out a case for the relief sought. The video link conference will also assure access to the courts in terms of s 34 of the Constitution for the applicant and courts have a duty to ensure that people who have physical, financial, health and age barriers like the applicant, have access to justice. The legal barriers created by the lack of rules, cannot override the right to access to justice. Video link conferencing extends and expands access to justice. Technology with the necessary safeguards enhances such a right enshrined in the Constitution.'

[38] Having navigated through the terrain of international jurisprudence on whether or not video link should be permitted as a means to receive evidence during a trial, it becomes apparent that, the traditional approach, which should be preferred is that, witnesses must physically be present in court to testify. This approach finds support from the *Stellenbosch Farmers Winery matter (supra).* The doors of the courtroom should, however, not be shut to key witnesses who find themselves to be geographically beyond the jurisdiction of the court. In view of the purpose of the courts, being to deliver justice, it is incumbent on the courts to ensure not only that justice is delivered to those in physical court attendance but also to ensure that persons have access to justice. This includes enforcing a person's right to a fair trial which encompasses the right to call witnesses wherever they may be located.[15]

[39] The fact that the statutes, rules of the court and the common law do not make provision for the trial court to receive evidence during the trial via video link, should not be a barrier to so receive such evidence via the said video link where, on application, good cause is shown that it is in interests of justice to grant such order and further that another party will not be unfairly prejudiced thereby. The application to adduce evidence via video link should not be had for the mere asking. Courts should, therefore, scrutinise the application on the basis of the surrounding facts in order to determine whether or not it will be in the interests of justice to grant the order sought.

[40] I harbour no doubt that video link is a modern process within which audio and visual communication with a person in another place or country is possible. It, therefore, does not come as a surprise that our statutes do not make provision for courts to hear

[15] Article 12(1)(a) and (d).

evidence adduced via video conference, as most of the statutes may have been promulgated prior to the discovery of video link.

[41] The law must evolve in order to cater for the ever-changing circumstances of the people. The law cannot be static lest it becomes redundant and worthless. In the same breath, Bhagwathi J in the Supreme Court of India in *National Textile Workers' Union v P.P. Ramakrishnan*,[16]emphasised the principle that the law cannot stand still, and eloquently remarked as follows:

> 'We cannot allow the dead hand of the past to stifle the growth of the living present. Law cannot stand still; it must change with changing social concepts and values. If the bark that protects the tree fails to grow and expand along with the tree, it will either choke the tree or if it is a living tree, it will shed that bark and grow a new living bark for itself. Similarly, if the law fails to respond to the needs of changing society, then either it will stifle the growth of the society and choke its progress or if the society is vigorous enough, it will cast away the law which stands in the way of its growth. Law must therefore constantly be on the move adapting itself to the fast changing society and not lag behind.'

[42] Courts should adapt to modern technology within the sphere that they operate for as long as it is in the interests of justice to do so and that any other party will not be unfairly prejudiced in the process. Where the rules are lacking, this court can invoke its inherent jurisdiction to act in the interests of justice in order to ensure that persons have access to justice and that their rights to a fair trial are preserved.

[43] It would constitute counter constitutionalism for the court, after finding that it has the necessary jurisdiction to deal with the matter, to decline to exercise its jurisdiction on account of the process not being provided for in the rules of court. Lest we forget, the rules are made for the court and not the court for rules.

[44] A few challenges with hearing evidence via video link comes to mind and the list is by no means exhaustive. Lack of basic infrastructure, including well-functioning computers, uninterrupted internet and electricity connections to ensure smooth recoding of evidence are but a few. Furthermore, a witness who testifies via video link cannot be

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[16] *National Textile Workers' Union v P.P. Ramakrishnan* (1983) 1 SCC 228 at p. 256.

compelled to testify, and if compelled in any manner, including an order of court, such will be difficult for the court to enforce. A witness who testifies via video link while beyond the jurisdiction of the court, may abuse his or her geographical distance from the court and speak loosely knowing that he or she cannot be committed for contempt of court or perjury. Even if he or she is convicted for contempt of court or perjury, such may be an academic exercise as it cannot be implemented given the distance.

[45] I am of the view that in order to cater for the above scenario and put a safe guard that the witness will adhere to the rules of court, such witness should be allowed to testify via video link from a country which has an extradition treaty with our country or a country that is duly designated in terms of the Extradition Act 11 of 1996. This will ensure that although such witness may be beyond the geographical jurisdiction of the court, he or she is not beyond the long arm of the law of the land where trial takes place.

[46] Hearing evidence via video link allows the witness to be viewed in person at the same time and same manner by the parties, the judge and the public that are in attendance in court. The court can observe witnesses who testify via video link and be able to make credibility findings. The witness who testifies via video link will be as good as present in court save that he or she cannot be touched.

[47] With the existence of modern technology, it will be a travesty of justice where a party shows on application that it will be in the interests of justice that its key witness who is beyond the jurisdiction of the court, is able and willing to testify via video link but cannot, for good reason, be in court attendance, should not be permitted to so testify. This may weaken or destroy such party's case and surely, that cannot be in the interests of justice. Furthermore, it could serve to violate the right to a fair trial envisaged in Art 12(1)(a) and (d).

[48] In view of the foregoing discussion, findings and conclusions, I hold that, although not provided for in the rules of court, statutes or common law, this court can, in an appropriate case, on application by a party who has established that it is in the interests of justice that the evidence of a key witness who is outside the jurisdiction of

the court, and where good reasons are advanced for the non-attendance in court of such witness and where the other party will not be unfairly prejudiced, permit such evidence to be heard via video link. This, in my view, is what the interests dictate.

Was a case made out to allow Mr de Klerk to testify via video link?

[49] Mr Corbett argued that the applicant has established that it is in the interests of justice to allow Mr de Klerk to adduce evidence via video link and therefore the application should be granted. He referred to the matter of *Penderis and Others v De Klerk and Others,*[17]where Masuku J, found Mr de Klerk to be a fugitive from justice. Masuku J further found that Mr de Klerk who is an officer of the court 'does not give an explanation for his absence from the Republic. Furthermore, the abruptness of his departure and its implications on his co-directors and clients, particularly the estates in question, are not explained'.[18]

[50] Mr Corbett, however, sought to distinguish the *Penderis* matter from the present matter as in the *Panderis* matter, Mr de Klerk was a party to the proceedings, while in this matter, he is a witness with nothing to gain for adducing evidence.

[51] Mr Fitzgerald, expectedly, argued the opposite. He disputed the assertion that the evidence of Mr de Klerk sought to be adduced is key to the applicant's case. He further argued that Mr de Klerk is a fugitive from justice and allowing his evidence to be adduced via video link will aid his fugitive status.

[52] This court in the matter of *August 26 Holdings (Pty) Ltd v Broad-Based Network,*[19] *mero motu* raised a concern whether it is desirable for Mr de Klerk to act as an executor in the estate and be substituted for the deceased party in the matter. In the *August 26* matter, it was brought to the attention of the court on 22 March 2022 that there was a pending warrant for the arrest of Mr de Klerk, by a peace officer, upon sight. It was issued on 29 April 2021. The said warrant of arrest was not available when the

[17] *Penderis and Others v De Klerk and Others* 2021 (1) NR 152 (HC).
[18] *Penderis (supra)* at para [99].
[19] *August 26 Holdings (Pty) Ltd v Broad-Based Network* (HC-MD-CIV-ACT-CON-2020/04219) [2022] NAHCMD 249 (18 May 2022).

Penderis matter was heard. This court, in *August 26*, also found after considering the surrounding circumstances of the matter, that Mr de Klerk was a fugitive from justice.[20]

[53] It is disputed that the evidence sought to be led is key to the applicant's case. It is extremely difficult to assess the significance of the evidence sought to be adduced at this juncture. Considering the content of the affidavit of Mr de Klerk submitted to the ACC and the answering affidavit filed in opposition thereto, it could be said that there is merit, even to the slightest degree, in the argument by Mr Corbett that the evidence sought to be adduced by Mr de Klerk is important to the applicant's case. This, however, is not the end of the matter. The court must further determine whether there are good reasons advanced why Mr de Klerk cannot attend court in person and tender evidence *viva voce*.

[54] Mr de Klerk deposed to an affidavit in support of this application to have his evidence adduced via video conference. He explained that the reason for his unavailability to attend court, is the fear for his life. He stated that there were attempts made to kill him by unknown people, hence he is in hiding. Mr Corbett argued that Mr de Klerk is a target at the hands of the persons who do not want to see him testify in the pending "fishrot scandal" matter. Mr de Klerk, thus is not prepared to disclose his whereabouts and is further not prepared to return to Namibia.

[55] Mr Fitzgerald argued the contrary, namely, that Mr de Klerk subjectively speculates that his life is in danger and uses that as a ruse not to attend court. He argued further that when the subjective belief of Mr de Klerk is rejected, Mr de Klerk will be left with an option of being extradited to Namibia, after which he can testify *viva voce* in court, and this possibility renders the applicant's application premature.

[56] The court posed a question to Mr Corbett that if Mr de Klerk is extradited to Namibia and is kept in police custody, the police will be expected to carry out one of their primary duties, which is to ensure his safety. To this, Mr Corbett could not say more, save to refer to one isolated incident involving a Mr Kandara who died while in the care of the police. I find that it was not established that the Namibian police, who are

[20] Para [48] – [49].

statutorily compelled to ensure the safety of inmates in their custody, will not do all they can to protect the life and limb of Mr de Klerk if he is extradited to Namibia and kept in custody. The police have a duty to protect accused persons and witnesses, if so required, who may be in their custody. Once the pending warrant of arrest against Mr de Klerk is executed, and Mr de Klerk is extradited to Namibia, then he will be able to testify *viva voce* in the main action.

[57] Mr de Klerk says that his life is in danger. The difficulty that the court finds itself in is that Mr de Klerk subjectively appears to believe that his life is in danger. He judges his situation subjectively and delivers a verdict that his life is in danger through that individualised prism. The test to assess the alleged fear, in my view, should be that of a reasonable man in the position of Mr de Klerk. In a judgment that stood the test of time, Lord Macmillan, of the House of Lords, in *Muir v Glasgow Corporation*[21] described the reasonable man's test as follows:

> 'The standard of foresight of the reasonable man is, in one sense, an impersonal test. It eliminates the personal equation and is independent of the idiosyncrasies of the particular person whose conduct is in question. Some persons are by nature unduly timorous and imagine every path beset with lions. Others, of more robust temperament, fail to foresee or nonchalantly disregard even the most obvious dangers. The reasonable man is presumed to be free both from over-apprehension and from over-confidence, but there is a sense in which the standard of care of the reasonable man involves in its application a subjective element.'

[58] The above passage resonates in this matter, in that, Mr de Klerk is required to have a reasonable belief that his life is in danger. His belief should pass the bar of a reasonable man. Failure to establish that a reasonable man, in his position, would harbour the fear that his life is in danger, would mean that, even if Mr de Klerk believes that his belief is reasonable, such belief does not manifest itself into a reasonable belief as it falls short of the standard of a belief of a reasonable man.

[59] Courts should be careful not to purely assess a matter on a subjective analysis, when such matter requires the determination of its reasonableness. One imagines how chaotic it would be if any person who is, for example, served with summons or a

[21] *Muir v Glasgow Corporation* [1943] UKHL 2 (16 April 1943), [1943] 2 ALL ER 44.

subpoena to attend to court can, on his or her own subjective assessment decide not to attend court for whatever reason. This could result in the failure of the rule of law, a situation that the courts should guard against.

[60] As alluded to above, the applicant and Mr de Klerk failed to establish that once extradited, Mr de Klerk's safety will be compromised by the police. Simply put, it was not established that once extradited, his life and limb will not be protected by the police if kept in custody or when so required. The failure to so prove that the police will carry out their statutory duty to protect him, renders his hiding unreasonable. Mr de Klerk is well aware of the warrant of arrest issued against him, and that his return to this country is required not only by the state machineries but by the law, by virtue of the warrant of arrest issued by a competent court. In my view, this renders the explanation tendered by Mr de Klerk for the alleged fear of his life, unreasonable and falls to be rejected. In any event, even if the alleged fear was to be accorded credence of a slight degree, the question remains that why is Mr de Klerk continuing to reside at a place where his life is threatened, in South Africa as he claims, instead of returning to the country where the police have a duty to protect him. The answer is a mystery.

[61] Mr de Klerk deposed that he is willing and able to testify at an undisclosed location. He, therefore, still intends to continue to be in hiding even to the court. If Mr de Klerk perjures himself, the court will not be able to call him to order and enforce its punitive measures. The fact that Mr de Klerk continues to be in hiding, places him in a space that is totally beyond the reach of the court and the law of the land, and in my view, it is undesirable to have such a person tender evidence via video link. He can commit perjury or be in contempt of court and the court will be toothless and simply be at his mercy. In such a situation, evidence via video link should not be an option. On this basis, and the reasons set out above, the applicant's application should fail.

[62] Mr de Klerk is, in my view, in a worse off position, as the warrant of arrest issued against him on 21 April 2021 and which is about a year and a half ago, still awaits execution. The authorities in this country seek his whereabouts in order to execute a warrant of arrest (which is an order of court). In my view, allowing Mr de Klerk to testify via video link from an undisclosed location when he is a fugitive from justice, in the face

of a pending warrant of arrest, constitutes aiding his flight from justice. On this basis, the application ought to be refused.

[63] The applicant, in its application failed to set out the details of the proposed video link. As such, the court is in darkness as to the nature of the technology sought to be utilised, the reliability of the audio-visual equipment sought to be used, and the connectivity thereof. The court is literally requested to make an order to grant leave for evidence to be led via video link blindly. This is a risky invitation that the court is not prepared traverse. The administrative and technical facilities and arrangements made at the place where the witness is expected to give evidence should be laid bare for the court to satisfy itself of the process that it is about to approve. This premise finds support from the *Wang Xiaopu* matter *(supra).* The applicant's application fail on this score as well.

The lateness of the application

[64] There is another aspect that I have found worthy to be addressed. It is the lateness at which the applicant launched its application. At the pre-trial conference of 22 March 2022, the applicant stated that it intended to seek leave from court to have the evidence of Mr de Klerk recorded on commission. The matter was postponed for more than six months for trial during the two weeks of 19 to 30 September 2022. The reason for a lengthy postponement of the matter for trial for a period of six months was the availability of senior counsel employed by the opposing parties. No application to record evidence on commission was, however, brought by the applicant.

[65] On the brink of the trial, and in less than two weeks before the trial could commence, on Thursday, 8 September 2022, the applicant filed an application for leave to lead the evidence of Mr de Klerk through video conference. Considering that the trial dates were fast approaching, the applicant set out truncated dates for the respondents to oppose the application, if they so wished, and to file answering affidavits. The notices to oppose the application were to be filed by the next day, Friday, 9 September 2022, while the answering affidavits were to be filed by Wednesday, 14 September 2022. The

respondents opposed the application. The application was set down for hearing on 19 September 2022 at 10:00, the date and time that the trial was long scheduled to commence.

[66] The court, *mero motu*, called for a status hearing on Thursday, 15 September 2022. In answer to a question from court on how the applicant intended to proceed with its present application, Mr Corbett stated that the applicant intends to have a ruling on the application to lead evidence via video link determined before it could lead any other evidence during the trial. The application and the stance adopted by the applicant resulted in the first week allocated for trial being vacated. The court ordered the respondents to file their opposing papers by 21 September 2022 and the application was scheduled for hearing on Friday, 23 September 2022 with costs for the said week to be costs in the application. The parties agreed that the wasted costs for the week of 26 to 30 September 2022, be costs in the main action.

[67] The application to lead evidence via video link was not brought on urgency. The said application was belatedly brought. No application for condonation for the late filing of the application was brought. At the very least, no relief for condonation for the late filing of the application is sought by the applicant. The inconvenience to the respondents and the court caused by the late filing of the application is clear as day. On this premise, the court could refuse to exercise its discretion to entertain the application launched.

[68] Ms Doris Hans-Kaumbi, who is part of the legal team for the applicant deposed to an affidavit where she explains, *inter alia*, that the applicant had no knowledge of the whereabouts of Mr de Klerk until 18 August 2022 when she became aware that Mr de Klerk is legally represented in Namibia. It appears that the revelations of 18 August 2022 culminated in the present application. What is apparent, however, is the fact that by 22 March 2022, the applicant was clear to the court that it will bring an application for leave to obtain the evidence of Mr de Klerk on commission.

[69] It appears, from the affidavit of Ms Kaumbi, that by 22 March 2022, when the applicant gave notice to bring an application for leave to obtain the evidence of Mr de

Klerk on commission, the applicant had no knowledge of the whereabouts of Mr de Klerk. How the applicant, therefore, could give notice for leave to obtain evidence on commission from a witness whose whereabouts it had no idea of, leaves a lot to be desired. I, therefore, find as a matter of consequence, that by 22 March 2022, the applicant lacked genuine intention to bring an application for leave to obtain the evidence of Mr de Klerk on commission.

[70] The approach adopted by the applicant as aforesaid by threatening to bring an application for leave to adduce evidence on commission, only to belatedly bring an application for leave to lead evidence via video link, which resulted in the vacation of the trial dates, defeats the overriding objectives of case management. Parties are reminded that rule 1(3) requires no magnified glasses to appreciate that it provides that:

> 'The overriding objectives of these rules is to facilitate the resolution of the real issues in dispute justly and speedily, efficiently and cost effectively as far as practicable…'

[71] Parties must genuinely assist the court in the task to finalise matters in terms of the disposal benchmarks. In appropriate cases, courts will met out punitive measures to the parties in default, in order to demonstrate their condemnation of actions taken by parties that are viewed to delay the finalisation of cases, and thus increasing costs and demonstrating inefficiency.

Conclusion

[72] In the present day and age where it is inevitable to depend on technology in daily activities, courts being no exception, there is a need to develop the laws in order to be relevant and keep up with modernisation. With adequate laws and procedures in place, recording of evidence through video link where necessary, will smoothen the process which is bound to be time and cost effective while ensuring access to justice and enforcing the right to a fair trial. In my view, the hour has come to properly regulate the recording of evidence through video link during the trial in appropriate cases.

[73] On the premise of the findings and conclusions made above, I deem it necessary to draw the attention of the rule makers, to consider, when reviewing the rules of court, to regulate the processes to be utilised when the court receives evidence via video link.

[74] In view of the conclusions reached hereinabove, I find that the applicant failed to establish that it is in the interests of justice to grant leave to lead the evidence of Mr de Klerk at the trial via video link. The applicant further failed to show good reason why Mr de Klerk cannot be physically present in court to give *viva voce* evidence. As a sequel to the above findings, the applicant's application is bound to be refused as I hereby do.

Costs

[75] It is an established principle of law that that costs ordinarily follow the result. The parties did not argue contrariwise, neither could I find any reasons from the record to depart from such well settled principle. The respondents were successful to ward off the application launched by the applicant. It should thus follow as a matter of consequence that the respondents should be awarded costs.

[76] The application before court is interlocutory in nature, therefore, the award of costs should ordinarily be limited to the threshold provided for in rule 32(11) of the rules of this court. However, in view of the novelty of the issues ventilated, the complexity of the matter and research required, justified the employment of senior counsel on either side. I further consider the amount of time reserved for the preparation and hearing of the application and the wasted costs for the week of 19 to 23 September 2022. In the exercise of my discretion, I find that to order the award for costs to be subject to rule 32(11) will cause injustice to the matter.

[77] This matter is therefore worthy of an award for costs beyond the threshold provided for in rule 32(11) and I shall order accordingly.

Order

[78] In view of the above findings and conclusions, I find that the following order meets the justice of matter:

1. The applicant's application for leave to lead the evidence of Mr Maren de Klerk at the trial of the matter by way of video link is refused;

2. The applicant must pay the first and second respondents' wasted costs for the period 19 to 23 September 2022, including costs of one instructing and two instructed legal practitioners, not capped in terms of 32(11);

3. The interlocutory application is regarded as finalised and removed from the roll;

4. The Registrar is directed to bring this ruling to the attention of the Judge-President.

5. The wasted costs for 26 to 30 September 2022 shall be costs in the main action;

6. The main action is postponed to 24 November 2022 at 08:30 for status hearing and possible allocation of trial dates;

7. Parties must file a joint status report on or before 22 November 2022.

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O S SIBEYA

JUDGE

APPEARANCES:

APPLICANT:	A CORBETT SC Assisted by L Mufune Instructed by Ueitele Hans Inc
1ST AND 2ND RESPONDENTS:	M FITZGERALD SC Assisted by J P Jones Instructed by Evert Gous Legal Practitioners