



Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO

**IN THE HIGH COURT OF SOUTH AFRICA  
NORTH WEST DIVISION - MAHIKENG**

**CASE NO.: 525/2014**

In the matter between:

**HERLAN LANCE KRUGER**

Plaintiff

And

**MINISTER OF SAFETY AND SECURITY**

Defendant

**Delivered:** This judgment is handed down electronically by circulation to the parties through their legal representatives' email addresses. The date for the hand-down is deemed to be **29 January 2025**.

**JUDGMENT**

**Makoti AJ**

**Introduction**

[1] This is a matter with a long history, with liability having been

decided by Gutta J 06 April 2017. The outcome was in the applicant's favour, the court issuing an order that: "*The plaintiffs claim for unlawful arrest and detention is granted with costs.*" That means the respondent was held liable for the damages suffered by the applicant due to his unlawful arrest and detention by the members of the South African Police Service, in particular by Warrant Officer T Nkgodi.

[2] The applicant who is a plaintiff in the action proceedings is pursuing the final leg of the claim, which entails the quantification of the damages suffered. To achieve that the applicant has procured several medico legal reports which he intends using to guide the court in its determination of the compensation amount.

[3] By this application the applicants seeks an order to be authorised in terms of Rule 38(2) to lead the evidence of the expert witnesses who compiled the medico legal reports through the use of affidavits. Below is a list of the expert witnesses whose evidence the applicant wishes for the court to accept on affidavit:

1.1. M Tsambos (Clinical Psychologist);

1.2. Helen Robinson (Occupational Therapist);

1.3. Dr RS Leshilo (Psychiatrist); and

1.4. Dr Ben Moodie (Industrial Psychologist); and

1.5. L du Plessis (Actuary).

[4] The application in terms of Rule 38(2) is opposed by the respondent who intends to cross-examine the witnesses in court, but without the filing of an opposing affidavit.

### **Applicable legal principles**

[5] At the outset, the subrule requires that evidence in action matter should be *viva voce*. Then it introduces the exception in terms whereby evidence in such cases may be accepted on affidavit. The subrule 38(2) states that:

“The witnesses at the trial of any action shall be examined viva voce, but a court may at any time, for sufficient reason, order that all or any of the evidence to be adduced at any trial be given on affidavit or that the affidavit of any witness be read at the hearing, on such terms and conditions as to it may seem meet: Provided that where it appears to the court that any other party reasonably requires the attendance of a witness for cross-examination, and such witness can be produced, the evidence of such witness shall not be given on affidavit.” (Emphasis added)

[6] In *Bafokeng Land Buyers Association and Others v Royal*

*Bafokeng Nation*<sup>1</sup> the court held *inter alia* that:

[63] *Rule 38(2) contains an exception to this general rule. An applicant who seeks to invoke the exception must prove that "sufficient reason" exists to do so. While this requirement confers a broad discretion on a Court, in determining whether sufficient reason exists a Court must bear in mind the disadvantages above of permitting this to both the Court and the other side, and then consider whether the interests of justice nonetheless requires that the evidence be admitted on affidavit. The Rule also contains an express proviso limiting the Court's discretion, namely that where it appears to the Court that a party reasonably requires the attendance of the witness for cross examination, and the witness can be produced, then the evidence of the witness shall not be given on affidavit.* (Emphasis added)

[7] The employment of the word ‘*may*’ in the rule signifies the discretion of the court to decide whether to permit or to refuse the request to adduce evidence by means of affidavits. However, as expressed in the above extract from *Royal Bafokeng*, the court’s discretion is limited where a party in the proceedings requires the appearance of the witnesses for purposes of cross-examination.

[8] Though the case was with reference to the importance of section 35 of the Constitution in criminal proceedings, the principles of fair trial expressed by the court in *S v Gumede* are equally trite in civil

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<sup>1</sup> *Bafokeng Land Buyers Association and Others v Royal Bafokeng Nation and Others* (CIV APP 3/17) [2018] ZANWHC 5; [2018] 3 All SA 92 (NWM); 2018 (5) SA 566 (NWM) (9 March 2018).

actions.<sup>2</sup> Reddy AJ, as he was then, posited the principle thus:

[25] ... It is essential in a society which recognises the rights to human dignity and to the freedom and security of the person, and is based on values such as the advancement of human rights and freedoms, the rule of law, democracy and openness. The importance and universality of the right to a fair trial is evident from the fact that it is recognized in key international human rights instruments. Every person in South Africa has the right to a fair trial. This is a fundamental right enshrined in the Constitution of the Republic of South Africa. This, in essence, is what makes cross-examination important. Cross-examination allows the accused and the defendant to thoroughly analyse and challenge the evidence brought forward by opposing witnesses. Cross-examination is a right and preventing cross-examination from happening might violate the fundamental right to a fair trial.”

[9] Bearing the importance of the right to fair trial in mind, courts have allowed evidence on affidavit where fairness considerations favoured such approach. How to approach an application in terms of rule 38(2) was decided by the Supreme Court of Appeal in *Madibeng Local Municipality v Public Investment Corporation*<sup>3</sup> in the following manner:

[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

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<sup>2</sup> S v Gulekane (HC 04/23) [2023] ZANWHC 206 (14 November 2023).

<sup>3</sup> Madibeng Local Municipality v Public Investment Corporation Ltd (603/2017) [2018] ZASCA 93; 2018 (6) SA 55 (SCA) (1 June 2018).

*appropriate and suitable in the circumstances 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."*  
(Emphasis added)

[10] The parties do not agree as to the using of affidavits for the production of evidence. The applicant's case is that it will help the parties to minimise costs if the court allows that the evidence of the expert witnesses be adduced through affidavits. The respondent asserts the right to cross-examine the witnesses, whatever the costs implications there may be.

[11] Although I am mindful that calling the witnesses will greatly extend the litigation costs, I do not deny the respondent an opportunity to cross-examine the expert witnesses. Every litigant has the right to not only produce own evidence, but to cross-examine witnesses during trial. Such right should not be easily taken away. Therefore, this application fails.

## **Order**

[12] I make the following order:

[a] The application to adduce evidence of the applicant's

witnesses at the trial is dismissed with costs on party and party scale A.



**M. Z. MAKOTI**

**ACTING JUDGE OF THE HIGH COURT  
NORTH WEST DIVISION**

**APPEARANCES:**

<b>FOR APPLICANT</b>	<b>:</b>	<b>ADV C ZWIEGELAR WJ COETZER ATTORNEYS C/O LABUSCHAGNE ATTORNEYS MAHIKENG</b>
<b>FOR FIRST RESPONDENT</b>	<b>:</b>	<b>ADV T SEBOKO STATE ATTORNEYS MMABATHO</b>
<b>DATE HEARD</b>	<b>:</b>	<b>31 JULY 2024</b>
<b>DATE DELIVERED</b>	<b>:</b>	<b>29 JANUARY 2025</b>