38 Procuring evidence for trial

(1)*(a)*(i) Any party, desiring the attendance of any person to give evidence at a trial, may as of right, without any prior proceeding whatsoever, sue out from the office of the registrar one or more subpoenas for that purpose, each of which subpoenas shall contain the names of not more than four persons, and service thereof upon any person therein named shall be effected by the sheriff in the manner prescribed by rule 4.

(ii) The process for subpoenaing a witness referred to in subparagraph (i) shall be by means of a subpoena in a form substantially similar to Form 16 in the First Schedule.

(iii) If any witness is in possession or control of any deed, document, book, writing, tape recording or electronic recording (hereinafter referred to as a "document") or thing which the party requiring the attendance of such witness desires to be produced in evidence, the subpoena shall specify such document or thing and require such witness to produce it to the court at the trial.

[Paragraph *(a)* amended by GN R2410 of 30 September 1991.]

(b)(i) The process for requiring the production of a document referred to in subrule (1)*(a)*(iii) shall be by means of a subpoena in a form substantially similar to Form 16A in the First Schedule.

(ii) Within 10 days of receipt of a subpoena requiring the production of any document, any person who has been required to produce a document at the trial shall lodge it with the registrar, unless such a person claims privilege.

(iii) The registrar shall set the conditions upon which the said document may be inspected and copied so as to ensure its protection.

(iv) Within five days of lodgement with the registrar, the party causing the subpoena to be issued for the production of the document shall inform all other parties that the said document is available for inspection and copying and of any conditions set by the registrar for inspection and copying.

(v) After inspection and copying, the person who produced the document is entitled to its return.

[Paragraph *(b)* inserted by GN R2164 of 2 October 1987 and by GN R2642 of 27 November 1987.]

(c)(i) The process for requiring the production of a thing referred to in subrule (1)*(a)*(iii) shall be by means of a subpoena in a form substantially similar to Form 16A in the First Schedule.

(ii) Within 10 days of receipt of a subpoena requiring the production of any thing, any person who has been required to produce a thing at the trial shall inform the registrar of the whereabouts of the thing and make the thing available for inspection, unless such person claims privilege.

(iii) The registrar shall set the conditions upon which the said thing may be inspected and copied or photographed so as to ensure its protection.

(iv) Within five days of notification from the registrar of the whereabouts

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of the said thing, the party causing the subpoena to be issued for the production of the thing shall inform all other parties where and when the thing may be inspected and copied or photographed and of any conditions set by the registrar for inspection, copying and photographing.

(v) After inspection and copying or photographing, the person who produced the thing is entitled to its return.

(2) The witnesses at the trial of any action shall be orally examined, 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.

(3) A court may, on application on notice in any matter where it appears convenient or necessary for the purposes of justice, make an order for taking the evidence of a witness before or during the trial before a commissioner of the court, and permit any party to any such matter to use such deposition in evidence on such terms, if any, as to it seems meet, and in particular may order that such evidence shall be taken only after the close of pleadings or only after the giving of discovery or the furnishing of any particulars in the action.

(4) Where the evidence of any person is to be taken on commission before any commissioner within the Republic, such person may be subpoenaed to appear before such commissioner to give evidence as if at the trial.

[Subrule (5) substituted by GN R235 of 18 February 1966.]

(5) Unless the Court ordering the commission directs such examination to be by interrogatories and cross-interrogatories, the evidence of any witness to be examined before the commissioner in terms of an order granted under subrule (3), shall be adduced upon oral examination in the presence of the parties, their advocates or attorneys, and the witness concerned may be subject to cross-examination and re-examination.

(6) A commissioner shall not decide upon the admissibility of evidence tendered, but shall note any objections made and such objections shall be decided by the court hearing the matter.

(7) Evidence taken on commission shall be recorded in such manner as evidence is recorded when taken before a court and the transcript of any shorthand record or record taken by mechanical means duly certified by the person transcribing the same and by the commissioner shall constitute the record of the examination: Provided that the evidence before the commissioner may be taken down in narrative form.

(8) The record of the evidence shall be returned by the commissioner to the registrar with a certificate to the effect that it is the record of the evidence given before the commissioner, and shall thereupon become part of the record in the case.

(9)*(a)* A court may, on application on notice by any party and where it appears convenient or in the interests of justice, make an order for evidence to be taken through audiovisual link.

(b) A court making an order in terms of paragraph *(a)* must give such directions which it considers appropriate for the taking and recording of such evidence.

(c) An application in terms of this rule must be accompanied by a draft order setting out the terms of the order sought, including particulars of —

(i) the witness who is required to adduce evidence through audiovisual link;

(ii) the address of the premises from where such evidence will be given; and

(iii) the address of the premises to where the evidence will be transmitted by audiovisual link.

(d) For purposes of this rule "audiovisual link" means facilities that enable both audio and visual communications between a witness and persons in a courtroom, to be transmitted in real-time as they take place.

[Subrule (9) inserted by GN R1603 of 17 December 2021.]

[Rule 38 amended by GN R235 of 18 February 1966, by GN R2164 of 2 October 1987, by GN R2642 of 27 November 1987, by GN R2410 of 30 September 1991, substituted by GN R1318 of 30 November 2018, and amended by GN R1603 of 17 December 2021.]

Commentary

Forms. Subpoena, 16; Subpoena *duces tecum*, 16A.

General. Rule 38 makes provision for various procedures to procure evidence for trial. In addition, the rule makes provision for the manner in which evidence will be adduced at a trial.

The rule makes provision for the following distinct procedures:

(a) procuring the attendance of a person to give evidence at a trial by means of a subpoena (subrule (1)*(a)*(i) and (ii));

(b) procuring the attendance of a witness to produce a deed, document, writing or tape recording at the trial by means of a subpoena *duces tecum* (subrule (1)*(a)*(iii) and *(b)*(i)), and requiring such witness to lodge the document, etc with the registrar for inspection by the party who caused the subpoena *duces tecum* to be issued (subrule (1)*(b)*(ii)–(v));

(c) procuring the attendance of a witness to produce a thing at the trial by means of a subpoena *duces tecum* (subrule (1)*(a)*(iii) and *(c)*(i)), and requiring such witness to lodge the thing with the registrar for inspection by the party who caused the subpoena *duces tecum* to be issued (subrule (1)*(c)*(ii)–(v));

(d) the oral examination of a witness at the trial (subrule (2));

(e) the production of proof by way of affidavit (subrule (2));

(f) the taking of evidence of a witness, before or during the trial, before a commissioner (subrules (3)–(8));

(g) the taking of evidence through audiovisual link (subrule (9)).

The rule should be read together with the following sections of the Superior Courts Act 10 of 2013, and the notes thereto, in Volume 1 third edition, Part D:

(a) s 35 — Manner of securing attendance of witnesses or production of any document or thing in proceedings and penalties for failure;

(b) s 36 — Manner in which witness may be dealt with on refusal to give evidence or produce documents;

(c) s 37 — Witness fees;

(d) s 39 — Examination by interrogatories;

(e) s 40 — Manner of dealing with commissions rogatoire, letters of request and documents for service originating from foreign countries;

(f) s 41 — A court may order removal of certain persons;

(g) s 47 — Issuing of summons or subpoena in civil proceedings against a judge.

Section 47 of the Superior Courts Act 10 of 2013 provides for the issuing of a subpoena in respect of civil proceedings against any judge of a superior court. [1] See further s 47 of the Superior Courts Act 10 of 2013 and the notes thereto in Volume 1 third edition, Part D.

Interrogatories are not dealt with in the rules but in s 40 of the Superior Courts Act 10 of 2013, as to which see Volume 1 third edition, Part D.

Section 7(1) of the Promotion of Access to Information Act 2 of 2000 ('PAIA') provides, *inter alia*, that PAIA cannot be used to obtain access to information where such information is required for pending trial proceedings and where access to it is provided by another 'law'. It has been held that rule 38 is a 'law' as contemplated in PAIA and, consequently, that rule 38, and not PAIA, should be applied in pending court proceedings. [2]

Rule 35(15) provides that for purposes of rules 35 and 38 —

(a) a document includes any written, printed or electronic matter, and data and data messages as defined in the Electronic Communications and Transactions Act 25 of 2002; and

(b) a tape recording includes a sound track, film, magnetic tape, record or other material on which visual images, sound or other information can be recorded or any other form of recording.

See further the notes to rule 35(15) above.

Subrule (1)*(a)*(i): 'Desiring the attendance of any person.' Section 35(1) of the Superior Courts Act 10 of 2013 provides that a party to proceedings before any superior court [3] in which the attendance of witnesses or the production of any document or thing is required, may procure the attendance of any witness or the production of any document or thing in the manner provided for in the rules of that court.

This subrule lays down the manner in which the attendance of any witness in civil proceedings in the High Court is to be obtained. For the procedure in other superior courts, in particular the Labour Court and the Land Court, see Volume 3, Parts Q1 and R1.

Section 47 of the Superior Courts Act 10 of 2013 sets out the manner in which the attendance of a judge of the High Court in civil proceedings is to be obtained.

It is essential that a person be subpoenaed. If the witness has merely been warned, an offence as contemplated in s 35(4) of the Superior Courts Act 10 of 2013 is not committed. [4]

'May as of right.' The party who desires the attendance of the person to be subpoenaed need not first obtain the leave of the High Court to sue out the subpoena. Such party may, in terms of this subrule, do so as of right. Section 36(5) of the Superior Courts Act 10 of 2013 provides for the setting aside of a subpoena by any judge [5] of the court out of which the subpoena was issued if it appears that:

(a) the person concerned is unable to give any evidence or to produce any book, paper or document which would be relevant to any issue in the proceedings;

(b) such book, paper or document could properly be produced by some other person;

(c) to compel the person concerned to attend would be an abuse of the process of the court.

Prior to the introduction of s 36(5) of the Superior Courts Act 10 of 2013 it has been held that a High Court has inherent power to set aside a subpoena if it is satisfied as a matter of certainty that the subpoena is unsustainable, e g that the witness who has been subpoenaed will be totally unable to be of any assistance to the court in the determination of the issues raised at the trial. [6] It has also been held that a High Court has inherent jurisdiction to protect itself (and others — i e litigants) against an abuse of its process. [7] Consequently, if the issue of a subpoena amounts to an abuse of process, a court should not hesitate to set it aside. [8] These principles have now obtained statutory force under s 36(5) of the Superior Courts Act 10 of 2013.

An abuse of process occurs 'where the procedures permitted by the Rules of the Court to facilitate the pursuit of the truth are used for a purpose extraneous to that object', [9] or put differently, when 'an attempt (is) made to use for ulterior purposes machinery designed for the better administration of justice'. [10]

The onus of proof of an abuse of process rests on the party alleging such an abuse and is not an easy one to discharge. [11]

The default of a person subpoenaed may be justified by 'reasonable excuse' under s 35(2)*(a)* of the Superior Courts Act 10 of 2013.

'Sue out . . . one or more subpoenas.' A subpoena has been aptly described by the Constitutional Court as 'a court order commanding the presence of a witness under a penalty of fine for failure'. [12]

The subpoena must contain the name of the person in respect of which it is to be issued and must, in terms of paragraph (ii) of this subrule, be in a form substantially similar to Form 16 in the First Schedule to the rules.

The reasonable expenses of the person subpoenaed must be paid or offered to such person. See further, in this regard, the notes to s 35(2)*(a)* of the Superior Courts Act 10 of 2013 s v 'Reasonable expenses calculated in accordance with the tariff framed under s 37(1)' and 'Paid or offered' in Volume 1 third edition, Part D.

'Service . . . shall be effected by the sheriff in the manner prescribed by rule 4.' The correct approach to service on a company for purposes of this subrule is to inquire whether there has been substantial compliance with rule 4(1)*(a)*(v). [13] See further rule 4 and the notes thereto above.

Whenever any person subpoenaed to attend any proceedings as a witness or to produce any document or thing evades service of the subpoena, the court concerned may, in terms of s 35(2)*(a)*(ii) of the Superior Courts Act 10 of 2013, issue a warrant directing that such person

be arrested and brought before the court at the time and place stated in the warrant or as soon thereafter as possible. In the context of s 35(2)*(a)*(ii) such evasion must be intentional. In terms of s 35(4) of the Superior Courts Act 10 of 2013 such person is guilty of an offence and liable upon convinction to a fine or to imprisonment for a period not exceeding three months. See further, in this regard, the notes to s 35(4) s v 'A fine or . . . imprisonment' in Volume 1 third edition, Part D.

The return of service of the sheriff is, it is submitted, regarded as prima facie proof of service and of what is stated therein in terms of s 35(2)*(a)* of the Superior Courts Act 10 of 2013. See, in this regard, the notes to s 35(2)*(a)* s v 'Return of the person who served such subpoena' in Volume 1 third edition, Part D.

Subrule (1)*(a)*(ii): 'The process for subpoenaing a witness . . . shall be by means of a subpoena in a form substantially similar to Form 16.' The verbatim following of Form 16 is not required. A subpoena need only to 'substantially' comply with the form. The word 'substantially' requires, it is submitted, that the subpoena must by and large, or materially, comply with the prescribed requirements. It need not in all respects conform to the specimen. In other words, Form 16 may be used with such variation as circumstances require.

It is to be noted that Form 16 contains the following paragraph:

> 'AND INFORM each of the said persons that such person is required to produce the following documents or things:
> (1) .....
> (2) .....
> (3) .....'

The paragraph is not in harmony with the provisions of rule 38(1)*(a)*(i) and (ii) to the extent that it requires of the witness *to produce documents or things to the court*. In terms of rule 38(1)*(b)*(i) the process for requiring a witness to produce a document in evidence at the trial as provided for in subrule (1)*(a)*(iii) must be by means of a subpoena in a form substantially similar to Form 16A (i e a subpoena *duces tecum*). Rule 38(1)*(c)*(i) contains a similar provision in regard to the production of a thing. Having regard to the provisions of rule 38(1)*(a)*(i) and (ii) the purpose of Form 16 is only to secure the attendance of a witness to give evidence at the trial and not to serve as a subpoena *duces tecum*. Form 16 is therefore in need of an amendment to bring it in line with the provisions of rule 38(1)*(a)*(i) and (ii).

Subrule (1)*(a)*(iii): 'If any witness is in possession or control of any deed, document, book, writing, tape recording or electronic recording (hereinafter referred to as a "document") or thing . . . to be produced in evidence.' In terms of rule 38(1)*(b)*(i) and *(c)*(i) the production of a document or thing by a witness at the trial or for inspection beforehand has to be obtained by means of a subpoena *duces tecum* in a form substantially similar to Form 16A in the First Schedule to the rules.

Form 16A, however, does not provide for a witness to appear at the trial and to produce documents or things at the trial as provided for by paragraphs *(b)*(i) and *(c)*(i) of subrule (1) respectively. It only requires of the witness to lodge the documents or things specified in the subpoena *duces tecum* for inspection with the registrar as provided for by paragraphs (1)*(b)*(ii)–(v) and *(c)*(ii)–(v) of subrule (1) respectively. Form 16A is therefore in need of an amendment to bring it in line with the provisions of rule 38(1)*(b)*(i) and *(c)*(i).

For the meaning of the words 'document' and 'tape recording', see the notes to rule 38 s v 'General' above.

The 'document' referred to in the subrule must be one that is relevant to the issues before the court. In *Beinash v Wixley* [14] it was held: [15]

> 'Ordinarily, a litigant is of course entitled to obtain the production of any document relevant to his or her case in the pursuit of truth, unless the disclosure of the document is protected by law. The process of a subpoena is designed precisely to protect that right. The ends of justice would be prejudiced if that right was impeded.'

Relevance must be determined with reference to the pleadings. [16]

'The subpoena shall specify such document or thing.' This subrule expressly requires that a subpoena *duces tecum* shall 'specify' the document or thing which the witness is required to produce. If a document or thing cannot be specified it is submitted that it should, at least, be sufficiently described in the subpoena *duces tecum* in order for it to be properly identified. See further the notes to s 35(2) of the Superior Courts Act 10 of 2013 s v 'Or to produce any document' in Volume 1 third edition, Part D. Wide language which may include within its sweep a wide and ill-defined category of documents (or things) does not comply with the subrule. [17] In terms of s 36(4) of the Superior Courts Act 10 of 2013, no person is bound to produce any document or thing not specified or otherwise sufficiently described in the subpoena *duces tecum* unless such person actually has the document or thing in court at the hearing of the proceedings.

The default of a person subpoenaed *duces tecum* may be justified by 'reasonable excuse' under s 35(2)*(a)* of the Superior Courts Act 10 of 2013.

A subpoena *duces tecum* may be set aside under the circumstances provided for in s 36(5) of the Superior Courts Act 10 of 2013. See further the notes to subrule (1)*(a)* s v 'May as of right' above.

'Require such witness to produce it to the court at the trial.' The manner in which a recalcitrant witness may be dealt with by the court at the hearing of any proceedings is set out in s 36(1) and (2) of the Superior Courts Act 10 of 2013. See further, in this regard, s 36(1) and (2), and the notes thereto, in Volume 1 third edition, Part D. See further the notes s v 'The subpoena shall specify such document' below.

Subrule (1)*(b)*(i): 'The process for requiring the production of a document . . . shall be by means of a subpoena in a form substantially similar to Form 16A.' See the notes to subrule (1)*(a)*(iii) s v 'If any witness is in possession or control of any deed, document, book, writing, tape recording or electronic recording (hereinafter referred to as a "document") or thing . . . to be produced in evidence' above.

Subrule (1)*(b)*(ii): 'Shall lodge it with the registrar.' The purpose of this subrule, originally inserted into the body of the rule in 1987 (and subsequently amended), is to obviate the almost inevitable delays in the conduct of a trial resulting from the production at the trial for the first time of any document for inspection and copying by the parties. [18]

'Unless such a person claims privilege.' A bona fide claim that the document in question is privileged does not entitle the party subpoenaed to refuse to comply with the subpoena. He must satisfy the registrar or the court that his claim of privilege is legally justified. [19] As to privilege, see the notes to rule 35(2)*(b)* s v 'A valid objection to produce' above.

Subrule (1)*(c)*(i): 'A subpoena in a form substantially similar to Form 16A.' See the notes to subrule (1)*(a)*(iii) s v 'If any witness is in possession or control of any deed, document, book, writing, tape recording or electronic recording (hereinafter referred to as a "document") or thing . . . to be produced in evidence' above.

Subrule (1)*(c)*(ii): 'Shall inform the registrar of the whereabouts of the thing and make the thing available for inspection.' It is submitted that the purpose of this subrule is to obviate the almost inevitable delays in the conduct of a trial resulting from the production at the trial for the first time of a thing for inspection by the parties. See in this regard the notes to subrule (1)*(b)*(ii) s v 'Shall lodge it with the registrar' above.

'Unless such person claims privilege.' See the notes to subrule (1)*(b)*(ii) s v 'Unless such a person claims privilege' above.

Subrule (2): 'The court may at any time, for sufficient reason, order . . . the evidence . . . to be given on affidavit.' The court has a discretion, to be exercised judicially upon a consideration of all the facts, to allow evidence to be given on affidavit. The power should be exercised carefully and there must be clear evidence in the affidavit(s) supporting the application that sufficient reason exists. [20]

In *Madibeng Local Municipality v Public Investment Corporation Ltd* [21] the Supreme Court of Appeal summarized the correct approach to this subrule as follows: [22]

> '[26] The approach to rule 38(2) may be summarised as follows. A trial court has a discretion to depart from the position that, in a trial, oral evidence is the norm. When that discretion is exercised, two important factors will inevitably be the saving of costs and the saving of time, especially the time of the court in this era of congested court rolls and stretched judicial resources. More importantly, the exercise of the discretion will be conditioned by whether it is appropriate and suitable in the circumstance to allow a deviation from the norm. That requires a consideration of the following factors: the nature of the proceedings; the nature of the evidence; whether the application for evidence to be adduced by way of affidavit is by agreement; and ultimately, whether, in all the circumstances, it is fair to allow evidence on affidavit.'

Other factors which will weigh with the court in granting such leave include lack of means, distance from the court and serious illness. [23] To this could be added, it is submitted, factors such as prejudice and fairness to the parties. In terms of rule 37(5) it is required of the parties attending a pre-trial conference, to deal with the production of proof by way of an affidavit in terms of rule 38(2). Rule 37(6)*(i)* requires of the parties to record any agreement regarding such production of proof in the minutes of the pre-trial conference. It is submitted that such

an agreement does not bind the court and that, in the exercise of its discretion under this subrule, is but another factor to be taken into consideration in determining whether sufficient reason as required by this subrule exists for granting an order.

The subrule expressly provides that the order that all or any of the evidence to be adduced at the trial be given on affidavit may be made 'at any time'. Thus, it may be made prior to the commencement of the trial, at the commencement of the trial and even during the trial.

The court, in granting the application, may reserve to the opposite party the right to object to such evidence at the trial. [24]

In an application for default judgment, where the defendant failed to appear at the hearing but had previously filed an affidavit in opposition to a summary judgment application, the court disregarded the evidence contained therein and granted default judgment. [25]

In terms of the proviso to this subrule evidence shall not be given on affidavit if it appears to the court that any other party reasonably requires the attendance of a witness for cross-examination, and that such witness can be produced. If the parties agree that the deponent will not be cross-examined, the factual allegations in the affidavit stand unchallenged and, accordingly, no dispute of fact in respect thereof arises. [26]

In *Uramin (Incorporated in British Colombia) t/a Areva Resources Southern Africa v Perie* [27] it was held to be convenient and in the interests of justice to vary the general trial procedure and receive the evidence of two witnesses from abroad via video link. The decision is discussed in more detail in the notes to rule 39(20) s v 'If it appears convenient . . . make any order with regard to the conduct of the trial' below.

Under certain circumstances evidence of damages may be given on affidavit, but proving damages by affidavit of a medical practitioner could be dangerous. [28]

Subrule (3): General. Subrules (3)–(8) make provision for evidence to be taken by way of commission *de bene esse*.

The basic distinction between evidence on commission and interrogatories (which is provided for in s 39 of the Superior Courts Act 10 of 2013) is that in the latter specific questions are formulated and approved by the court, while in the former the proceedings partake much more of a 'roving' commission conducted by examination and cross-examination, the evidence being given, as in a trial, orally. Section 39 of the Superior Courts Act 10 of 2013 does not refer to commissions *de bene esse*, and rather loses sight of the differences between these and interrogatories.

In terms of rule 37(6)*(i)* the parties who attended a pre-trial conference must in the minutes of such conference record any agreement regarding the taking of evidence on commission terms of rule 38(3).

'A court may.' [29] The grant or refusal of a commission is a matter within the discretion of the court. [30] It is not, however, an absolute discretion but one to be exercised in accordance with recognized principles which have evolved over the years. [31]

In deciding how to exercise this discretion, it may be profitable to consider not only the decisions given in civil cases on this question but also the principles laid down in respect of the issue of a commission for the hearing of evidence in criminal trials, because, although

the discretion is exercised less liberally in the latter instance than in the former, in both the fundamental consideration is whether, in particular circumstances, justice is likely to be done if evidence is placed before the court in this manner.

Where the court is faced with the problem of vital evidence being lost if a commission *de bene esse* were refused, or of allowing the production of evidence considerably weakened by the defendant's inability to cross-examine foreign witnesses, if the likelihood of a miscarriage of justice lies in the refusal of the application rather than in the granting of it, the court will grant a commission. Though there may be circumstances in which this would operate as a hardship on a party, he will always have the opportunity of arguing this before the trial judge. [32] Some prejudice is inevitable in all commissions: expense, delay, the difficulty of obtaining professional representation out of the jurisdiction — these are all matters which are inseparably attendant upon commissions. [33] As was pointed out by Wessels J in *Robinson v Randfontein Estates GM Co Ltd,* [34] the prejudice is not entirely one-sided:

> 'The person who produces on paper the evidence of a witness is as a rule at a disadvantage, because the court will pay more attention to the evidence of witnesses who appear before it, who are examined and cross-examined before it, than to those witnesses whom it has not had the opportunity of seeing, and if a question arises as to the credibility of such a witness, or whether the court ought to accept his testimony, it would prefer to base its judgment on what it has seen and heard than on testimony about which some doubt may exist.' [35]

'On application on notice.' The affidavit in support of the application should set out:

(a) the reasons why it is necessary for the purposes of justice that the ordinary way of taking evidence (i e that all witnesses should be examined in the presence of the court, orally) [36] should be departed from. [37] In this regard the applicant should adduce sufficient evidence to support the inference that the commission is being sought on bona fide grounds to advance a legitimate case, and that he has acted with proper diligence in pursuing alternative remedies which might reasonably be available; [38]

(b) the nature of the evidence to be given and its relevance; [39]

(c) the names of the witnesses whose evidence on commission is required, for the courts are reluctant to grant a roving commission to examine an unlimited number of people. [40] The

courts have, however, granted leave to take the evidence of named persons on commission, as well as the evidence of 'any other person whose evidence becomes relevant or appears to be so as a result of the evidence given at the commission.' [41]

'It appears convenient or necessary for the purposes of justice.' This is a jurisdictional fact: if it does not appear to the court that the taking of evidence on commission is indeed convenient or necessary for the purposes of justice, [42] the subrule gives it no jurisdiction to grant such an order. [43]

The convenience referred to in the subrule is the convenience not only of the applicant but also of the respondent and of the court. [44]

In the exercise of its discretion the following factors will be considered by the court:

(a) **Relevance of the evidence**. The evidence sought to be adduced on commission must be relevant to the issues in dispute. If evidence is not demonstrated to be relevant to the issues in dispute, it cannot be 'convenient or necessary for the purposes of justice' to order the hearing of such evidence before a commission. [45]

(b) **Nature of the evidence**. Before the court will authorize a commission, it must be satisfied that the required evidence is truly material to the real issues in the litigation, and likely to contribute appreciably to their determination. [46]

The court may in the exercise of its discretion secure the leading of evidence on commission on contentious factual issues in both civil and criminal cases. [47] If the court is of the opinion that the acceptability of the evidence sought to be led would depend to a great extent on the court's assessment of the witness's demeanour, personality and conduct and that, without such assessment, very little weight could be placed upon it, it might be necessary for the ends of justice to refuse the application. [48]

In cases involving allegations of fraud, the courts are reluctant to give leave for evidence to be taken on commission. [49] If the exclusion of the evidence of a witness whose attendance cannot be enforced is more likely to lead to a miscarriage of justice than to have his testimony on paper, a commission will be granted also where fraud is alleged 'though it may make the necessity for a more careful inquiry greater'. [50] If the witness can be compelled to

attend, the court will in cases involving allegations of fraud require his attendance. [51]

If the evidence sought to be led is of an involved nature, such as evidence concerning intricate matters of account, a commission will not be granted. [52]

As a general rule the court will not allow expert evidence to be taken on commission, the reason being that in the case of an expert witness it is of the utmost importance that the examination and cross-examination should be conducted before the court. [53] The mere fact that the foreign witness may be more expert than those in the Republic does not warrant a commission. [54] If there are no experts available locally, a commission will be granted. [55] A commission will not be granted where the possibility of obtaining witnesses in South Africa has not been sufficiently explored. [56]

(c) **Admissibility of the evidence.** A commission will not be granted unless the proposed evidence is relevant and admissible. [57] If it is impossible to decide until the trial whether the evidence is admissible, a commission will be granted and the question of admissibility left until the evidence is before the court. [58] If the application for a commission is made during a trial, the court must be satisfied that the evidence is admissible and material, and will scrutinize the merits of the application more closely than where such an application is made before the trial. [59]

A commission may be appointed to take evidence which is only corroborative in nature [60] if the court is of opinion that the evidence is relevant, material and necessary to do justice between the parties. [61]

(d) **Evidence likely to be lost.** Ordinarily a commission *de bene esse* will be issued where the evidence sought is necessary for the proper trial of the case and ought, if reasonably possible, to be before the court, and is likely to be lost if not taken on commission. [62] Thus, a commission will be granted where the witness is likely to die, [63] or is about to depart from the jurisdiction of the court. [64]

(e) **Inability of witness to attend**. A commission will be granted if it can be shown that for some valid reason the witness cannot attend the court to give evidence in person. [65] Thus, a commission will be granted if a witness is unable to appear at the trial by reason of ill-health. [66] A commission will not be granted merely upon the ground of the witness's

old age; it must also be shown that he is in ill-health. [67]

A commission will be granted if a witness beyond the jurisdiction refuses to attend. [68] The court cannot 'compel an unwilling person to come from a foreign country to give his evidence here and in these circumstances the next best thing that the Court can do is to take his testimony on paper'. [69]

Mere inconvenience to a witness, or the fact that a witness cannot, without loss, leave his business to give evidence is not sufficient ground for the granting of a commission, [70] though in exceptional circumstances commissions have been granted. [71]

If there is material before the court which leads the court to infer that the witness is not an honest person, the court may refuse leave to have his evidence taken on commission and require his presence. [72]

If the evidence of a witness is taken on commission but subsequently he is present at the trial, the evidence taken on commission is not used and the witness must give his evidence orally. The reason is that evidence taken on commission is said to be *de bene esse*, that is 'conditional', the condition being that the evidence shall be used only if the witness should not be present at the trial. [73]

If there is nothing before the court to show that even if the commission were granted the witness would come before it, the court will refuse the application. [74]

(f) **Evidence by plaintiff or defendant.** In general the courts are slow to grant the plaintiff the right to give evidence on commission. [75] If the defendant is resident out of the jurisdiction and has been brought into the forum by virtue of the fact that the plaintiff has been given leave to sue him by edictal citation, the court, in the exercise of its discretion, will not regard the application of the defendant with the same strictness as the case of a plaintiff who has chosen his own forum. [76] If both parties are resident out of the jurisdiction a commission is usually refused, [77] presumably on the ground that the case can better be heard in the country where either or both of them are residing. The fact that a party, knowing the case to be coming on, has left the country, is a reason for refusing to allow his evidence to be taken on commission. [78]

(g) **Opportunity for cross-examination**. Before the commissioner there must be 'opportune possibility for cross-examination'. [79] If the witness is in a locality which no lawyers can reach, so that he can be properly examined and cross-examined, a commission will not be granted. [80]

(h) **Expenses.** The court should consider the comparative expense of the alternative methods of obtaining the evidence [81] and the capacity of the parties to bear the expense involved. [82]

(i) **The balance of prejudice**. The court must weigh the prejudice to the party seeking the commission if the application is refused against the prejudice to his adversary if it is granted. [83]

'Before a commissioner of the court.' The court names the commissioner, but is, of course, ready to accept suggestions from the parties and it is usual to state the name of the suggested commissioner in the founding affidavit. If the witness is within the Republic, the commissioner is usually a magistrate, as no fees are chargeable by such officials for taking evidence on commission. If the witness is outside the Republic, a barrister or solicitor is usually appointed as commissioner.

The Cape Supreme Court has issued a commission to a foreign country in blank, leaving it to the registrar of the local court to fill in the name of the commissioner. [84] Provision is sometimes made for the appointment of a substitute should the commissioner for some

reason be unable to act. [85]

Parties cannot, by agreement and without the issue of a commission, have a witness examined before a person not qualified to administer an oath and then put in the statement as evidence. [86] Cases have occurred where the superior courts have admitted evidence so taken, where the person before whom it was taken was a justice of the peace [87] or a commissioner of oaths [88] and when the imminent departure of the witness examined had rendered it urgent to obtain his evidence without delay; but Laurence JP expressed strong disapproval of the practice and explicitly stated that his action in admitting the evidence must not in any way be regarded as a precedent. [89]

'On such terms . . . as to it seems meet.' When an order is granted for a commission, the costs incurred in and about the commission are usually ordered to be costs in the cause. There is, however, nothing to prevent the question being reserved for determination at the trial. [90] Even where the costs have been ordered to be costs in the cause, the expenses may be disallowed on taxation if unnecessarily incurred; for example, if the evidence was not relevant. [91]

If the respondent in an application for a commission is impecunious, the court may order the applicant to disburse the respondent's costs with regard to the commission, and that such costs will be costs in the cause. [92]

The costs of a commission form part of the necessary expenses of a proceeding and will be taxed as such. A fee for counsel attending a commission to take evidence abroad will be allowed as between party and party only under special circumstances, such as where there is no local agent available or the matter is one of peculiar difficulty. [93] Generally, counsel's fees for consultation as to the advisability of an application for a commission *de bene esse* will not be allowed between party and party. [94]

'Shall be taken only after the close of pleadings.' A commission is not usually granted until the pleadings are closed; until then it is not known what points are in dispute and therefore what evidence will be relevant. [95] It will, therefore, in most cases be convenient to make a special application after close of pleadings for the appointment of a commissioner, and not to set down the case for trial until the evidence has been returned, so that the whole matter may be dealt with at one sitting.

There are, however, exceptions, as where a witness is dangerously ill [96] or is about to leave the jurisdiction; [97] and generally, where there is imminent risk that delay will cause the total

loss of the evidence desired. [98] In *Botha v Van der Vyver,* [99] where the defendant had not yet pleaded but the witness was dangerously ill, the commission was issued, but the examination was postponed until a plea had been filed. In *Nelson v Nelson* [100] a commission to take the evidence of sailors about to sail was issued before appearance had been entered, but only upon condition that the evidence should not be used if the defendant should appear and object to it.

If the necessity of a witness living abroad appears only at the trial, a commission may be granted at that stage. [101] In *Guggenheim v Rosenbaum (1)* [102] the court held that the power to entertain such an application in the middle of a trial should be sparingly exercised. It was also held [103] that where the application for a commission is made during a trial the court must

be satisfied that the proposed evidence is admissible and material, and the court will scrutinize the merits of such an application more closely than an application made before the trial.

There should be no unnecessary delay in applying for a commission. [104] Such delay raises the suspicion that the application is not bona fide and is good ground for refusing the application. [105] If the delay in making the application would, if the application were granted, involve the postponement of the trial, the court may refuse the application, [106] or the trial may be postponed and the party requiring the adjournment be ordered to pay the costs thereof. [107]

Subrule (4): 'Before any commissioner within the Republic.' If the evidence of any person is to be taken before any commissioner within the Republic, such person, if within the Republic, may be subpoenaed to appear before the commissioner to give evidence as if at the trial. A witness who has been so subpoenaed to appear before a commissioner and fails to appear or to give evidence or to produce documents, is probably liable to the same penalties as any other witness who fails to obey a subpoena or fails to give evidence. See, in this regard, ss 35 and 36 of the Superior Courts Act 10 of 2013 and the notes thereto in Volume 1 third edition, Part D.

If the evidence of any person is to be taken before a commissioner outside the Republic, the court cannot compel a witness either to appear before the commission or to comply with an order *duces tecum*. It merely directs that the witness be examined, and leaves it to the court in whose area the witness is to compel his attendance. [108] The following possible courses of action present themselves: [109]

(i) In those countries where there is legislation similar or comparable to the Foreign Courts Evidence Act 80 of 1962, [110] the procedure provided for in such legislation may be adopted.

(ii) Where there is no such legislation, the procedure laid down in the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, may be followed, but

only in respect of those countries which have acceded to the Convention. The Republic has acceded to the Convention under certain reservations, etc. [111]

(iii) Where there is no such legislation, as aforesaid, and the Convention cannot be applied, the only alternative will be to apply to the court before which the action is pending for the issue of a letter of request to the government of the country where the witness is and the commission is to sit. In such a letter of request the government concerned is requested to take steps to obtain the evidence of the witness. If the court grants the application, the request is forwarded to a proper authority in the foreign country through the Department of International Relations and Cooperation (formerly the Department of Foreign Affairs). Whether or not effect is given to the letter of request depends entirely upon the foreign country concerned. [112]

In *Randgold & Exploration Co Ltd v Gold Fields Operations Ltd* [113] the applicants applied to the High Court for it to issue letters to certain foreign judicial authorities requesting them to subpoena witnesses in their jurisdictions to give evidence from these jurisdictions, in real time by audiovisual link, to the South African trial court. The application was dismissed for the following reasons: [114]

(a) the applicants had not produced precedent in which the foreign judicial authorities had made the orders the letters sought;

(b) there was no local precedent of a court making the request the High Court was asked to make;

(c) no legislation empowered the High Court to make the request;

(d) The Hague Evidence Convention gave no such power to the court;

(e) profiles of the foreign jurisdictions recorded that none would compel a witness to give testimony in the manner sought.

Subrule (5): 'Shall be adduced upon oral examination.' Although this subrule envisages the possibility that the court may direct the commission to conduct the examination by interrogatories and cross-interrogatories, the usual and normal position is that the evidence is adduced upon oral examination before the commissioner. The subrule provides that a witness shall give his evidence under oath or affirmation in the presence of the parties and their legal representatives, and that the witness shall be subject to cross-examination and re-examination. It is submitted that this subrule should be read in harmony with subrule (9), which provides, in paragraph *(a)* thereof, that a court may, on application on notice by any party and where it appears convenient or in the interests of justice, make an order for evidence to be taken through audiovisual link. If the evidence of any person is to be taken before any commissioner within the Republic through audiovisual link, such person, if within the Republic, may be subpoenaed to appear before the commissioner to give evidence as if at the trial. If the evidence of any person is to be taken before any commissioner within the Republic through audiovisual link, such person, if not within the Republic, will have to consent to the taking of evidence before the commissioner through audiovisual link. See further the notes to subrule (9) below.

Subrule (6): 'Shall not decide upon the admissibility of evidence.' A commissioner does not have the power to decide on the admissibility or relevance of evidence. [115] The ordinary practice, enshrined in the provisions of this subrule, is for the commissioner to take the evidence

as tendered, noting any objection taken thereto and reporting to the trial court that the objection was taken and noted by him. When the record of the evidence taken by the commissioner is presented to the trial court, any lawful objection pertaining to the admissibility or relevance of such evidence may be raised and must be decided by the court hearing the matter. [116]

Subrule (8): 'The record of the evidence.' Evidence taken on commission for a case in a particular court, which case was afterwards withdrawn owing to lack of jurisdiction, cannot be used when the same claim is brought on another summons in another court. [117]

Subrule (9): General. Before the introduction of rule 38(9) with effect from 1 February 2022, [118] rule 39(2) was employed to vary the general trial procedure and receive evidence via video link, taking into account convenience and the interests of justice. Thus, in *Uramin (Incorporated in British Colombia) t/a Areva Resources Southern Africa v Perie* [119] it was held to be convenient and in the interests of justice to vary the general trial procedure and receive the evidence of two witnesses, with their consent, from abroad via video link under circumstances where their evidence was vital to the defendant's defence but both of them were no longer in its employ and not willing to travel from abroad to the seat of the trial court in Johannesburg in order to testify. In her judgment, Satchwell J included comment on the video conferencing procedures as they eventuated. The judgment is more fully referred to in the notes to rule 39(2) s v 'If it appears convenient . . . make any order with regard to the conduct of the trial' below.

It is submitted that a court cannot under rule 38(9) compel a witness in a foreign jurisdiction to comply with an order made by it. The court could merely direct that the witness be examined through audiovisual link and then leave it to the court in whose area the witness is to compel his attendance. The position seems to be similar to where the evidence of any person is to be taken before a commissioner outside the Republic. See, in this regard, the notes to subrule (3) s v 'Before any commisioner within the Republic' above.

In *Randgold & Exploration Co Ltd v Gold Fields Operations Ltd* [120] the applicants applied to the High Court for it to issue letters to certain foreign judicial authorities requesting them to subpoena witnesses in their jurisdictions to give evidence from these jurisdictions, in real time by audiovisual link, to the South African trial court. The application was dismissed for the following reasons: [121]

(a) the applicants had not produced precedent in which the foreign judicial authorities had made the orders the letters sought;

(b) there was no local precedent of a court making the request the High Court was asked to make;

(c) no legislation empowered the High Court to make the request;

(d) The Hague Evidence Convention gave no such power to the court;

(e) profiles of the foreign jurisdictions recorded that none would compel a witness to give testimony in the manner sought.

Although the *Randgold* case was decided before the introduction of rule 38(9), it is a good illustration of what difficulties could be encountered when application under rule 38(9) is made for an order for evidence to be taken through audiovisual link.

Section 37C of the Act, which came into operation on 5 August 2022, [122] now also makes provision for evidence through audiovisual link. Section 37C reads as follows:

> '**37C Evidence through remote audiovisual link in proceedings other than criminal proceedings**
>
> (1) A Superior Court may, on application by any party to proceedings before that court or of its own accord, order that a witness, irrespective of whether the witness is in or outside the Republic, if the witness consents thereto, give evidence by means of audiovisual link.
>
> (2) A court may make an order contemplated in subsection (1) only if —
>
> *(a)* it appears to the court that to do so would —
>
> (i) *(aa)* prevent unreasonable delay;
>
> *(bb)* save costs;
>
> *(cc)* be convenient; or
>
> *(dd)* prevent the likelihood that any person might be prejudiced or harmed if he or she testifies or is present at such proceedings; and
>
> (ii) otherwise be in the interests of justice;
>
> *(b)* facilities therefor are readily available or obtainable at the court; and
>
> *(c)* the audiovisual facilities that are used by the witness or at the court enable —
>
> (i) persons at the courtroom to see, hear and interact with the witness giving evidence; and
>
> (ii) the witness who gives evidence to see, hear and interact with the persons at the courtroom.
>
> (3) The court may make the giving of evidence in terms of subsection (1) subject to such conditions as it may deem necessary in the interests of justice.
>
> (4) The court must provide reasons for —
>
> *(a)* allowing or refusing an application by any of the parties; or
>
> *(b)* its order and any objection raised by the parties against the order, as contemplated in subsection (1).
>
> (5) For purposes of this Act, a witness who gives evidence by means of audiovisual link, is regarded as a witness who was subpoenaed to give evidence in the court in question.
>
> (6) For purposes of this section 'audiovisual link' means facilities that enable both audio and visual communications between a witness and persons at a courtroom in real-time as they take place.'

The existence of s 37C and rule 38(9) side by side has the potential to cause conflict as their requirements are not the same. [123] In the event of conflict the provisions of s 37C will prevail, rule 38(9) being subordinate legislation. [124]

In addition to s 37C, s 37A, which also came into operation on 5 August 2022, provides for evidence through intermediaries.

In terms of rule 37(6)*(i)* the parties who attended a pre-trial conference must in the minutes of such conference record any agreement regarding the production of proof by way of audiovisual link in terms of rule 38(9).

It is submitted that the provisions of subrule (9) should be read in harmony with the provisions of subrule (5) which provides that a witness giving evidence under oath or affirmation before a commissioner shall do so in the presence of the parties and their legal representatives, and shall be subject to cross-examination and re-examination. See further, in this regard, the notes to subrule (5) s v 'Shall be adduced upon oral examination' above.

Subrule (9)*(a)*: 'A court may.' Compare the notes to subrule (3) s v 'A court may' above.

'It appears convenient or in the interests of justice.' This is a jurisdictional fact: if it does not appear to the court that the taking of evidence through audiovisual link is indeed convenient or in the interests of justice, the subrule gives it no jurisdiction to grant an order for the taking of evidence through audiovisual link. Compare the notes to rule 38(3) s v 'It appears convenient or necessary for the purposes of justice' above, where some factors that, it is submitted, should be taken into account by the court in the exercise of its discretion under this subrule, are discussed. See also the notes to rule 39(2) s v 'If it appears convenient . . . make any order with regard to the conduct of the trial' below.

Subrule (9)*(b)*: 'Directions which it considers appropriate.' This subrule should be read together with s 37C(3) of the Act which provides that the court may make the giving of evidence in terms of s 37C(1) of the Act subject to such conditions as it may deem necessary in the interests of justice. See further the notes to s 37C(3) of the Act in Volume 1, third edition, Part D.

Subrule (9)*(c)*: 'A draft order setting out the terms of the order sought.' It is submitted that in framing the draft order, consideration should be given to the conditions and directions provided for in s 37C(3) of the Act and rule 38(9)*(c)* respectively. Such directions could include, for example, the following:

(a) the technology to be employed;

(b) the supervision of the witness and measures to be taken during the examination of the witness; [125]

(c) measures to protect the decorum of the court;

(d) the recordal and transcription, if necessary, of the proceedings and the evidence given, and the filing thereof on the court file.

1 In s 1 of the Superior Courts Act 10 of 2013 the term 'Superior Court' is defined as 'the Constitutional Court, the Supreme Court of Appeal, the High Court and any court of a status similar to the High Court'. Courts of a status similar to the High Court include the Labour Court, the Land Claims Court, the Competition Appeal Court and the Electoral Court.

2 *PFE International v Industrial Development Corporation of South Africa Ltd* 2013 (1) SA 1 (CC) at 6I–7A, 7H–8C, 8H–10C and 11C.

3 In s 1 of the Superior Courts Act 10 of 2013 the term 'Superior Court' is defined as 'the Constitutional Court, the Supreme Court of Appeal, the High Court and any court of a status similar to the High Court'. Courts of a status similar to the High Court include the Labour Court, the Land Claims Court, the Competition Appeal Court and the Electoral Court.

4 Cf *R v Hefferman* 1924 EDL 1.

5 In terms of the definition of 'judge' in rule 1 this means a judge sitting otherwise than in open court, i e a judge in chambers.

6 *Sher v Sadowitz* 1970 (1) SA 193 (C) at 195; *Matisonn v Additional Magistrate, Cape Town* 1980 (2) SA 619 (C) at 625; *S v Matisonn* 1981 (3) SA 302 (A) at 313. See also *Meyers v Marcus* 2004 (5) SA 315 (C) at 324E; *South African Coaters (Pty) Ltd v St Paul Insurance Co (SA) Ltd* 2007 (6) SA 628 (D) at 634E–F.

7 *Beinash v Wixley* 1997 (3) SA 721 (SCA) at 743D; *South African Coaters (Pty) Ltd v St Paul Insurance Co (SA) Ltd* 2007 (6) SA 628 (D) at 633E.

8 *Beinash v Wixley* 1997 (3) SA 721 (SCA) at 734J–735A; *South African Coaters (Pty) Ltd v St Paul Insurance Co (SA) Ltd* 2007 (6) SA 628 (D) at 633E–634A. See also *Mostert v Nash* 2018 (5) SA 409 (SCA) at 422B–C.

9 *Beinash v Wixley* 1997 (3) SA 721 (SCA) at 734F–G.

10 *Hudson v Hudson* 1927 AD 259 at 268. See also *De Klerk v Scheepers* 2005 (5) SA 244 (T) at 246C–D; *South African Coaters (Pty) Ltd v St Paul Insurance Co (SA) Ltd* 2007 (6) SA 628 (D) at 633F–G.

11 *South African Coaters (Pty) Ltd v St Paul Insurance Co (SA) Ltd* 2007 (6) SA 628 (D) at 634A.

12 *Minister of Police v Premier of the Western Cape* 2014 (1) SA 1 (CC) at 3I.

13 *Value Logistics Limited v Britz* (unreported, GJ case no 2020/13997 dated 15 November 2021) at paragraphs [38]–[44].

14 1997 (3) SA 721 (SCA).

15 At 734G. See also *Value Logistics Limited v Britz* (unreported, GJ case no 2020/13997 dated 15 November 2021) at paragraphs [52]–[56]; *Deltamune (Pty) Ltd v Tiger Brands Limited* [2022] 2 All SA 26 (SCA) at paragraph [22].

16 *Value Logistics Limited v Britz* (unreported, GJ case no 2020/13997 dated 15 November 2021) at paragraph [56]; *Deltamune (Pty) Ltd v Tiger Brands Limited* [2022] 2 All SA 26 (SCA) at paragraph [23].

17 See *Beinash v Wixley* 1997 (3) SA 721 (SCA) at 735C–F; *Moodley NO v Public Investment Corporation SOC Limited* (unreported, WCC case no 3609/2023 dated 9 March 2023) at paragraphs [7], [11], [12]–[14].

18 See *Trust Sentrum (Kaapstad) (Edms) Bpk v Zevenberg* 1989 (1) SA 145 (C) at 148C–J where it is also pointed out that the introduction of this subrule eliminated the conflict in procedure which had in this regard arisen between the Cape and Transvaal courts (see *Waterhouse v Shields* 1924 CPD 155; *King v Margau* 1949 (1) SA 661 (W); *Bladen v Weston* 1967 (4) SA 429 (C); *Picked Properties (Pty) Ltd v Northcliff Townships (Pty) Ltd* 1972 (3) SA 770 (W)).

19 *Trust Sentrum (Kaapstad) (Edms) Bpk v Zevenberg* 1989 (1) SA 145 (C) at 150F; *Divine Inspiration Trading 205 (Pty) Ltd v Gordon* 2021 (4) SA 206 (WCC) at paragraph [17]. In *MEC for Health, Gauteng v Solomons* 2023 (6) SA 601 (GJ) the appellant caused a subpoena *duces tecum* to be issued and served on the respondent, calling upon him to hand over or inform the registrar of the court of the whereabouts of certain documents, raw data, expert reports, medical records and MRI scans referred to in a research paper that was co-authored by the respondent. Compliance with the subpoena was resisted on the basis that the information requested was privileged because of the confidentiality of patient information and a legal and ethical obligation of researchers and research institutions to protect the identities of research participants. The appellant thereupon unsuccessfully brought an application to compel compliance with the subpoena. The full court, in dismissing the appellant's appeal against the order of the court *a quo*, held that:
(a) whilst a party was as of right entitled to issue a subpoena under Uniform Rule of Court 38, in terms of s 36(1)*(c)* of the Superior Courts Act 10 of 2013 a recipient of a subpoena may refuse to produce the documentation sought (i e resist compliance with the subpoena), provided such recipient had a 'just excuse' for such refusal (at paragraph [35]);
(b) the court *a quo* was correct in its finding that the ambit of a 'just excuse' was wide enough to cover the confidentiality obligations imposed upon the respondent by virtue of the relevant legislative framework (and that it could therefore not be concluded that the respondent was in wilful disobeyance of the subpoena or that the appellant was without more entitled to the documentation sought) (at paragraph [37]);
(c) contrary to the assertions of the appellant, the appellant did not have an unassailable right of access to documents containing otherwise confidential patient information once such documents were disclosed in unrelated court proceedings and thus comprising public records (at paragraph [38]);
(d) it was apparent from case law that a court would only allow disclosure of private and confidential medical records after careful enquiry, having regard to a number of guiding principles (at paragraph [38] – [42]):
(i) medical records inherently affected the rights to dignity and privacy of individuals. Those rights must, by default, be respected and protected;
(ii) there was a strong privacy interest in maintaining confidentiality over medical records;
(iii) the need for access to medical records had to be weighed against the patient's privacy interest in every instance;
(iv) a court therefore had to carefully consider whether there was a genuine need for access to medical records sought. This would perforce entail a consideration of the relevance of the documentation sought in each case, the potential harmful effects that may result from disclosure, and whether the benefits of the principle of openness outweighed the dangers inherent in the disclosure of private information, amongst others, the conceivable violation of the dignity and psychological integrity of the patient/s. If the records were not genuinely necessary, then, by default, the court ought to protect the individual's rights to dignity and privacy. A factual basis for a finding that access to medical records was warranted in a particular case had to be laid by an applicant for purposes of enabling a court to conduct the above enquiries (at paragraph [43]);
(e) in terms of s 14(1), read with s 14(2), of the National Health Act 61 of 2003, private and confidential patient information may only be disclosed if a court ordered that disclosure, absent patient consent or absent non-disclosure of such information representing a serious threat to public health. When disclosure of private and confidential medical information absent patient consent was sought, judicial oversight was required, in terms of which a court would grant disclosure only in circumstances where a factual foundation had been laid for such disclosure, having regard to the guiding principles referred to above (at paragraphs [17], [47] – [48]);
(f) the appellant's choice to issue a subpoena against a medical professional to produce private medical information (i) in the absence of patient consent; (ii) absent proper inquiry undertaken by the court consequent to an application in terms of s 14(2) of the National Health Act 61 of 2003; and (iii) in circumstances where the medical professional was statutorily and ethically duty-bound to resist compliance, more particularly, under threat of a costs order, was inappropriate (at paragraph [50]);
(g) the appellant's argument that confidentiality was lost in respect of patient information once it was contained in public records, stood to be rejected (at paragraph [57]). The fact that a patient's private and confidential medical information was disclosed in a court file for purposes of that specific litigation (in which the patient was involved as a party) did not mean that the patient had provided blanket consent for the publication of their health information in any future unrelated litigation instituted between third parties going forward (at paragraph [60]);
(h) in all the circumstances the conclusion reached by the court below, that the appellant had utilized the wrong procedure was unassailable (at paragraph [61]).

20 See *Davis v Davis* (1894) 11 SC 253; *Hartung v Hartung* 1913 EDL 62.

21 2018 (6) SA 55 (SCA). See also *Molefe v Road Accident Fund* 2022 (2) SA 461 (GP) at paragraphs [21]–[23] (a case where the applicant, under rule 38(2), sought leave to present evidence by means of affidavit in support of her application for default judgment against the Road Accident Fund, and where the court held that reasonable notice of the rule 38(2) application should have been given to the Road Accident Fund even if it was not participating in the legal process).

22 At 61F–H.

23 *Brink v Wilson & Glynne* (1880) 1 SC 331; *Martin v Martin* (1885) 3 SC 330; *Knight v Knight* (1900) 14 EDC 162; *Ex parte Tyzzer* 1910 TH 185; *Ex parte Williams* 1912 CPD 708; *Hartung v Hartung* 1913 EDL 62; *Atkinson v Atkinson* 1931 WLD 212; *Ex parte Duncan* 1932 TPD 138; *Howden v Howden* 1932 NPD 764.

24 See *Atkinson v Atkinson* 1931 WLD 212.

25 *Birgin Bower Investments (Pty) Ltd v Marketing International* 2003 (3) SA 382 (W).

26 *Esorfranki (Pty) Ltd v Mopani District Municipality* 2022 (2) SA 355 (SCA) at paragraph [27].

27 2017 (1) SA 236 (GJ). See also *M K v Transnet Ltd t/a Portnet* [2018] 4 All SA 251 (KZD).

28 See *New Zealand Insurance Co Ltd v Du Toit* 1965 (4) SA 136 (T); *N C P Havenga v S M Parker* (unreported, TPD case dated 26 February 1993) (discussed in 1993 *De Rebus* 483); and *Marshall v Pillay* (unreported, WCC case no 3761/17 dated 28 April 2023) at paragraph [25] (where it was held that there is a disadvantage of accepting evidence of damages by a medical practitioner on affidavit, especially when it relates to medical reports and opinions proffered therein, as such evidence is prone to challenge or change. A court should therefore be slow to accept such medical evidence on affidavit, other than in exceptional circumstances, properly motivated).

29 See, in general, Govender 'Taking of evidence abroad' 2007 (August) *De Rebus* 24.

30 This has been stressed on numerous occasions (see for example *Fleischer v Klassen* (1883) 3 EDC 207; *Becker v Beukes* (1885) 4 EDC 313; *Crowder v The Natal Bank* (1891) 12 NLR 191; *Botma v Norton* (1905) 22 SC 65; *Kantor v James Bell & Co* (1906) 27 NLR 363; *Hills v Hills (II)* 1933 NPD 293; *Princess Eugenie of Greece v Prince Dominique Radziwill* 1949 (2) SA 259 (C) at 261; *S v Hassim* 1973 (3) SA 443 (A) at 452; *Nxasana v Minister of Justice* 1976 (3) SA 745 (D) at 760; *Smitham v De Luca* 1977 (2) SA 582 (W); *S v Hoare* 1982 (3) SA 306 (N) at 308; *S v Mzinyathi* 1982 (4) SA 118 (T); *Meyerson v Health Beverages (Pty) Ltd* 1989 (4) SA 667 (C) at 675H; *Fernandes v Fittinghoff & Fihrer CC* 1993 (2) SA 704 (W) at 707I and 708C).

31 *S v Ffrench-Beytagh (2)* 1971 (4) SA 426 (T) at 426F.

32 *Robinson v Randfontein Estates GM Co Ltd* 1918 TPD 420; *Pountas' Trustee v Coustas* 1924 WLD 170; *Grant v Grant* 1949 (1) SA 22 (C) at 30; *Princess Eugenie of Greece v Prince Dominique Radziwill* 1949 (2) SA 259 (C); *S v Ffrench-Beytagh (2)* 1971 (4) SA 426 (T) at 428.

33 *Grant v Grant* 1949 (1) SA 22 (C) at 30; *Federated Insurance Co Ltd v Britz* 1981 (4) SA 74 (T) at 77; *Myerson v Health Beverages (Pty) Ltd* 1989 (4) SA 667 (C) at 677A; *Fernandes v Fittinghoff & Fihrer CC* 1993 (2) SA 704 (W) at 709C.

34 1918 TPD 420 at 422.

35 This statement was approved in *Grant v Grant* 1949 (1) SA 22 (C) at 30; *S v Ffrench-Beytagh (2)* 1971 (4) SA 426 (T) at 428G; *S v Hassim* 1972 (2) SA 448 (N) at 456; *Federated Insurance Co Ltd v Britz* 1981 (4) SA 74 (T) at 77H; *S v Hoare* 1982 (3) SA 306 (N) at 308E–H.

36 *Kantor v James Bell & Co* (1906) 27 (NLR) 363 at 366.

37 *Kantor v James Bell & Co* (1906) 27 NLR 363; *Rollnick v Rollnick* 1923 (2) PH F16 (W); *Hills v Hills (II)* 1933 NPD 293; *Myerson v Health Beverages (Pty) Ltd* 1989 (4) SA 667 (C) at 676C.

38 *Fernandes v Fittinghoff & Fihrer CC* 1993 (2) SA 704 (W) at 708H–709A.

39 *Stanton v Ferguson* (1885) 3 HCG 435; *Kantor v James Bell & Co* (1906) 27 NLR 363; *Botha v Van Rooyen* (1909) 30 NLR 13; *Freedman v Bauer & Black* 1941 WLD 161 at 175; *Grant v Grant* 1949 (1) SA 22 (C) at 26–7; *Guggenheim v Rosenbaum (1)* 1961 (4) SA 15 (W) at 18; *Nxasana v Minister of Justice* 1976 (3) SA 745 (D) at 760–1.

40 *Ross T Smith & Co v A Findlay & Co* (1899) 20 NLR 148. In *Freedman v Bauer & Black* 1941 WLD 161 at 175 Ramsbottom J stated that it 'is customary to require the name of one witness at any rate to be given, but I shall assume that this can be dispensed with'. However, in *De Kock v De Kock* 1924 (1) PH F22 (C) the court refused to grant a commission where the names of the witnesses were not specified.

41 *Hurwitz NO v Southern Insurance Association Ltd* 1970 (3) SA 80 (W); and see *Curator of Marais' Estate v Woodbine Cloete* (1880) Kotzé 187.

42 In *Hills v Hills (II)* 1933 NPD 293 at 294 it was held that a party seeking to dispense with the 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'. See further the notes to rule 39(20) s v 'If it appears convenient . . . make any order with regard to the conduct of the trial' below.

43 *Fernandes v Fittinghoff & Fihrer CC* 1993 (2) SA 704 (W) at 707J–708A.

44 *Myerson v Health Beverages (Pty) Ltd* 1989 (4) SA 667 (C) at 675J–676A.

45 *Fernandes v Fittinghoff & Fihrer CC* 1993 (2) SA 704 (W) at 708B.

46 *Kantor v James Bell & Co* (1906) 27 NLR 363; *Davis v Davis* 1945 WLD 87 at 91; *Grant v Grant* 1949 (1) SA 22 (C) at 26–7; *Guggenheim v Rosenbaum (1)* 1961 (4) SA 15 (W) at 18; *Rafbros (Tvl) (Pty) Ltd v Nortier* 1968 (1) SA 160 (W); *Nxasana v Minister of Justice* 1976 (3) SA 745 (D) at 760H–761A; *Federated Insurance Co Ltd v Britz* 1981 (4) SA 74 (T) at 75; *S v Mzinyathi* 1982 (4) SA 118 (T); *Meyerson v Health Beverages (Pty) Ltd* 1989 (4) SA 667 (C) at 678A; *Fernandes v Fittinghoff & Fihrer CC* 1993 (2) SA 704 (W) at 708D–F; *Randgold & Exploration Co Ltd v Gold Fields Operations Ltd* 2020 (3) SA 251 (GJ) at paragraph [105]. Upon admission by the other side of the facts to which a commission was sought, the court refused the application in *Excombe v Henderson & Scott* 1872 NLR 90.

47 See, for example, *Smitham v De Luca* 1977 (2) SA 582 (W); *S v Ffrench-Beytagh (2)* 1971 (4) SA 426 (T); *Federated Insurance Co Ltd v Britz* 1981 (4) SA 74 (T) at 77; *S v Mzinyathi* 1982 (4) SA 118 (T); *Fernandes v Fittinghoff & Fihrer CC* 1993 (2) SA 704 (W) at 708E.

48 *S v Ffrench-Beytagh (2)* 1971 (4) SA 426 (T) at 428; *S v Hassim* 1972 (2) SA 448 (N) at 456; *S v Hoare* 1982 (3) SA 306 (N) at 309; *Fernandes v Fittinghoff & Fihrer CC* 1993 (2) SA 704 (W) at 709D–E.

49 See *Robinson v Randfontein Estates GM Co Ltd* 1918 TPD 420 at 422.

50 *Robinson v Randfontein Estates GM Co Ltd* 1918 TPD 420 at 423; *Pountas' Trustee v Coustas* 1924 WLD 170 at 171–2. See also *Fernandes v Fittinghoff & Fihrer CC* 1993 (2) SA 704 (W) at 708G.

51 *Wiley v African Realty Trust Ltd* 1908 TH 86; *Biggs v Molife* (1910) 20 CTR 532.

52 *Fass & Co v Michaelson* (1884) 5 NLR 60.

53 *The Globe & Phoenix Gold Mining Co Ltd v The Rhodesian Corporation Ltd* 1932 (2) PH F103 (SR), approved of in *Hills v Hills (II)* 1933 NPD 293 at 294–5.

54 *Carnes v Maeder* 1939 WLD 207.

55 *SA Mutual Life Assurance Society v African Life Assurance Society Ltd* (1909) 19 CTR 38; *Gough v Woolley* 1912 EDL 39; *Jokl v Alexander* 1947 (3) SA 542 (W); and see *Kitchener v South African Native Trust* 1962 (2) SA 311 (T).

56 *Hind v Boswell Brothers Circus (Pty) Ltd* 1952 (2) SA 158 (N).

57 *Matthews v Hartley & Son* (1882) 1 HCG 13; *Eliovson v Magid* 1908 TS 558; *SA Mutual Life Assurance Society v African Life Assurance Society Ltd* (1909) 19 CTR 38; *James Bruce & Co v Gilbey* 1914 CPD 789.

58 *Natal Land and Colonization Co Ltd v J W Rycroft* (1906) 27 NLR 215; *Muller v Phillips & Co* (1907) 24 SC 32. If the question of admissibility is left to be decided at the trial, the court may reserve the costs of the application as also the costs of the commission for decision by the trial judge (*Zackon & Gordon v Roux* 1933 (2) PH F117 (C); *Roux v Zackon, Gordon & Sovinsky (2)* 1933 (2) PH F190 (C); and see *Rafbros (Tvl) (Pty) Ltd v Nortier* 1968 (1) SA 160 (W)).

59 *Guggenheim v Rosenbaum (1)* 1961 (4) SA 15 (W) at 18.

60 Such evidence is usually inadmissible and leave will normally not be granted to take it on commission (*Guggenheim v Rosenbaum (1)* 1961 (4) SA 15 (W)).

61 *Rafbros (Tvl) (Pty) Ltd v Nortier* 1968 (1) SA 160 (W). See also *Hespel v Hespel* 1948 (3) SA 257 (E) at 261 and *Grant v Grant* 1949 (1) SA 22 (C) at 28.

62 *Carnes v Maeder* 1939 WLD 207.

63 *McLeod v Green and Sea Point Municipality* (1899) 16 SC 398; *Botha v Van der Vyver* (1908) 18 CTR 20; *Ex parte Brunt* 1916 CPD 579; *Shield Insurance Co Ltd v Deysel* 1978 (2) SA 164 (SE); and see *Joseph v Parker* 1917 EDL 281.

64 *Cohen v Cohen* (1884) 4 EDC 40; *Luckie v Oman* (1904) 14 CTR 515; *Batchelor v SA Breweries* (1904) 14 CTR 1021; *Delany v Medefindt* 1908 EDC 48; *Roycroft v Roycroft* (1909) 30 NLR 104; *Janisch v Herold* 1914 CPD 258; *Viking Corporation v Navigatione Libera Triestina* SA 1935 CPD 151; *Lindsay-Dickson v Southern Insurance Association Ltd* 1959 (1) SA 528 (D).

65 *Robinson v Randfontein Estates GM Co Ltd* 1918 TPD 420 at 422; *Johnson NO v Guernsey & Foreign Investment Trust Ltd* 1935 CPD 448; *Princess Eugenie of Greece v Prince Dominique Radziwill* 1949 (2) SA 259 (C); *Federated Insurance Co Ltd v Britz* 1981 (4) SA 74 (T); *Fernandes v Fittinghoff & Fihrer CC* 1993 (2) SA 704 (W) at 708G.

66 *Laatz v Potgieter* (1903) 24 NLR 228; *Dhooma v Pillay* (1906) 27 NLR 248; *Botha v Van Rooyen* (1909) 30 NLR 13; *Estate Bernhardt v Kent* (1910) 20 CTR 508; *Lloyd v Finnemore* 1917 EDL 270; *Gray v Gray* 1923 OPD 111.

67 *Trollip v Tromp and Van Zweel* (1880) 1 NLR 32; *Ex parte Preller qq Viljoen* (1883) 1 SAR 54; *Grand Junction Railway v Walker* (1905) 15 CTR 599; *Becker v Wolfaardt* (1906) 16 CTR 727; *Joseph v Parker* 1917 EDL 281.

68 In *Federated Insurance Co Ltd v Britz* 1981 (4) SA 74 (T) witnesses resident in England refused to testify in South Africa unless all their expenses and losses (including loss of earnings) as well as substantial additional payments were made to them. The party requiring their evidence declined to accede to these terms and the court dealt with the matter on the basis that the witnesses had refused to testify in South Africa. See also *Randgold & Exploration Co Ltd v Gold Fields Operations Ltd* 2020 (3) SA 251 (GJ) at paragraph [105].

69 *Robinson v Randfontein Estates GM Co Ltd* 1918 TPD 420 at 421. Other examples of civil matters in which commissions were granted

where witnesses were beyond the jurisdiction are: *National Bank of SA Ltd v Peel* (1909) 19 CTR 1011; *Pountas' Trustee v Coustas* 1924 WLD 170; *Howaldt & Volmer v Land & Agricultural Bank of SWA* 1924 SWA 91; *Hespel v Hespel* 1948 (3) SA 257 (E); *Grant v Grant* 1949 (1) SA 22 (C); *Federated Insurance Co Ltd v Britz* 1981 (4) SA 74 (T). Older cases, which should perhaps be treated with some circumspection in view of improvements in communication and transport, include *Ford v Greene* (1886) 7 NLR 136; *Escombe v Folkes* (1890) 11 NLR 68; *Raw & Co v Hugh Parker & Co* (1890) 11 NLR 112; *Bloemberger v Van Gorkum* (1894) Off Rep 159.

70 *Coronel v Cohen & Co* (1890) 11 NLR 85; *Moosajee v Randles Brothers & Hudson* (1894) 15 NLR 222; *Van Heerden v Jooste* (1917) 17 CTR 580; *Langerman v Milnerton Estates Ltd* 1912 CPD 870.

71 See *McEwan's Curators v Pietermaritzburg Corporation* (1885) 6 NLR 66; *Ex parte Wood v Wood* (1891) 6 EDC 163; *Bruhns v Frylinck* 1924 CPD 299.

72 *Robinson v Randfontein Estates GM Co Ltd* 1918 TPD 420 at 422.

73 *Janisch v Herold* 1914 CPD 258; *Shield Insurance Co Ltd v Deysel* 1978 (2) SA 164 (SE).

74 *Princess Eugenie of Greece v Prince Dominique Radziwill* 1949 (2) SA 259 (C); *Segal v Segal* 1949 (4) SA 86 (C) at 89.

75 *Kantor v James Bell & Co* (1906) 27 NLR 363; *Longe v Lageson* 1914 WLD 13; *Hespel v Hespel* 1948 (3) SA 257 (E) at 263; *Princess Eugenie of Greece v Prince Dominique Radziwill* 1949 (2) SA 259 (C); *Caldwell v Chelcourt Ltd* 1965 (2) SA 270 (N) at 272. Commissions to hear the evidence of plaintiffs were granted in *Escombe v Folkes* (1890) 11 NLR 68 and *Bloemberger v Van Gorkum* (1894) 1 Off Rep 159.

76 *Rollnick v Rollnick* 1923 (2) PH F16 (W); *Harris v Machanick* 1922 CPD 304; *Jacobson v Harkness* 1936 CPD 173; *Freedman v Bauer and Black* 1941 WLD 161 at 176; *Grant v Grant* 1949 (1) SA 22 (C) at 31; *Meyerson v Health Beverages (Pty) Ltd* 1989 (4) SA 667 (C) at 678D.

77 *Tipper & Good v Van den Burg* (1879) Kotzé 112; *Ex parte Crawford* (1885) 2 SAR 24.

78 *Morgan v Hiddingh* (1898) 8 CTR 318; a commission was granted in *Gotze v Bergl* (1904) 14 CTR 821.

79 *S v Ffrench-Beytagh (2)* 1971 (4) SA 426 (T) at 430. See also *Biet v Trubshawe* (1887) 8 NLR 35, *Pountas' Trustee v Coustas* 1924 WLD 170 at 172–3; *Rhodesian Railways Ltd v Markham & Willoughby's Consolidated Co Ltd* 1924 SR 57; *Princess Eugenie of Greece v Prince Dominique Radziwill* 1949 (2) SA 259 (C) at 264; *Hespel v Hespel* 1948 (3) SA 257 (E) at 265.

80 *Robinson v Randfontein Estates GM Co Ltd* 1918 TPD 420 at 422; and see *S v Hassim* 1972 (2) SA 448 (N) at 450E–G.

81 *Harris v Machanick* 1922 CPD 304; *Princess Eugenie of Greece v Prince Dominique Radziwill* 1949 (2) SA 259 (C); *Caldwell v Chelcourt Ltd* 1965 (2) SA 270 (N); *Federated Insurance Co Ltd v Britz* 1981 (4) SA 74 (T); *Fernandes v Fittinghoff & Fihrer CC* 1993 (2) SA 704 (W) at 709B.

82 *Montgomery v Montgomery* (1910) 20 CTR 9; *Lange v Lageson* 1914 WLD 13; *Hespel v Hespel* 1948 (3) SA 257 (E) at 265; *Federated Insurance Co Ltd v Britz* 1981 (4) SA 74 (T).

83 *Grant v Grant* 1949 (1) SA 22 (C) at 32; *Princess Eugenie of Greece v Prince Dominique Radziwill* 1949 (2) SA 259 (C) at 263; *Fernandes v Fittinghoff & Fihrer CC* 1993 (2) SA 704 (W) at 709C.

84 *Paarl Roller Flour Mills v Union Government* 1925 (1) PH F39 (C), following *Saninena Distributing Syndicate v Cape Cold Storage and Supply Co Ltd* (1908) 18 CTR 774.

85 In *Jacobson v Harkness* 1936 CPD 173 the registrar of the local court was authorized to appoint a substitute, while in *S v Ffrench-Beytagh (2)* 1971 (4) SA 426 (T) the commissioner himself was authorized to appoint a substitute in the event of it being impossible for him to attend.

86 *Wood Bros v Gardner* (1886) 5 EDC 223.

87 *Malan v Rosenburg & Bros* (1892) 6 EDC 223.

88 *'British Yeoman' v Hunt, Leuchars & Hepburn Ltd* (1912) 33 NLR 418.

89 *'British Yeoman' v Hunt, Leuchars & Hepburn Ltd* (1912) 33 NLR 418 at 419–22.

90 This was done in, for example, *Zackon & Gordon v Roux* 1933 (2) PH F117 (C); *Rafbros (Tvl) (Pty) Ltd v Nortier* 1968 (1) SA 160 (W).

91 See *Hamburg v Ohlsson's Cape Breweries Ltd* 1908 TS 924.

92 This course was adopted in *Hespel v Hespel* 1948 (3) SA 257 (E) at 265 and in *Federated Insurance Co Ltd v Britz* 1981 (4) SA 74 (T).

93 *May v Federal Supply and Cold Storage Co Ltd* (1904) 25 NLR 244.

94 *Policansky Bros v Hermann & Canard* 1911 TPD 319.

95 *Don v Erasmus* (1881) Kotzé 254; *Hall v Compagnie Francais* (1883) 1 HCG 335; *Schnitzler v Trustees of the Insolvent Estate of Schnitzler and Peyke* (1892) 6 EDC 190; *Hamburg v Ohlsson's Cape Breweries Ltd* 1908 TS 924 at 928; *Durban Corporation v Pather* (1909) 30 NLR 96.

96 *McLeod v Green and Sea Point Municipality* (1899) 16 SC 398; *Estate Bernhardt v Kent* (1910) 20 CTR 508; *Ex parte Brunt* 1916 CPD 579.

97 *Cullen v Cullen* (1887) 8 NLR 34; *Delany v Medefindt* 1908 EDC 48; *Roycroft v Roycroft* (1909) 30 NLR 104; *Kalan v Kalan* 1930 CPD 230; *Viking Corporation v Navigatione Libera Triestina SA* 1935 CPD 151; *Lindsay-Dickson v Southern Insurance Association Ltd* 1959 (1) SA 528 (D); *Smitham v De Luca* 1977 (2) SA 582 (W).

98 *Natal Land and Colonization Co Ltd v Stainbank* (1884) 5 NLR 186; *Master and Owners SS 'Hilcrag' v Beckett* (1902) 23 NLR 450.

99 (1908) 18 CTR 20.

100 (1881) 1 SC 139. See also *Ex parte Aitchison* 1906 TS 7; *Ex parte Lesser* (1910) 20 CTR 165. In *Ex parte Buxbaum* (1939) 56 *SALJ* 113 (T) leave was refused at this stage.

101 *Howaldt & Vollmer v Land & Agricultural Bank of SWA* 1924 SWA 91.

102 1961 (4) SA 15 (W).

103 *Guggenheim v Rosenbaum (1)* 1961 (4) SA 15 (W) at 18C.

104 *Grant v Grant* 1949 (1) SA 22 (C) at 30; *Meyerson v Health Beverages (Pty) Ltd* 1989 (4) SA 667 (C) at 678G.

105 *Matthews v Hartley & Son* (1882) 1 HCG 13; *Fleischer v Klassen* (1883) 3 EDC 207.

106 *Botma v Norton* (1905) 22 SC 65. See also *Fleischer v Klassen* (1883) 3 EDC 207.

107 *Shaw's Trustee v Alcott* (1886) 5 EDC 122; *Bradley v Barr* (1901) 6 HCG 120.

108 *Brittain v Pickburn* 1929 CPD 436; *Segal v Segal* 1949 (4) SA 86 (C); *Randgold & Exploration Co Ltd v Gold Fields Operations Ltd* 2020 (3) SA 251 (GJ) at paragraphs [48] and [109].

109 See *Randgold & Exploration Co Ltd v Gold Fields Operations Ltd* 2020 (3) SA 251 (GJ) at paragraph [109].

110 There is such legislation in, for example, neighbouring countries such as Botswana, Lesotho, Swaziland and Zimbabwe.

111 See GN R1271 of 30 October 1997 in *GG* 18316 of 3 October 1997.

112 See also *Randgold & Exploration Co Ltd v Gold Fields Operations Ltd* 2020 (3) SA 251 (GJ) at paragraph [48].

113 2020 (3) SA 251 (GJ).

114 At paragraph [150].

115 *Robinson v Benson and Simpson* 1918 WLD 1 at 7.

116 In *De Jong v Durbach & Co* (1923) 1 PH F3 (GW) a judgment was set aside where the only evidence justifying the judgment was hearsay evidence taken on commission.

117 *Smith v Smith* (1903) 24 NLR 38.

118 Under GN 1603 0f 17 December 2022 (*GG* 45645).

119 2017 (1) SA 236 (GJ). See also *M K v Transnet Ltd t/a Portnet* [2018] 4 All SA 251 (KZD); and see *Hills v Hills (II)* 1933 NPD 293 at 294–5; I Knoetze 'Virtual evidence in courts — a concept to be considered in South Africa' 2017 (October) *De Rebus* 30–1; N Whitear-Nel 'Video-link testimony in civil courts in South Africa: K v Transnet Ltd t/a Portnet (KZD)' (2019) 136.2 *SALJ* 245.

120 2020 (3) SA 251 (GJ).

121 At paragraph [150].

122 Proclamation Notice R 75 of 2022 dated 4 August 2022.

123 See, in this regard, the notes to s 37C s v 'General' in Volume 1 third edition, Part D.

124 *Rennies Travel (Pty) Ltd v Commissioner, South African Revenue Services* 2022 (6) SA 349 (SCA) at paragraph [5].

125 See, for example, the following measures that were proposed in *Union-Swiss (Pty) Ltd v Govender* 2021 (1) SA 578 (KZD) at paragraph [10]:

'23.1 When not speaking all participants will be required to mute their devices (so as to prohibit background noise);
23.2 When a participant is introduced or wishes to interrupt a speaker, he/she shall raise his/her hand;
23.3 Headsets should not be allowed;
23.4 The presiding Judge, the witness giving evidence and lead counsel for both parties shall remain visible on video at all times;
23.5 Each witness, at the outset of their testimony, will be asked to identify anyone who is in the room with them and to give a display on their device of the room from where they are testifying to verify that fact;

23.6 During their testimony, witnesses must not communicate with anyone other than the examiner and the Judge and must not refer to documents other than those in the agreed trial bundle without the Judge's knowledge and permission;

23.7 Each witness shall give his/her evidence sitting at an empty desk or table and the witness's face shall be clearly visible throughout the hearing;

23.8 Each witness shall at all times during his/her testimony and as far as possible: (i) maintain eye contact with the camera of the relevant device that the witness is using and (ii) maintain a reasonable distance from the camera to ensure that the witness's head and upper body are visible.'