

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: AC10/2021

In the matter between:

WILMINGTON SAVINGS FUND SOCIETY FSB

1st PLAINTIFF

ACT MARITIME LLC

2nd PLAINTIFF

and

THE MOTOR TANKER "MARVIN STAR" HER

OWNERS AND ALL OTHERS INTERESTED IN HER

DEFENDANT

PRIME PARADISE INTERNATIONAL LIMITED

INTERESTED PARTY

Neutral citation: *Wilmington Savings Fund Society FSB v Prime Paradise International Limited* (AC10/2021) [2023] NAHCMD NC 558 (8 September 2023)

Coram: Schimming-Chase J

Heard: 14 August 2023

Delivered: 8 September 2023

Flynote: Civil procedure – Oral Evidence – Adducing of evidence by way of video link procedure – Court not having the necessary programme(s) in place to receive evidence – Court not amenable to permitting one or both of the parties

to manage the facilities and programme for the adducing of evidence via video link.

Jurisdiction – the High Court has an inherent power to regulate and determine its own procedures in the proper administration of justice. The power has been exercised in exceptional cases to afford the parties a remedy not afforded in the rules to avoid or correct an injustice.

Jurisdiction – receipt of evidence via video link is not simply a matter of procedure but also of substance – Cementing the court's jurisdiction and competence to ensure compliance with its orders.

Summary: In an interlocutory application, the interested party in an admiralty action set down for trial from 18 September to 6 October 2023, applied to lead the evidence of one of its main witnesses via video link. This witness is a national of and resides in the Islamic Republic of Iran. The grounds for the application, launched two months before the trial date, are that the witness suffered a heart attack during 2019. The witness was examined by a medical practitioner on 13 June 2022, and his witness statement was delivered on 29 June 2022. On 2 October 2022, the witness's medical practitioner advised that he refrain from long travels, as the change in temperature and altitude, might have a negative effect on his health. The witness was not able to travel to any country with which Namibia has an extradition agreement, also on the grounds that the flights were too long.

The application of the interested party was opposed by the plaintiffs who contended *inter alia* that the applicant failed to make out a case for the relief sought. They further argued that in any event, the evidence of the witness' ill health was not properly supported or explained by his medical practitioner and that he failed to place before court an explanation for possible alternatives other than testimony via video link, such as, arrangements for Mr Niknafs to fly medically aided and at short distances to offset any possible negative impact to his health.

Held that, it is well established that the court has the inherent power to regulate and determine its own procedures in the proper administration of justice. This power has been exercised in exceptional cases to afford parties a remedy not afforded in the rules or to correct an injustice.

Held that, the receipt of evidence via video link is not simply a matter of procedure only, but also one of substance related to its jurisdiction and competence to exercise some form of control over the witness during the receipt of evidence if this is called for. By way of example, the jurisdiction to make an appropriate and enforceable order in the event of perjury being committed by the witness.

Held that, receipt of evidence via video link should be provided for either in the rules of court or legislation, and should not be dealt with on an *ad hoc* basis. It should be dealt with in a manner that enables the court to exercise proper jurisdiction and control. Leaving this aspect to one or both of the parties is not sufficient.

Held that, at this stage, the court has the facilities but not the programme(s) to facilitate the receipt of evidence via video link.

Held that, in any event, the applicant did not make out a case for the relief sought, had the programme (s) been available.

ORDER

1. The interested party's application to lead the evidence of Mr Masoud Niknafis via video link is refused.
2. The interested party must pay the plaintiffs' costs in the interlocutory application, which costs are not to be capped in terms of rule 32(11).

3. The case remains set down for trial on the action fixed roll for the period 18 September 2023 to 6 October 2023.
 4. The case is postponed to 18 September 2023 at 10h00 for trial.
-

JUDGMENT

SCHIMMING-CHASE J:

[1] Before me is an interlocutory application by Prime Paradise International Limited¹ ('Prime Paradise') for leave to lead the evidence of one of its main witnesses, Mr Masoud Niknafs via virtual video link at the hearing of this matter. The trial between the parties to this matter is set down for hearing before this court exercising its admiralty jurisdiction from 18 September 2023 to 6 October 2023. The interlocutory application was launched on 20 July 2023.

[2] The first plaintiff is Wilmington Savings Fund Society, FSB, a company incorporated in terms of the company laws of the United States of America. The second plaintiff is Act Maritime LLC, a company incorporated in terms of the company laws of the United States of America. The plaintiffs conduct business as registered banks within their respective jurisdictions. I will in this judgment refer to the plaintiffs as 'the banks'.

[3] The first defendant is the MT "Marvin Star", a crude oil tanker built in 2009 and flagged in the Marshall Islands, currently within the jurisdiction of this court, and under arrest at the instance of the banks at the port off Walvis Bay since 10 August 2021. The registered owner of the vessel is an entity known as Panormos Crude Carriers Limited ('Panormos') who is not a party to these proceedings.

¹ The interested party in relation to the claim of the banks for monies due in terms of a loan agreement.

[4] Briefly, the claim of the banks is for a sum allegedly owed to one or both of the banks under a loan agreement concluded between the banks and Panormos. The loan was secured by a mortgage bond which was registered on the Marshall Islands register. The loan agreement, the mortgage and the recordal of the mortgage on the Marshall Islands register all reflect Panormos as being the owner of the tanker, the MT “Marvin Star”.

[5] As part of its opposition to the banks’ claim, Prime Paradise contends that it is the factual and legal owner of the MT “Marvin Star” and that the registration of the vessel on the Marshall Islands register was fraudulent. In addition it contends that it was not a party to the loan agreement and mortgage. It had bareboat chartered the vessel to Panormos but had at all times retained ownership of the vessel.

[6] Prime Paradise regards it as crucial to the defence of the banks’ claim that it, and not Panormos was the factual and legal owner of the MT ‘Marvin Star’ at the time that the loan agreement and mortgage agreement was concluded and the mortgage was recorded on the Marshall Islands Maritime Administrator’s records.

[7] The main gist of the testimony to be led by Mr Niknafs on behalf of Prime Paradise as summarised in his founding affidavit in support of the interlocutory application, is that his signature as representative of the seller on a memorandum of sale dated 18 January 2018 which records the sale of the vessel, was forged, as he did not sign it. He also refers to the ‘illicit’ registration of three other vessels by one Mr Kairaktides who signed the agreement dated 18 January 2018 on behalf of the buyer, where his signatures were similarly forged. Prime Paradise also intends to lead the evidence of an expert graphologist at the hearing of this matter who will apparently confirm that the signatures are forged.

[8] The reason for Mr Niknafs’ inability - in fact - his refusal,² to appear personally to testify at the hearing of this matter is, as stated by him in his

² Replying affidavit paragraph 27.

founding papers, due to ill health.

[9] Mr Niknafs is a citizen of the Islamic Republic of Iran, and resides there. Mr Niknafs' founding affidavit in support of the relief sought in this interlocutory application was deposed to on 16 July 2023³. A witness statement for purposes of trial was delivered on 29 July 2022 already.

[10] Mr Niknafs avers that he has a poor heart condition and that his medical advisers have advised him not to travel on long flights. He is 68 years old. He had a severe heart attack on 16 September 2019, and was admitted to the Saudi German hospital in Dubai where he underwent an emergency coronary angioplasty. During the operation he experienced a heart stoppage but fortunately the doctors were able to get his heart beating again. The stoppage, according to Mr Niknafs, unfortunately caused permanent damage to his heart and although the operation was successful, he still experiences difficulty walking any distance. Further, if he experiences any significant variation in temperature or altitude, this affects his blood pressure. This condition has not improved over time and, if anything, appears to have worsened.

[11] Mr Niknafs states that he was last examined by his cardiologist, Dr Ali Rashidi on 13 June 2022, who carried out various tests and advised him strongly not to travel on long flights. A brief medical report of Dr Rashidi dated 2 October 2022 was attached to the founding papers. Mr Niknafs states that since the report, his cardiac condition has not improved and he therefore regrets that he cannot travel to Namibia to give evidence in person.

[12] The medical report of Dr Rashidi states the following:

'This is to certify that Mr Masoud Niknafs is 67 years old, was admitted to the Saudi German Hospital, Dubai on 16 September 2019 due to acute heart attack. He

³ The parties reached agreement in their pre-trial report, that any interlocutory application for the leading of evidence via virtual video link would be launched, in the absence of an agreement on the issue, at least 2 months prior to the allocated trial date.

underwent emergency coronary angioplasty. He was examined by me on 13 June 2022 and the necessary tests were carried out. Due to the severe earlier heart attack, he still is not permitted to travel on long flights due to his poor heart condition. He was advised to continue follow up with cardiology clinic for periodical check up.'

[13] Mr Niknafs also states that he is not in a position to travel to a country that has an extradition treaty with Namibia,⁴ because travel to any of these countries would also involve long flights, which would be against the medical advice received.

[14] It is also stated that other alternatives would not be of assistance. As regards the procedure foreshadowed in s 28 of the High Court Act 16 of 1990, which provides a procedure for the appointment of a commissioner to take the evidence of a witness resident in a foreign country, this procedure envisages the issue of a letter of request to a competent court of the foreign country requesting that a commissioner be appointed by the foreign court to take the evidence by means of interrogatories or otherwise. Upon enquiries made at the Iranian Embassy in Windhoek as to whether an Iranian Court would appoint a commissioner as envisaged by s 28 of the High Court Act, Prime Paradise's legal practitioners were informed that the Embassy is unfamiliar with this procedure and that the Embassy is not in a position to provide an estimation as to how long it would take to obtain a directive from an Iranian Court at this stage. Thus, it was submitted that this would be both a time consuming and expensive procedure.

[15] Reference was also made to rule 91 of the High Court Rules which empowers the managing judge on application to make an order for the taking of the evidence of a witness before a commissioner. It was submitted that this too would be both a time consuming and expensive procedure which would involve the parties travelling to Tehran for the taking of Mr Niknafs' evidence, and would in all likelihood result in a postponement of the trial which would cause a delay that both parties do not wish for. Thus, evidence via video link would be the

⁴ Namibia has extradition treaties with Angola, Botswana, China, Nigeria, Russia and Zimbabwe.

most cost-effective way for the evidence of Mr Niknafs to be led.

[16] It was also submitted that as the banks had not delivered any witness statements placing Mr Niknafs' evidence in dispute, it appears that his evidence would not likely be challenged by the banks. In this regard it was submitted that in the event of a dispute on the evidence, counsel for the banks would be in a position to observe the demeanour of the witness via video link.

[17] Lastly, various procedures for the governing of the receipt of the evidence via video link were provided in the event that the court did not have the facilities to manage the receipt of the evidence via video link. Suggestions included that Prime Paradise would take responsibility for ensuring a stable internet/WIFI connection for the duration of Mr Niknafs' evidence. Also that as long as Mr Niknafs gives his evidence:

- (a) same would be given at a location that Mr Niknafs would identify at the commencement of his evidence and given in a secure room with closed doors where Mr Niknafs would be alone;
- (b) he would not communicate with any other person other than the examiner or judge; and
- (c) he would tender evidence at an empty desk and his face would be clearly visible throughout the proceedings.

[18] Mr Niknafs submits finally that Prime Paradise would be severely prejudiced if his evidence was not received, and that it would be in the interest of justice to permit him to give evidence virtually via video link.

[19] The banks strongly oppose the interlocutory application. They contend that Mr Niknafs has not made out a case on the facts or the law, as to why his evidence should be led by video link. They take the position that the averments in the founding papers are entirely unsatisfactory, especially given that his witness statement was delivered in July 2022, yet he waited till July 2023 to

launch the application. They also complain about the lack of evidence or proper information by Dr Rashidi regarding Mr Niknafs' condition and inability to travel.

[20] They further state that the Islamic Republic of Iran is subject to internet censorship, and that as a result, there is no guarantee that a video link will be reliable, given the alleged links of Mr Niknafs and Prime Paradise to the Iranian Government.

[21] The banks further argue that Mr Niknafs' explanation that he is unable to endure long flights is simply untenable, as they have been able to ascertain that he could travel on a number of flights from Tehran to Windhoek, with the longest of such flights just exceeding five hours.⁵ Thus, it is alleged, Mr Niknafs would have been well suited to arrange layovers between the various stops and it is apparent that Prime Paradise has simply chosen not to explore all reasonable options available to it in order to ensure that Mr Niknafs is able to appear in person at the trial.

[22] The banks point out that not even a recent (after 2 October 2022) detailed and confirmed medical report or report of any nature was attached to the founding papers to provide the court with a more complete picture of Mr Niknafs' medical situation, or that travel with a medical practitioner, or use of the 'special needs' facilities (such as wheelchairs) available at the airports was not something that could be considered, given Prime Paradise's reliance on the testimony to be provided. In this regard it was mentioned that attempts were only made to deal with the travel situation and the insufficiency of the airport facilities, as it were, in the replying affidavit, however this should have been explained in the founding papers, and was not.

[23] The banks aver that at this stage, a scant picture is painted at best, on Mr Niknafs' condition and inability to travel by air.

[24] This aspect is also pointed out through the affidavit of an imminent South African cardiologist, Dr Adrian Horak, attached to the answering papers. Dr

⁵ This is disputed in reply.

Horak is a physician and specialist in cardiology with a special interest in Interventional Cardiology, Complex PCI, TAVI, Rotablator and Heart Failure, practising as such at Life Vincent Pallotti Hospital, Alexandra Road, Cape Town, South Africa.

[25] His expert opinion, which is accepted based on the information contained in his affidavit together with annexures⁶ thereto, is that Dr Rashidi's note is quite cursory and does not contain sufficient medical information to conclude that Mr Niknafs is unable to travel by air from Iran to Namibia. Dr Horak pointed out what he terms several unsatisfactory and superficial explanations proffered by Mr Niknafs for him being unable to travel to Namibia.⁷ They are:

(a) Mr Niknafs' heart attack occurred in September 2019, almost four years ago.

(b) It was treated by way of angioplasty. This means using a balloon to stretch open a narrowed or blocked artery being the cause of the heart attack. Angioplasty procedures often involve inserting a short wire mesh tube called a stent into the artery during the procedure which is left in place permanently to allow blood to flow more freely. It is not clear whether a stent or multiple stents were inserted during Mr Niknafs' procedure in 2019.

(c) It is not uncommon for an angioplasty to be done in an emergency situation like during a heart attack, however, it is a minimally invasive and painless procedure.

(d) Compared to a procedure like a bypass, being the replacement and repair of arteries and serious surgery, which may result in months of

⁶ Primes counsel also did not dispute Dr Horak's expertise.

⁷ At the hearing of the interlocutory application, the court was informed Mr Niknafs refuses to travel.

recovery time, and a patient can be discharged on the same day that an angioplasty is completed.

- (e) Mr Niknafs' allegation of heart stoppage resulting in permanent damage is not reflected in Dr Rashidi's report, which would be of a more serious concern.

- (f) Dr Rashidi's note is 'economical' in respect of providing any medical evidence in support of the conclusion that Mr Niknafs is unable to take long flights. Dr Horak states that he would have expected Dr Rashidi to have provided results from the various 'test runs', including a 'left ventricular ejection fraction (LVEF) which would record any residual damage present following the 2019 heart attack and angioplasty'.

- (g) An LVEF of 50 per cent and above is completely normal and anything below 30 per cent would be a cause for concern, in which event there is an expectation for Mr Niknafs to be consulting with Dr Rashidi on a much more regular basis, as opposed to his last consultation having been in June 2022 when he was examined by Dr Rashidi.

- (h) Dr Rashidi's note also does not allege that Mr Niknafs is suffering from ongoing angina, nor does he refer to any recent test results which confirm this. In this regard, Dr Horak expected Dr Rashidi to at the very least conduct an ECG, stress test and echocardiogram, the latter of which would show chamber size, muscle wall thickness, blood vessel structure, valves and how they are functioning, blood flowing through the heart, blood clots in the heart or blood vessels, tumors in the heart and most importantly, given Mr Niknafs' allegations, areas of muscle damage.

[26] As regards the suggestions for the receipt of the evidence via video link should the court not have the facilities available, the banks allege that this would not assist in any way. First Prime Paradise's legal practitioners of record nominated themselves as the party who would will be held liable for the fulfilment of the terms of the proposed order. This, it is submitted, would be a *brutum fulmen*. Also, Prime Paradise's legal practitioners cannot stand surety for the actions or omissions of Mr Niknafs. They would not be present in the room when he gives evidence and as such, have no power for purposes of enforcing the terms of the proposed procedure for receiving evidence via video link.

[27] The banks lament that the proposed order for the receipt of the evidence via video link does not provide for Mr Niknafs to give evidence in a neutral venue or for a neutral third party to monitor, observe and report on the giving of evidence.

[28] I point out that in the replying affidavit one Mr Abdolreza Valefi, general manager of Islamic Republic of Iran Shipping Lines (IRISL), that previously acted for Prime and oversaw commercial and technical management of the *Marvin Star*, states that while the Iranian authorities indeed prevent or restrict access to certain news and social networking channels, the country has a stable and dependable internet system that is widely used for banking and commercial purposes. He has personally been involved in such proceedings where evidence has been given by witnesses via video link. He has offered, as it were, to arrange for Mr Niknafs to attend at the offices of Taba Legal Services in Tehran to give evidence via video link. According to this deponent, IRISL has no link to Taba Legal Services, which is a respected and reputable firm.

[29] The banks submit that Mr Valefi's affidavit should be ignored, as the allegations contained therein should have been in the founding papers.

[30] Criticism is levelled at Prime Paradise's inability to take evidence on

commission, given that at the time Mr Niknafs' witness statement was delivered, there was ample time to commence with this procedure, and no dates are provided as to when these enquiries at the Iranian Embassy were made.

[31] I have considered the allegations contained in the papers in support of this application, as well as the arguments advanced by counsel at the hearing of this matter.

[32] It is indeed well established that the court has the inherent power to regulate and determine its own procedures in the proper administration of justice. This power has been exercised in exceptional cases to afford parties a remedy not afforded in the rules to avoid or correct an injustice. This inherent jurisdiction must be exercised only in exceptional circumstances and where there are strong grounds to persuade a court to act outside its powers provided for in its rules. The courts have repeatedly stressed that it is a power to be invoked sparingly and only if satisfied that justice cannot properly be done unless that form of relief is granted.⁸

[33] Counsel for Prime Paradise referred to a number of cases where the court received virtual evidence via video link. I mention two for purposes of this judgment. The first is *Uramin (Incorporated in British Columbia) (t/a Areva Resources Southern Africa v Perie*,⁹ and *MK v Transnet Limited t/a Portnet*.¹⁰

[34] In both these cases, evidence via video link was permitted by the High Court in South Africa. Also recognised was the inherent jurisdiction of the High Court to regulate its procedures in the interests of justice to afford a remedy not contained in the rules and to prevent injustice. The main principle elucidated in these two matters was that oral testimony in civil proceedings should ordinarily be given in person, however with the advancement of technology, there is a

⁸ *Prime Paradise International Ltd v Wilmington Savings Fund Society FSB* (SA10 and 34-2023) [2023] (24 August 2023 at paras [33] and [34] and the authorities collected there.

⁹ *Uramin (Incorporated in British Columbia) (t/a Areva Resources Southern Africa v Perie* 2017(1) SA 236 (GJ).

¹⁰ *MK v Transnet Limited t/a Portnet* [2018] JOL 40248 (KZD).

possibility for direct evidence to be taken from a witness in another country and for cross examination to take place whilst the witness is visible to all. Although South African law does not cater for instances where a person cannot properly testify in court, the granting of an order permitting receipt of evidence in such manner is within the court's discretion, the main consideration being if evidence is placed before the court in this manner, justice is likely to be done.

[35] For these purposes, it was held in the above cases that an applicant must depose to an affidavit and give reasons why it is necessary for the purposes of justice to depart from the norm, the nature of the evidence to be given; the nature of witnesses and if it is convenient and necessary for purposes of justice. This is a jurisdictional factor. A party seeking to dispense with a personal appearance of a witness must show that it is necessary for the purposes of justice that the ordinary way of taking evidence should be departed from. The convenience must not only be for the applicant but also for the respondent and the court.¹¹

[36] In the *Uramin* case, the evidence to be tendered via video link related to an employment agreement, and neither the employee who had concluded the agreement, nor another employee who had executed a settlement agreement were in the employment of Uramin anymore and were resident outside South Africa.

[37] In the *MK* case the evidence to be led via video link related to the determination of the quantum of damages regarding the duty of support after an accident resulting in the death of the deceased. The witness whose evidence was to be led was an octogenarian and it did not appear to be in dispute that the witness was in ill health and unable to travel. Two medical certificates were provided that set out the witnesses condition in some detail.¹²

¹¹ *MK v Transnet Limited t/a Portnet* [2018] JOL 40248 (KZD) para [18], and paras [16], [17], and [22]-[24]; *Uramin (Incorporated in British Columbia) (t/a Areva Resources Southern Africa v Perie* 2017(1) SA 236 (GJ) paras [24]-28] and [33]-[37].

¹² *MK* pars [5]-[7].

[38] Mr Niknafs' evidence is of a different nature.

[39] In the Namibian courts, two cases have dealt with the issue. In *National Fishing Corporation (Pty) Ltd v African Selection Fishing (Namibia) (Pty) Ltd & Others*,¹³ Sibeya J dealt with an application for leave to lead evidence via video link from a fugitive from justice apparently resident in South Africa who averred that it would be unsafe for him to come to Namibia to testify. After a thorough consideration of the judgments of international jurisdictions on the issue including the judgments in *Uramin* and *MK*, the inherent jurisdiction of the court to regulate procedure was reiterated. In addition, the value of evidence received via video link to bring the court in line with the significant technological advances in this sphere was similarly underscored. In this regard, Sibeya J stated the following:

' . . . 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.'¹⁴

[40] He further opined that

'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

¹³ *National Fishing Corporation (Pty) Ltd v African Selection Fishing (Namibia) (Pty) Ltd & Others* (HC-MD-CIV-ACT-OTH-2021/01143) [2022] NAHCMD 580

¹⁴ At par [38]

not it will be in the interests of justice to grant the order sought.¹⁵

[41] Sibeya J still refused the application on the grounds that a case had not been made out for the relief sought on the grounds that it was not proved on a balance of probability that the witnesses' safety would be compromised. Simply put, he held¹⁶ that it was not established that once extradited, the witness' life and limb will not be protected by the police if kept in custody or when so required.

[42] In contrast, Ueitele J, as recently as August 2023 penned a judgment on the issue of leading evidence by video link. He set out his reasons for his respectful disagreement with the judgment of Sibeya J in *Moongo v Moongo*.¹⁷ This case involved an application to lead evidence via video link in a divorce action. The applicant was unable to travel to Namibia to give evidence personally for a number of reasons set out in her founding papers and summarised by Ueitele J in his judgment.

[43] After considering the application Ueitele J held that:

[41] The circumstances in which to admit video-link evidence must be duly-considered and constitutionally-mandated legislation as opposed to ad-hoc decision-making by individual Judges must be followed. I hold the further view that to, in the absence of statutory provisions, admit video linked evidence is tantamount to bypass the constitutionally-required process of amending statutes and rules of court under the guise of regulating its own process. I equally have come to the conclusion that to, in the absence of legislative provision, admit or allow video linked evidence overlooks and undermines the doctrine of separation of powers.

[42] As I indicated the ramifications for the introduction of such rule (to receive evidence by video link) are complex. The introduction thus requires a thorough

¹⁵ *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) par [39]. See also paras [39]-[43] and [48].

¹⁶ At par [60]

¹⁷ *Moongo v Moongo* (HC-MD-CIV-ACT-OTH-2019/02608) [2023] NAHCMD 521 (22 August 2023).

investigation, considerations of resource-allocation issues may need to be considered and determined by those persons constitutionally-mandated to do so, before the question of when, if at all, and in what circumstances and subject to what requirements, video-link evidence might be permitted . The Constitution identifies the functionary who must, when the necessity arises to modernise the courts procedure, initiate that process.'

[44] In consideration of the two diverging judgments, let me make it clear that I am in respectful agreement with the principle that technology has advanced to such an extent that the receipt of evidence via video link should be welcomed in our courts. However, I do not believe that the receipt of evidence via video link is simply a matter of procedure only. It also involves a consideration of the jurisdiction of this court. By way of example, for the court to have jurisdiction to make an appropriate order in the event of perjury being committed by the witness, or the witness simply refusing from the remote location to answer questions.

[45] Rule 93(4) is an example. The rule requires the judge to admonish the witness before the witness reads the statement into the record, *inter alia* as follows: 'Because of the oath you have taken or the affirmation you have made, I want you to understand that once you have read the statement into the record that statement is your evidence given under oath or affirmation in the proceedings and that if anything is not true and you are aware of such fact, you may be liable for perjury.'

[46] Counsel for Prime Paradise submitted in this regard that in the unlikely event that the witness perjures himself, the court can simply disregard the evidence. This argument cannot be sustained, because there are consequences to perjury, and the court must have jurisdiction to impose those consequences on a witness. I am accordingly in agreement with the sentiments expressed by Ueitele J on this issue. This simply dilutes the powers of the court to impose the proper sanctions.

[47] Sibeya J also recognised this conundrum when he stated the following in

his judgment:

[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 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.'

[48] In this regard, Mr Niknafs is unable to even make attempts to travel to a country that has an extradition agreement with Namibia, as traveling to these countries also involves long flights.

[49] In addition, and as part of the court's jurisdiction and ability to receive evidence via video link, the court itself must be in possession of the necessary facilities and programmes to receive the evidence in that manner, and not be placed in the position to have to rely on the facilities of one or both of the parties, or even to leave the seat of the court to hear the evidence. The court would have no control over Mr Niknafs while he sits in another room, whether supervised or not. In this regard I am advised by the Registrar of the High Court that although the facilities are available, the programme(s) necessary for this purpose are not as yet available.

[50] That said, and even if the facilities were indeed available, I am not satisfied, in any event, that Prime Paradise has made out a case for the relief sought for the following reasons. Firstly, this application was brought almost one year after Mr Niknafs deposed to a witness statement on 29 June 2022. Dr Rashidi also examined Mr Niknafs before the witness statement was finalised on 13 June 2022. Despite the fact that the parties agreed on a two-month period for the launching of this application, I cannot ignore the fact that Prime Paradise had ample time to explore receiving evidence by commissioner in terms of rule 91, or in terms of s 28 of the High Court Act. Prime Paradise provided the court with absolutely no time frame as to when these enquiries were made, especially given that it knew in advance that Mr Niknafs may not come to Namibia to testify. Apart from the undated enquiries there is only a cursory reference to this procedure not being cost-effective. Prime has been litigating extensively in this court and in the Supreme Court, and given the value of the claim, this argument does not hold merit.

[51] Secondly, Mr Niknafs has also not shown on a balance of probability that he is too ill to travel, and too ill to make use of wheelchair facilities, layover and other facilities available to offset any negative impact to his health. This is evident from the opinion of the cardiologist Dr Horak, which is accepted. In light of the forgoing, I hold that the application must be refused.

[52] On the question of costs, it is trite that the costs follow the event. Both parties were in agreement that, despite the interlocutory nature of the application, the circumstances of the matter and the complexity thereof warrants an order exceeding the cap foreshadowed in rule 32(11). I am inclined to agree with the parties.

[53] The following order is therefore made:

1. The interested party's application to lead the evidence of Mr Masoud Niknafs via video link is refused.
2. The interested party must pay the plaintiffs' costs in the interlocutory

application, which costs are not to be capped in terms of rule 32(11).

3. The case remains set down for trial on the action fixed roll for the period 18 September – 6 October 2023.
4. The case is postponed to 18 September 2023 at 10h00 for trial.

E M SCHIMMING-CHASE

Judge

APPEARANCES

PLAINTIFFS:

M Fitzgerald SC

Instructed by Koep & Partners,
Windhoek

INTERESTED PARTY:

M Wragge SC

Instructed by ENSAfrica Namibia,
Windhoek