EVOLUTION OF THE POWERS OF THE JUDGE AND THE POWERS OF THE PARTIES REGARDING TAKING OF EVIDENCE

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1. Introduction

The word "*procedure*" inherently means "*going forward*".[1] Viewed as such, civil procedure not only aims at moving forward the dispute between the parties up to the point of its eventual determination by a court, but also aims at reflecting the evolution (i.e. change) of society and its needs. Since all legal systems are closely linked to their historical, cultural, socio-economic, political, etc, milieu in which they have developed and find application, the degree of the powers of the judge and the powers of the parties regarding taking of evidence in a given system must necessarily depend upon a variety of factors, juridical and non-juridical, that determines its character. As far back as 1975, Jolowicz[2] stated the following in this regard:

"*The essential question, to which each country must work out its own answer, concerns the extent to which the powers of the court can be increased without thereby sacrificing other values which are held to be vital to the due administration of civil justice.*"

In this presentation the focus will be directed at the South African adversarial system of civil procedure which owes its origin to that of England.[3] It, however, materially steered an independent course in its development since its implementation

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[1] Bernhardt *Das Zivilprozessrecht* 3ed (1968) correctly states that a legal procedure is "als Lebensvorgang betrachtet, ein *Verfahren*. Daher kommt auch der Name: processor (procedure – vorwärtschreiten)."

[2] Cappelletti and Jolowicz *Public Interest Parties and the Active Role of the Judge in Civil Litigation* (1957) 272.

[3] See Erasmus "Historical Foundations of the South African Law of Civil Procedure" (1991) 108 *The South African Law Journal* 265.

by the English in 1828.[4]

In terms of the Constitution of the Republic of South Africa, 1996, the courts in South Africa consist of:

(a) The Constitutional Court;

(b) The Supreme Court of Appeal;

(c) The High Courts;

(d) The Magistrates' Courts.

Although courts of appeal are entitled, on the hearing of an appeal, to receive further evidence,[5] the focus will be placed on the taking of evidence in courts of first instance, and in particular, the High Courts as courts of first instance in contradistinction to being courts of appeal also.

2. Civil procedure in the High Courts: a traditional perspective

In this regard the presentation is confined to the action procedure.[6]

The civil procedure in the High Courts distinguishes clearly between the pre-trial and trial stages. The pre-trial stage is subdivided in the pleading, discovery and preparation for trial stages. The trial, in turn, is a continuous process which is characterised by the immediate (direct) and, mainly, oral presentation of evidence.

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[4] The South African law is *sui generis*: its substantive law is of civil law (i.e. Roman-Dutch) origin whereas its civil procedural law is mainly of common law origin. In other words, it is a mixed legal system.

[5] Section 22(*a*) of the Supreme Court Act 59 of 1959, which provides as follows:

> "The appellate division or a provincial division, or a local division having appeal jurisdiction, shall have power-
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> *(a)* on the hearing of an appeal to receive further evidence, either orally or by deposition before a person appointed by such division, or to remit the case to the court of first instance, or the court whose judgment is the subject of the appeal, for further hearing, with such instructions as regards the taking of further evidence or otherwise as to the division concerned seems necessary."

[6] The rules of the High Courts also make provision for an application procedure, namely a procedure where the cause of action and defence, respectively, are set out in affidavits supported by the necessary and relevant factual evidence.

2.1 *Commencement of proceedings and the determination of issues*

The plaintiff institutes the action by issuing a summons that is normally accompanied by an annexure containing all the material facts upon which the plaintiff relies to support his claim. These facts should be set out with sufficient particularity to enable the defendant to reply thereto, otherwise the latter may except thereto or apply to court to have it set aside as an irregular step. The summons is served upon the defendant, who must thereupon, if he wishes to defend the action, deliver a notice of intention to this effect. Thereafter the defendant must, within a stated time, deliver a plea in which he must answer all the allegations of the plaintiff and set out all the material facts upon which he relies. Once again, these facts must be set out in sufficient particularity to enable the plaintiff to reply thereto, if necessary. Although the rules of court make provision for pleadings other than the plaintiff's particulars of claim (contained in the annexure attached to the summons) and the defendant's plea, these two are the most important. The purpose of the pleadings is to apprise each party of the nature of his opponent's case, while their function is to determine the issues which are to be tried by the court. The pleading stage is, therefore, traditionally characterised by party control.

2.2 *The discovery stage*

After the close of pleadings, the action proceeds through the next stage where the emphasis is on discovery of documents, the procedural requirements in regard to expert evidence, the steps to be taken by the parties in order to obtain statements of witnesses in support of their respective cases, and steps to be taken in order to ensure the presence of witnesses at the trial. Traditionally the preparatory stage is also dominated by the parties. It is for the parties to take the initiative in regard to all these procedures. As a general rule the court exercises no control over the development of this phase of the proceedings, except in so far as it may be called upon to resolve a dispute relating to one or the other of the procedures involved.

2.3 *The pre-trial conference*

Traditionally the parties must hold a pre-trial conference in order to endeavour to limit the issues between them, in other words, to curtail the duration of the trial, narrow down issues, cut costs and facilitate settlements.[7] The pre-trial conference is not meant to be a full preparation for trial; it is a stocktaking of possible co-operation in steps which will limit or prevent avoidable effort and costs.[8]

Traditionally the parties are in control of the pre-trial conference.

2.4 *The trial*

The trial is a 'single continuous drama' where the parties present all the evidentiary material at their disposal to establish their respective cases, whereafter the judge gives a judgment based upon such material. During the trial the judge is constrained to adopt a passive and neutral attitude lest it be seen that the judge "*descends into the arena and be liable to have his vision clouded by the dust of the conflict*".[9] The judge may, however, put questions to a witness in order to clarify obscure points and it is the judge's duty to see to it that the legal representatives appearing on behalf of the parties behave themselves seemly and comply with the prescribed procedure. The judge is not allowed to go beyond this, by, for example, putting questions to witnesses in the form of cross-examination or to call witnesses not called by the parties out of his own accord.

3. The action procedure in the High Courts: a developmental perspective

The greatest historical and contemporaneous challenge facing South African civil procedure is that of making litigation less costly and the courts more accessible to a far greater number

[7] *Road Accident Fund v Krawa* 2012 (2) SA 346 (ECG) at 353H-354A.
[8] *Lekota v Editor, 'Tribute' Magazine* 1995 (2) SA 706 (W) at 709A.
[9] Per Lord Greene in *Yuill v Yuill* 1945 All ER 183 (CA); and see *Hamman v Moolman* 1968 (4) SA 340 (A) at 344E-G.

of people. Throughout the years the legislators, in attempts to address this challenge, have framed various rules of court and/or practice directives. Each of these attempts mainly focussed on a more active role of the court in the preparation for trial stage, in other words, was aimed at enhancing the concept of judicial activism or, as it is called lately, judicial oversight. The following are examples of such attempts:

3.1 During January 1994 the rules of the High Courts were amended by the inclusion, in the rule dealing with pre-trial conferences,[10] of, *inter alia*, the following provisions:

> "*(8)(a) A judge, who need not be the judge presiding at the trial, may, if he deems it advisable, at any time at the request of a party or* ***mero motu****, call upon the attorneys or advocates for the parties to hold or to continue with the conference before a judge in chambers and may direct a party to be available personally at such conference.*
>
> *(b) …*
>
> *(c) The judge may, with the consent of the parties and without any formal application, at such conference or thereafter give any direction which might promote the effective conclusion of the matter …*".

It is clear from the wording of the rule that a judge can give a direction only with the consent of the parties, i.e. party control prevails. If there is no agreement between the parties in respect of, for example, factual admissions or expert evidence, a judge has no power to compel a party to agree to any matter in that regard.

3.2 During April 1996 practice directions in respect of commercial actions were issued in the then Witwatersrand Local Division of the High Court.[11] The practice directives empower parties to jointly apply for

[10] Rule 37.
[11] Now the South Gauteng High Court, Johannesburg.

an action to be designated a commercial action and have same decided by the commercial court of the Witwatersrand Local Division. Rules 8 to 10 of the practice directives read as follows:

"*8 Any party to a commercial action may upon notice to all other parties, apply to the nominated judge in chambers, for an order for directions. Upon such an application, the nominated judge may make such order as he deems appropriate to ensure the just, expeditious and satisfactory determination of the issues between the parties. It may where appropriate* ***inter alia*** *provide for and regulate the following matters:*

8.1 A written statement of the issues between the parties.

8.2 The separation of issues in terms of rule 33(4).

8.3 The discovery and exchange of documents.

8.4 The exchange of expert summaries or reports.

8.5 The identification of witnesses of fact and the exchange of statements or summaries of their evidence.

8.6 The order in which the parties are to present their evidence at the trial.

8.7 Any other matters required to be dealt with at a pre-trial conference in terms of rule 37.

9 The nominated judge may at any time of his own accord or on application by any party, issue, supplement or amend an order for direction, it he deems it appropriate to do so.

10 No order that witnesses' statements be exchanged will be made without the consent of all parties to the action."

As far as the taking of evidence is concerned, party control clearly prevails. The nominated judge has no power to take evidence and may not make an order that witness' statements be exchanged without the consent of all the parties to the action. These practice directives are hardly used by parties to a commercial action nowadays.

3.3 During the recent past numerous High Courts have adopted practice directives dealing with pre-trial conferences and case management.[12] Except for requiring that summaries of expert witnesses must be properly and sufficiently prepared by the parties, these practice directives lack provisions dealing with the taking of evidence by the court and/or the parties. Thus, the traditional position in respect of party control in the taking of evidence prevails.

3.4 During 2010 the South African Government, via the Office of the Chief Justice, embarked upon an attempt to address the need for reform. In a statement on the Cabinet Meeting that was held on 5 May 2010 the following is said:

"*Cabinet discussed the Civil Justice Reform Project that seeks to improve the efficiency of the civil justice system. The primary objective of the project is to provide a speedy, affordable and simple process for resolution of civil disputes. The terms of reference for the project will entail investigation of the following elements: increasing the effectiveness of the civil courts; the impact and effectiveness of the current legislation on the civil justice system, simplification of court procedures and processes, modernisation of the court's system; effective case management; and harmonisation of the court rules.*"

In pursuance of the aforesaid a judicial Case Flow Management Committee was established consisting of

[12] See, in this regard, the Consolidated Practice Notes of the Western Cape High Court, Cape Town; the Eastern Cape Rules of Practice; the North Gauteng High Court, Pretoria, *Practice Manual*; the South Gauteng High Court, Johannesburg, *Practice Manual*; the *Practice Manual* of the KwaZulu-Natal High Court; the Practice Directives of the North West High Court, Mafikeng and the Practice Directives of the Limpopo High Court, Thohoyandou.

senior judges of the Constitutional Court, the Supreme Court of Appeal and the various High Courts.

The Committee has overseen the drafting of a practice directive which was disseminated to the various heads of court of the High Courts for their inputs. A copy of the draft practice directives (dated 1 October 2012) is annexed hereto, marked **"A"**. The draft practice directive, *inter alia*, makes provision for the following:

3.4.1 An initial case management conference to be held before a judge where, amongst others, the admission of facts and other evidence by consent of the parties must be discussed. The judge may from time to time schedule, or the parties may from time to time request, additional case management conferences where, amongst others, the admission of facts and other evidence by consent of the parties could be discussed and agreed upon. Prior to the trial in any case, the judge must hold a final pre-trial conference at which the parties must table a joint proposed final pre-trial order in which the following must be addressed:[13]

(a) All issues of fact to be resolved at the trial;

(b) All issues of law to be resolved at the trial;

(c) All relevant common cause facts;

(d) All exhibits to be introduced into evidence during the trial, identified by the party that intends to introduce the exhibit;

(e) All objections to exhibits.

3.4.2 Issues and objections not specified in the final pre-trial order are not available to the parties at the trial.

[13] This is a far cry from civil procedure rule 32.1 in England which empowers the court to "control evidence" by giving directions on the issues on which it requires evidence, on the nature of the evidence that it requires to determine those issues, and on the manner in which the evidence is to be placed before court.

Although the draft practice directive extensively makes provision for judicial oversight, the taking of evidence and the limitation of issues of facts are still in the hands of the parties, in other words, party control prevails. This is, further, illustrated by paragraph *(b)* of the standard draft case management order which reads as follows:

"*All documents contained in the trial bundle are what they purport to be, without either party necessarily thereby admitting the correctness of the content thereof, but no document may be relied on as proof of a fact or facts unless the document was pertinently referred to either in an opening address or in the course of evidence.*"

The draft practice directive was met with opposition from the Bar (i.e. the advocates profession) as well as the side Bar (the attorneys profession). Amongst the criticism is that the proposals may threaten judicial independence and impartiality since, on the one hand, they will require judges to adopt a more administrative and management role (for which they are not suited by the nature of their office), whilst, on the other hand, trial judges will be required to delve into the merits of the dispute at an early stage, thereby substantially increasing the possibilities that the parties and the issues may be pre-judged. In short, judges are primarily there to hear and decide cases and are by and large not supposed to be involved in the developing of the litigation process.

In its response to the draft practice directive, the Pretoria Society of Advocates, of which I am a member, raised various issues. It, *inter alia*, stated:

"*… Both the previous draft Practice Directive and the 2012 Practice Directive provide in paragraph 15 thereof as follows:*

'If a party or his or her legal representative fails without lawful cause to attend an initial case management conference, additional case management conference or final pre-trial conference,

fails to participate in the preparation of a case management report or proposed final pre-trial order, fails to adhere to the terms of a case management order or final pre-trial order, or fails to participate in the case management or final pre-trial processes in good faith, the Judge may issue such orders as are just, including but not limited to the following-

(a) an order refusing to allow the defaulting party to advance or oppose designated claims or offences, or prohibiting that party from introducing designated issues in evidence;

(b) an order striking out pleadings or parts thereof;

(c) an order dismissing a claim or entering final judgment;

(d) an order requiring the defaulting party or his or her legal representative to pay the other party's costs caused by the default.'

9.

In our submission such powers are draconian and cannot, in law, be acquired by means of a mere ad hoc Practice Directive. The constitutionality or otherwise of the powers also needs to be carefully considered. Furthermore, material questions such as the following arise:

9.1 Would the trial court be bound by an order contemplated in, for example, paragraphs 15(a) or (b)?

9.2 What remedies will a party against whom any of the orders contemplated in paragraph 15 have if, for example, the case management judge has not exercised his or her discretion in a judicial manner or if it appears that such judge has been influenced by wrong principles or a misdirection on the facts, etc?

9.3 Is there a right of appeal in the aforesaid

circumstances, or not?

9.4 If there is, how does the exercise of such a right enhance the principle of procedural economy[14] and access to justice?

9.5 If there is not such a right, why not?

10.

A further question that arises is whether the case management judge may, in view of the active role that he or she played in the arena of case management, ultimately hear the case. In our view, this is not desirable.

11.

Lastly, we submit that it is common knowledge that the judges in the North and South Gauteng High courts have a very heavy workload. In our view they should not be unnecessarily burdened with case administration over and above their primary role as adjudicators. If they are, a real danger exists that it could have a detrimental effect on their primary role, for example, it may hamper their reading time in preparation for cases and it may cause judgments not to be delivered within a reasonable time."

4. The power of the parties in taking of evidence

Over the years the "powers" of the parties in taking and presenting evidence[15] have been evolved by the legislature and the courts. Examples of such evolution include the following:[16]

4.1 Whenever a commercial bank claims payment of money said to be owing to it by a customer who enjoys

[14] In terms of this principle cases must be disposed of within a reasonable time and with reasonable costs.

[15] The South African law of evidence is based on that of England as at 30 May 1961. See, in this regard, Zeffertt and Paizes *The South African Law of Evidence* 2ed (2009) 13 *et seq*.

[16] Section 35(5) of the Constitution of the Republic of South Africa, 1996, which provides as follows, does not pertain to civil proceedings but only to criminal proceedings:

> "Evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice."

overdraft facilities on a current account which fluctuates, possibly from day to day, it must needs rely on its books of account and other records of transactions in order to establish the amount due to it by the customer or by a person who bound himself as surety and co-principal debtor. To prove every one of the many entries in the books, which may have been made from time to time by a large number of different employees, might for obvious reasons sometimes be extremely difficult. It has, therefore, become customary for commercial banks to include in its agreements with customers and sureties, a clause to the effect that a certificate purportedly signed by any manager of the bank would constitute *prima facie* evidence of the nature of the debt and of the amount due by the debtor to the bank and, further, that such certificate would on its mere production in a court constitute such evidence. In *Senekal v Trust Bank of Africa Ltd*[17] the Appellate Division (now the Supreme Court of Appeal) approved of the use of such certificates.[18]

4.2 The Electronic Communications and Transactions Act 25 of 2002,[19] *inter alia*, provides[20] that a data message[21] made by a person in the ordinary course of business, or a copy or printout of or an extract from such data message certified to be correct by an officer in the service of such person, is on its mere production in any civil proceedings admissible in evidence against any person and rebuttable proof of the facts contained in such record, copy, printout or extract. Pursuant to this provision commercial banks are, for example, empowered to prove bank statements by means of its mere production in civil proceedings.

4.3 Section 3 of the Law of Evidence Amendment Act 45 of

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[17] 1978 (3) SA 375 (A).

[18] It is upon the debtor to rebut the *prima facie* evidence. If the *prima facie* evidence remains unrebutted at the close of the case, it becomes sufficient proof of the facts set out in the certificate.

[19] The Act came into force on 30 August 2002. For a more comprehensive treatment of the law, see Hofman "Electronic Evidence in South Africa" in *Electronic Evidence* (2007).

[20] In section 15 thereof.

[21] Section 1 of the Act defines "data" as meaning "electronic representation of information in any form" and a "data message" as meaning "data generated, sent, received or stored by electronic means and includes- *(a)* voice, where the voice is used in an automated transaction; and *(b)* a stored record".

1988 has empowered the parties to take and present hearsay evidence under certain conditions. It has revolutionised the approach to hearsay evidence.[22] Section 3 reads as follows:

"*3.(1) Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless-*

(a) each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings;

(b) the person upon whose credibility the probative value of such evidence depends, himself testifies at such proceedings; or

(c) the court, having regard to-

(i) the nature of the proceedings;

(ii) the nature of the evidence;

(iii) the purpose for which the evidence is tendered;

(iv) the probative value of the evidence;

(v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;

(vi) any prejudice to a party which the admission of such evidence might entail; and

(vii) any other factor which should in the opinion of the court be taken into account,

is of the opinion that such evidence should be admitted in the interests of justice.

[22] See, in general, Zeffertt and Paizes *The South African Law of Evidence* 2ed (2009) at 389 *et seq*.

(2) The provisions of subsection (1) shall not render admissible any evidence which is inadmissible on any ground other than that such evidence is hearsay evidence.

(3) Hearsay evidence may be provisionally admitted in terms of subsection (1)(b) if the court is informed that the person upon whose credibility the probative value of such evidence depends, will himself testify in such proceedings: Provided that if such person does not later testify in such proceedings, the hearsay evidence shall be left out of account unless the hearsay evidence is admitted in terms of paragraph (a) of subsection (1) or is admitted by the court in terms of paragraph (c) of that subsection.

(4) For the purposes of this section-

'hearsay evidence' means evidence, whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence;
'party' means the accused or party against whom hearsay evidence is to be adduced, including the prosecution."

4.4 Inspections *in loco* are principally intended to enable the court to follow and apply the evidence, but may also include some real evidence that is led in the trial. In *Kruger v Ludick*[23] the practice in these matters was described as follows:

"*It is important, when an inspection **in loco** is made, that the record should disclose the nature of the observations of the court. That may be done by means of a statement framed by the court and intimated to the parties who should be given an opportunity of agreeing with it or challenging it, and if, if they wish, of leading evidence to correct it. Another method, which is sometimes convenient, is for a court to obtain the necessary statement from a witness, who is called, or recalled, after the inspection has been made. In such a*

[23] 1947 (3) SA 23 (A) at 31.

case, the party should be allowed to examine the witness in the usual way."

5. Conclusion

South African civil procedure is traditionally characterised by a closed pre-trial stage. This entails that the parties, at this stage, disclose to each other as little as possible of their respective cases and strategies. Part and parcel of this system is the rule that, subject to certain exceptions, a party is not entitled to be apprised, prior to the trial, of the evidence that such party's opponent intends to present at the trial. The main effect of this rule is that the statements of witnesses on factual issues (i.e. lay witnesses) are protected from being disclosed before the trial. Since they have been obtained in anticipation of litigation, they are subject to legal professional privilege. The result is that the surprise element plays a major role in the context of the presentation of oral evidence at the trial. This could, in certain instances, result in "trial by ambush".[24]

As a general rule, lawyers are creatures of habit and those in South Africa are no exception. Their resentment to the extension of the powers of a judge in respect of the taking of evidence and overseeing party control is clearly demonstrated in this presentation. In this regard it is significant that the Supreme Court of Appeal recently, in another context, stated:[25]

"*A more active role in managing the litigation does not permit the judge to enter the arena or take over the running of the litigation.*"

In the premises, there is currently no talk in South Africa of "going forward" as far as the powers of the judge regarding taking of evidence are concerned. The parties remain in control of the taking of evidence, and distinctly so.

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[24] See, De Vos "Die openbaarmaking van getuieverklarings voor 'n siviele verhoor" ("The disclosure of witness statements prior to a civil trial") (1993) 2 *Journal of South African Law* 261 at 276.

[25] *City of Johannesburg v Changing Tides 74 (Pty) Ltd* 2012 (6) SA 294 (SCA) at 313B.