

"REPORTABLE"

CASE NO.: (P) I 563/2007

SUMMARY

JOHAN GABRIELSEN versus **CROWN SECURITY CC**

NAMANDJE AJ

12/11/2010

Practice

The plaintiff gave notices in terms of Rule 36(9)(b) in respect of six foreign experts in his claim for damages against the defendant as a result of injuries sustained when the plaintiff was shot by the defendant's security guard.

After the plaintiff testified plaintiff brought an application in terms of Rule 38(2) seeking for an order for the evidence of one of his expert's evidence to be tendered on affidavits.

The court considering the fact that the defendant has not sought to lead expert evidence to gainsay the plaintiff's concerned expert's evidence, the extent and nature of the evidence, the cost implications involved if the plaintiff were to pay for the attendance in court of all the six experts, the court ordered the evidence of that experts to be tendered on affidavit and that the defendant should pose its questions on the evidence so tendered by the expert through written questions.

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CASE NO.: (P) I 563/2007

IN THE HIGH COURT OF NAMIBIA

In the matter between:

JOHAN GABRIELSEN

PLAINTIFF

and

CROWN SECURITY CC

DEFENDANT

CORAM:

NAMANDJE AJ

Heard on:

20 October 2010

Delivered on:

22 October 2010

Reasons reserved:

12 November 2010

**RULING
INTERLOCUTORY APPLICATION**

NAMANDJE, AJ.: [1] On 20 October 2010 I granted the plaintiff's application in terms of Rule 38(2) of the Rules of the High Court in respect of his expert witness Dr

Kevin D Rosman.¹ I indicated, at the time, that the reasons will be furnished in due course. These are now the reasons therefor. The plaintiff is claiming from the defendant a sum of N\$1.4 million for general damages and loss of amenity and a further sum of N\$5.8 million for special damages

¹ The order of court reads as follows:

"1.1 that the evidence of the Plaintiff's expert witness Dr. Kevin D. Rosman shall be given on affidavit as contemplated in terms of Rule 38(2); and

1.2. the contents of the Summary of Expert Evidence and the Reasons therefor already filed of Court Record in terms of Rule 36(9)(b) shall be incorporated and contained as evidence in the Affidavit referred to in 1.1 hereinbefore; and

1.3. such Affidavit is to be served upon the Defendant and delivered with the Registrar within 8 (eight) court days from date of this order; and

1.4. the Defendant shall serve upon the Plaintiff and deliver with the Registrar, within 8 (eight) court days of receipt of the Affidavit referred to in 1.1 hereinbefore, its questions in writing, if any; and

1.5. such questions shall be answered by the expert witness, on Affidavit, within 8 (eight) court days from the date of delivery of such questions, by service upon the Defendant and delivery with the Registrar.

1.6. In the event of the Defendant having any further questions, he shall within 5 (five) court days of delivery of the expert witness's answers, referred to hereinbefore, pose such further questions by serving his questions in writing upon the Plaintiff and delivering same with the Registrar; and

1.7. the Plaintiff's expert witness shall have 5 (five) court days from date of delivery of the questions referred to in 1.6 hereinbefore, to serve his last and final answers on the further questions posed, upon the Defendant and deliver same with the Registrar."

which includes loss of income and past and future medical expenses. According to the particulars of claim, he is claiming the aforesaid damages from the defendant on the basis that the plaintiff was unlawfully shot and injured by the defendant's security guard who was, at the time, acting in the course and scope of the employment with the defendant. While the defendant admits that the plaintiff was shot by its security guard acting in the course and scope of his employment with the defendant, it denies wrongfulness and unlawfulness and puts the plaintiff to the proof of damages claimed.

[2] The plaintiff is seeking to lead expert evidence of 6 (six) expert witnesses in a bid to prove his damages. All of the plaintiff's expert witnesses practise in the Republic of South Africa where the plaintiff had earlier consulted them. The respective expert witnesses' summary of opinion evidence in terms of Rule 36(9)(b) were filed during April 2010. The defendant has not given notice of its intention as required to call any expert in support of its case on matters pertaining to opinion evidence or to challenge the plaintiff's expert evidence.

[3] After the evidence of the plaintiff Mr Heathcote (acting for the plaintiff) brought an application in terms of Rule 38(2) in which he sought an order for the evidence of Dr Kevin D Rosman to be tendered by affidavit. Mr Brandt (acting for the defendant) opposed the application.

[4] Rule 38(2) provides as follows:

*" The witnesses at the trial of any action shall be examined viva voce, but a court may at any time, **for sufficient reason**, order that all or any of the evidence to be adduced at any trial be given on affidavit or that the affidavit of any witness be read at the hearing, **on such terms and conditions as to it may seem meet**: Provided that where it appears to the court that any other **party reasonably requires the attendance of a***

witness for cross-examination, and such witness can be produced, the evidence of such witness shall not be given on affidavit"

[5] Dr Kelvin D Rosman in respect of whom the plaintiff brought an application in terms of Rule 38(2) is a Specialist in the field of Neurology. He has worked as such for many years and has also lectured in neurology at a number of medical institutions in the Republic of South Africa. He has published a number of papers in the field of neurology. He met the plaintiff for examination during November 2006. He filed a summary of facts in terms of Rule 36(9)(b). In the summary, he gave a brief background to the shooting incident and injuries sustained by the plaintiff as per his consultation with the plaintiff. He expressed an opinion that as a result of the injuries the plaintiff is now a T11 paraplegic and wheelchair bound. This fact, is confirmed by some of the experts in their summaries.

In any event it appears, at this stage, to be common cause that the plaintiff is wheelchair bound. It is also the court's observation when he testified. The plaintiff has largely confirmed, in his testimony, the background facts in Dr Rosman's summary of evidence.

[6] Dr Rosman opined that the plaintiff needs to obtain expert opinions from a number of experts to wit Occupational Therapist, Gastroenterologist, Urologist and Industrial Psychologist. Dr Rosman's evidence, regard being had to his summary in terms of Rule 36(9)(b), is largely on matters that appear to be common cause particularly if one considers the tenor of cross-examination of the plaintiff by the defendant's counsel. Moreover Dr Rosman refrained from expressing an opinion regarding the plaintiff's condition where experts in other fields are better positioned than him to express an opinion. The only expert summary of opinion he appears to have made is summarized in his Rule 36(9)(b) notice as follows:²

"He is suffering from pain roughly at the level of the spinal injury. This is severe, and is interfering with his functioning as well as his sleep. This will need appropriate treatment. The treatment is likely to consist of, initially, various pain controlling agents. However, it is

² This excludes part of his summary that does not amount to opinion evidence re: background information and other facts he was informed of by the plaintiff.

likely that he will ultimately require surgery to try and control the pain. The global sum of R 100,000 is suggested in regard to the pain management.

It is likely that, from time to time, the patient will develop a depression as a result of the situation in which he finds himself. In those instances he will require treatment from a psychiatrist. A psychiatrist should comment about the projected costs of treatment.

As a result of this injury, the patient has a reduced life expectancy. It is thought that his life expectancy is in the region of 65 years of age."

[7] Considering the notices in terms of Rule 36(9)(b) filed by the other plaintiffs' expert witnesses, some of the matters Dr Rosman commented on would further be commented on by other experts. In support of the plaintiff's application Dr Rosman filed an affidavit wherein he confirms the facts stated in his summary in terms of Rule 36(9)(b). He made the following allegations:

"I am advised that the Defendant has not appointed any experts who can gain say my opinion and recommendations.

I state that it is unlikely that any legal practitioner can fruitfully cross-examine me on the recommendation and opinions contained therein, particularly where the Defendant has not consulted any expert in my field.

I believe that, to require me to come to Namibia merely to confirm the facts and opinions as stated therein will serve no practical purpose, particularly in circumstances where the Defendant has not obtained its own expert opinions.

My daily fee to appear in court is R 21 600.00. This excludes traveling and accommodation costs."

[8] This court can only order that evidence (in whole or part thereof), to be adduced at the trial, be given on affidavit for sufficient reasons. As to what qualifies as sufficient reasons, the list is not exhaustive. Each case must be assessed on its own merits. I have considered, as sufficient reasons, the fact that the defendant has not indicated that it will lead expert evidence in support of its case or more specifically, to challenge the summary of facts forming the basis of the evidence to be tendered by Dr Rosman. Further the plaintiff, if he were to have all the six experts available in this court to tender *viva voce* evidence it will, in my view, be unnecessarily expensive. That would have been in addition to expenses he incurred already when he consulted the concerned experts beyond the borders of this country. It is also significant that only a small portion of Dr Rosman's evidence relates to opinion evidence. The above, in my opinion, constitutes sufficient reasons to make an order that his evidence be tendered on affidavit on the conditions and terms apparent from the order I made on the 20th of October 2010 and which order appears, in full, under the first footnote at page 2 of this judgment.

[9] In making the order I considered the fact that the terms and conditions of the court order I made are most favorable to the defendant and the purpose for the defendant's intended cross-examination could safely be achieved by posing questions in the terms and conditions provided for in the order. In view of the fact that the defendant, has not given notice to call expert witnesses to give evidence in *contra* to that of Dr Rosman, it does not appear to me that it (defendant) **reasonably** requires the attendance of Dr Rosman for cross-examination. It can fruitfully, meaningfully and fairly probe the facts in Dr Rosman's affidavit through written questions as provided for in the court order.

[10] Litigation in Namibia is notoriously expensive and can be protracted. It is even more

expensive in trials where litigants resort to expert evidence. Many experts are not only difficult to convince to attend court, but come at a huge price when they agree to be available as witnesses. It is therefore important that in cases where it is possible for sufficient reasons and on fair and proper terms and conditions, the use of Rule 38(2) should be encouraged. Each case should however be assessed on its own merits. The court should not, where injustice is likely to occur, make an order in terms of Rule 38(2), as cross-examination of witnesses is an important tool in the search for the truth.

[11] I am satisfied that this is a case where, in the interest of justice, it was appropriate and fair to order that the evidence of the concerned expert be tendered on affidavits on the terms and conditions apparent from the order. These were the reasons why this court granted the applicant's application on the 20th of October 2010.

NAMANDJE, AJ.

ON BEHALF OF THE PLAINTIFF:

ADV R HEATH COTE SC

INSTRUCTED BY:

VAN DER MERWE-GREEFF INC.

ON BEHALF OF THE DEFENDANT:

MR C BRANDT

INSTRUCTED BY:

CHRIS BRANDT ATTORNEYS