



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

Case no: I 347/2013

In the matter between:

RAINIER ARANGIES

FIRST PLAINTIFF

AUTO TECH TRUCK AND COACH CC

SECOND PLAINTIFF

and

UNITRANS NAMIBIA (PTY) LTD

FIRST DEFENDANT

PAULUS SHIMI

SECOND DEFENDANT

Neutral citation: *Arangies v Unitrans Namibia (Pty) Ltd* (I 347/2013)[2019]
NAHCMD 196 (18 June 2019)

Coram: **NARIB AJ**

Heard: 20, 21, 22, 23, 24 and 28 May 2019

Rulings: 23 and 28 May 2019

Reasons: 18 June 2019

REASONS

NARIB AJ:

[1] On 23 May 2019, I made a ruling on admissibility of certain evidence, which it was common cause between the parties, was computer generated, and which plaintiff wanted to present in Court. I, then indicated that my reasons for that ruling will be given, if requested by the parties, or will be delivered together with my final judgment in the matter.

[2] On 28 May 2019, I recused myself from this matter. I then indicated that my reasons for the recusal as well as the reasons for my earlier ruling on admissibility of computer generated evidence will be given on 18 June 2019. I believe that the parties are entitled to reasons for my ruling related to admissibility of evidence, even if my ruling is not binding on account of my subsequent recusal, as same issues might arise in the future. These are the reasons.

Computer Evidence

[3] It is said that we are presently in the age of the fourth industrial revolution, that is, the age of artificial intelligence and information and communication technology. A computer, as a tool, has become an indispensable part of the human endeavour. The processing power of microchip is now legendary, that, no doubt, Courts will more and more be confronted with evidence generated by computers and other electronic devices. Perhaps, it is time for the legislature to review the provisions of the Computer Evidence Act, 1985 (the Act) or to enact new legislation more suitable for what has doubtless been exponential and unprecedented developments since the Act was enacted.

[4] However prolific our use of computers might be, a computer is not a person. A computer cannot take an oath and subject itself to cross-examination, or realise its mistake mid-evidence and correct itself. It does not know right from wrong and cannot act in appreciation of such knowledge. It is not a competent and compellable witness. The outcomes of its processes are fixed and immutable. Computer generated evidence which is not properly authenticated suffers the

same impediment which was pointed out in the matter of *Rex v. Trupedo 1920 AD 58*¹, in that it is analogous to hearsay², thus offends the rule against hearsay.

[5] For such evidence to be admissible there must be compliance with various requisites of the Act. Such evidence must be authenticated by affidavit from a duly qualified and experienced person. Since my ruling was confined to non-compliance with sections 2(3)(a) of the Act, I shall similarly confine myself to this aspect.

[6] That section provides as follows:

‘(3) The deponent to an authenticating affidavit shall be some person who is qualified to give the testimony it contains by reason of –

(a) his knowledge and experience of computers and of the particular system by which the computer in question was operated at all relevant times;’

[7] Section 2(3)(a) thus requires proof that the deponent to the authenticating affidavit is duly qualified, by reason of his knowledge and experience, not only of computers in general, but also of the particular system by which the computer was operated at all relevant times, to give the testimony as set out in the authenticating affidavit.

[8] Section 2(1)(d)(ii) requires that the deponent to the authenticating affidavit must, in that affidavit, certify that the computer was unaffected in its operation by any malfunction, interference, disturbance or interruption which might have had a bearing on the computer generated evidence or on the reliability of such evidence.

¹ The effect of this decision was later ameliorated in *S v Shabalala 1986 (4) SA 734 (A)*, where the court also considered admissibility of evidence of behaviour of police dog in identifying scent of an accused.

² At p 63.

[9] Section (2)(1)(e), further requires that the deponent to the authenticating affidavit must, in that affidavit, certify that no reason exists to doubt or suspect the truth or reliability of any information recorded in or result reflected by the computer print-out.

[10] Mr Van Der Kolff deposed to the authenticating affidavit on 22 May 2019. He described himself as a sales and technical consultant employed by Y.E.S.-Your Equipment Supplier, Wynberg, Johannesburg, South Africa. In paragraph 11 of his affidavit and in dealing with the requirements of qualifications and experience referred to in section 2(3) of the Act, the sum total of his allegations was the following:

'11. Ad section 2(3) of the Act

11.1 I respectfully verify and confirm that I am duly qualified to give the testimony contained herein by reason of my knowledge and experience of computers and the particular system by which my computer in question was operated at all times, and by reason of my examination and knowledge of the relevant and required records and facts which are to be had concerning the operation of my computer and data and instructions supplied to it.

11.2 I have had extensive training on the applicable electronic measuring system in Nebraska, USA, at the Chief Training Facility for such system, and also had follow-up training with Genesis staff in the Republic of South Africa.

11.3 I have experience of more than 20 years in performing measurements of the kind as set out above.'

[11] It is clear that paragraph 11.1 is merely a paraphrasing of the provisions of subsections (a) and (b) of s. 2(3) of the Act. Paragraphs 11.2 and 11.3 simply contain conclusions, and no evidence of primary or secondary fact is presented for the court to reach these conclusions. There is no evidence of the alleged extensive training, the nature of such training, the qualifications received and the like. Also, there is no evidence regarding the alleged experience of 20 years.

Where and how that experience was obtained and how relevant it is to the requisites of the Act, are not stated.

[12] It is for the above reasons that I, on 23 May 2019 ruled that:

'I am not satisfied that the deponent to the authenticating affidavit, Mr. Van Der Kolff³ has by evidence of primary and secondary facts and not conclusions and surmise, brought himself within the purview of the provisions of section 2(3)(a) of the Computer Evidence Act, No. 23 of 1985 for him to be able to certify as required by:

1. Section 2(1)(d)(ii) that the computer was unaffected in its operation by any malfunction interference, disturbance or interruption which might have had a bearing on the information derived from it or on reliability of such information; and
2. Section 2(1)(e) that no reason exists to doubt or suspect the truth or reliability of any information recorded in or result reflected by the computer.

In the result, no reliance can be placed in these proceedings on the computer generated evidence, copies of which are attached as annexures D1, D2 and D3 to the affidavit of Mr. Van Der Kolff, dated 22 May 2019 or their equivalents in the witness statement of Mr Van Der Kolff and no reliance can further be placed on the information derived from such computer generated evidence'.

Recusal

[13] After my ruling on 23 May 2019, the plaintiffs indicated that they wanted to apply for leave in terms of rule 93(3) of the rules of court to supplement the witness statement of Mr Van Der Kolff, as substantial part of his evidence was ruled inadmissible. I granted leave to plaintiff to file the application by 14h00 and for defendants to file answering papers for the parties to be in position to make submissions the next day at 10h00.

³ In my ruling on 23 May 2019, I referred to Mr. Engelbrecht, but it was correctly brought to my attention by Mr. Barnard on behalf of the plaintiff that the deponent was in fact Mr. Van Der Kolff. This much is apparent from the affidavit dated 22 May 2019 and the court order was subsequently corrected to this effect.

[14] Mr Obbes, who appeared on behalf of the defendants, indicated that the defendant's may not be in position to file answering papers in time for argument the next day, but due to turn of events, it became unnecessary for me to have regard to the defendants' answering papers.

[15] The plaintiff filed the application in terms of rule 93(3) on 23 May 2019. On 24 May 2019 plaintiffs filed another application seeking declaratory orders, to declare certain evidence which was identified as per the notice of motion and the supporting affidavit, and which was contained in the witness statements of the defendants, inadmissible. This was a strange application, as by that time, plaintiffs' case had not been closed and the defendants' case not opened.

[16] Therefore, when the matter was called on 24 May 2019, I requested the parties, in particular, Mr Barnard who was acting for the plaintiffs to prepare and to address me on this specific aspect and the matter was adjourned to 14h30 on Tuesday, 28 May 2019. The postponement was also necessary for the defendants to put up answering papers.

[17] Over the weekend, it dawned on me that the expert witness whom the defendants intended to call was Stan Bezuidenhout, and he was referred to in prayer 1.1 of the plaintiff's notice of application for declaratory orders. This is the same expert whom I had consulted before, as counsel in a matter in which I had been briefed. That matter had been set down for hearing during the week of 03 to 07 June 2019, and I would have had to attend to it almost immediately after coming off the Bench in this matter. That also meant that I would have had to consult with Mr Bezuidenhout prior to commencement of the trial in which I had been briefed.

[18] In the matter in which I was briefed, Mr Stan Bezuidenhout was retained as an accident reconstruction expert, and it was apparent from the affidavit of Mr Rainier Arangies in the application for declaratory orders, in particular paragraphs 8 and 13 thereof, that the impartiality, reliability and credibility of Mr Stan Bezuidenhout would be challenged in this proceedings. This was with reference to certain judgments which had been passed by the courts in the Republic of South

Africa. This aspect related directly to the area of expertise of Mr Bezuidenhout, on which I would rely as counsel in the matter in which I had been briefed.

[19] I, accordingly requested the parties on 28 May 2019, in chambers to address me in open court on my fitness to further preside over this matter, as there was, to my mind a clear conflict of interest.

[20] When the matter was called, Mr Barnard's position, as it was to be expected, was that I should recuse myself. My Obbes said that he left the aspect of recusal in the hands of the court, particularly in view of the little time he had to consider the matter. As I have indicated, this aspect was drawn to their attention only during the morning of 28 May 2018.

[21] In view of the submissions of the parties, and my previously held view that I should recuse myself, I then recused myself from the matter.

[22] The decision to recuse myself was not taken lightly. I am aware of the following dictum in the matter of *S v Stewe*⁴ :

'But whenever it occurs the applicant or the judicial officer who raises recusal should cross the high threshold needed to satisfy the test for recusal. The application for recusal or where it is raised *mero motu* by a judicial officer, cannot be done in vacuo or on the judicial officer's predilections, preconceived, unreasonable personal views or ill-informed apprehensions. To do so would be to cast the administration of justice in anarchy where judicial officers would be at liberty to make choices of which cases to preside over and which not/or applicants to go on a judge forum shopping hoping to get the one who might be favourable to their cases. Judicial officers have 'a duty to sit in any case in which they are not obliged to recuse themselves. At the same time, it must never be forgotten that an impartial judge is a fundamental prerequisite for a fair trial and a judicial officer should not hesitate to recuse herself or himself if there are reasonable grounds on the part of a litigant for apprehending that the judicial officer, for whatever reasons, was not or will not be impartial.' Embodied in the test above are two further consequences 'on the one hand, it is the applicant for recusal who bears the onus of rebutting the presumption of judicial impartiality. On the

⁴ (SA 2/2018) [2019] NASC (15 March 2019), para 14.

other, the presumption is not easily dislodged. It requires 'cogent' or 'convincing' evidence to be rebutted.⁵

[23] I am also aware that the test for recusal is whether a reasonable objective and informed person would on the correct facts reasonably apprehend that the judge has not or will not bring an impartial mind to bear on the adjudication of the case.⁶

[24] To the above must be added what was said in *Minister of Finance and Another v Hollard Insurance Company and Others*⁷ at paragraphs [62] to [64] as follows:

[62] It must be apparent from the authorities cited above that the law on recusal serves three objectives. The first is that the court system must not be paralysed by frivolous claims for recusal - hence the presumption of impartiality and the duty to hear matters. The second is that those who sit in judgment over others must not promote their own or others' interests or causes. The third is that everything possible must be done to not leave a nagging feeling in the public's mind that one party to a dispute did not get a fair hearing because of who the judge is or was.

[63] All three objectives serve to promote confidence in the administration of justice. No one objective is less important than the other although there are different ways in which they can be given effect to – either through open ventilation or through administrative arrangements for which the head of jurisdiction is responsible.

[64] The last objective presents a peculiar problem in that the facts giving rise to its application are not easy to prove and is based on perception and value judgment and in some way the thought processes of an affected judicial officer. It therefore highlights the importance of the judicial officer making full disclosure and to err on the side of caution if in doubt as explained in para [85] below.'

[25] Even if I considered giving up the brief in the other matter, (which I did), the fact remained that I had previously consulted with Mr Bezuidenhout, and then

⁵ At para 14.

⁶ This was restated in *S v Stewe*, supra, at para 12.

⁷ (P8/2018) [2019] NASC (28 May 2019).

indented to call him as an expert witness. The problem of the nagging feeling in the public's mind that one party to a dispute did not get a fair hearing because of who the judge is or was, would thus always remain. This coupled with the interest I had, or might be perceived to have had in preserving the credibility of Mr Bezuidenhout, raised clear issues of conflict of interest.

[26] It is for these reasons that I on 28 May 2019 recused myself from this matter. The matter should thus be returned to the Registrar for allocation to a different managing judge.

G Narib AJ

APPEARANCE

FOR THE PLAINTIFFS:

On instructions of

P C I Barnard

De Klerk Horn and Coetzee Inc, Windhoek

FOR THE DEFENDANTS:

On instructions of

D Obbes

Francois Erasmus and partners, Windhoek