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THE ROLE OF EXPERT EVIDENCE IN CIVIL LITIGATION: A CRITICAL ANALYSIS (PART 1)

SUMMARY

Section 34 of the *Constitution of the Republic of South Africa* provides that everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum. A number of foundational principles that underlie the South African law of civil procedure had been afforded express recognition by this section. One of these principles entail that the duration and costs of civil litigation should be reasonable. In the past decade, or so, there have been several initiatives to give effect to this ideal of civil justice for all. Despite this, there are still several impediments in the South African law that causes civil trials too be exorbitant and time-consuming. One of these impediments relate to the presentation of expert evidence testimony. Part one of this article will critically discuss the historical development of Uniform Court Rule 36(9), its recent amendments and the critique raised against the procedure. In part two the position in relation to the presentation of expert witness evidence in England and Wales, and Australia, as well as its possible contribution to the South African law will be discussed. It will be argued that the current procedure relating to the presentation of expert evidence in South Africa still has certain shortcomings and that the Rules Board will have to intervene to ensure that the procedure enhances access to justice in civil matters.

1. INTRODUCTION

Sec. 34 of the *Constitution of the Republic of South Africa*, 1996 (hereafter the *Constitution*) provides that everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum. A number of foundational principles that underlie the South African law



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of civil procedure had been afforded express recognition by this section. One of these principles entail that the duration and costs of civil litigation should be reasonable. In the past decade, or so, there have been several initiatives to give effect to this ideal of civil justice for all. Despite this, there are still several impediments in the South African law that causes civil trials too be exorbitant and time-consuming. One of these impediments relate to the presentation of expert evidence testimony. Part one of this article will critically discuss the historical development of Uniform Court Rule 36(9), its recent amendments and the critique raised against the procedure. In part two the position in relation to the presentation of expert witness evidence in England and Wales, and Australia, will be discussed as well as its possible contribution to the South African law. It will be argued that the current procedure relating to the presentation of expert evidence in South Africa still has certain shortcomings and that the Rules Board will have to intervene to ensure that the procedure enhances access to justice in civil matters.

2. HISTORICAL DEVELOPMENT

In Roman times, expert assistance was used by tribunals on a variety of issues. It seems as if the expert's opinion was definitive and that it probably formed part of the final judgment.¹

The general rule in South African law is that opinion evidence by witnesses is not admissible. May aptly describes the position as follows:

The general rule is that the evidence of opinion or belief of a witness is irrelevant because it is the function of a court to draw inferences and form its opinion from facts; the witnesses give evidence as to the facts, the court forms its opinion from those facts.²

There are several exceptions to this general rule. One of these exceptions relate to the presentation of expert evidence. In *Coopers (South Africa) (Pty) Ltd v Gesellschaft für Schädlingsbekämpfung MBH*³ it was held that it is the court's duty to draw inferences from the facts established by the evidence. There are, however, instances where the court is, by reason of a lack of special knowledge and skill, not sufficiently informed to do so. In such cases, the evidence of expert witnesses may be received because, as a result of their special knowledge and skill, they are better qualified to draw inferences than the trier of fact. On some subjects the court is usually incapable of forming an opinion without expert assistance, and others where it could come to an independent conclusion, but the assistance of an expert would be useful.⁴

1 Meintjies-Van der Walt 2000:218.

2 May 1954:260.

3 *Coopers (South Africa) (Pty) Ltd v Gesellschaft für Schädlingsbekämpfung MBH* 1976 3 SA 352 (A):370.

4 See *R v Vilbro* 1957 3 SA 223 (AD):228G for an example relating to race classification.

In *Genturico AG v Firestone SA (Pty) Ltd*⁵ the Appellate Division, (with reference to Wigmore) held that the true and practical test of the admissibility of the opinion of an expert witness is whether the court can receive “appreciable help” from that witness on the particular issue. In other words, “the test is a relative one, depending on the particular subject and the particular witness with reference to that subject”. To hold otherwise would render the expert’s evidence supererogatory and superfluous, and would merely consume time, cumber the proceedings, or confuse the main issues. Expert evidence should not be admitted if it does not provide appreciable assistance to the court.

One of the general principles of the accusatorial-adversarial system entails that a party is not entitled to prior knowledge of the oral evidence to be presented by an opposing party’s witnesses at trial.⁶ Prior to the promulgation of the Uniform Rules of Court,⁷ even expert witnesses could be called without notice to the opposition. Although this provided a tactical advantage, it frequently led to postponements and other delays in the conduct of trials.⁸ In 1965 the Uniform Rules of Court were promulgated. Rule 36(9) stated the following:

No person shall, save with the leave of the Court or the consent of all parties to the suit, be entitled to call as a witness any person to give evidence as an expert upon any matter upon which the evidence of expert witnesses may be received unless he shall

(a) not less than 15 days before the hearing, have delivered notice of his intention so to do; and

(b) not less than 10 days before the trial, have delivered a summary of such expert’s opinion and his reasons therefor.

The reason for this exception to the general rule is that, because of the specialised nature of expert evidence, the opponent’s legal representative must familiarise herself with the expert’s opinion to be in a position to properly prepare rebutting evidence and to conduct an informed cross-examination of the expert witness. It is therefore only fair that a party must be given prior notification by means of a summary of the expert evidence to be presented at the trial. The primary purpose of this exception is to enable the opposing party to properly prepare for the trial, and to prevent surprise, thus avoiding a consequent postponement and delay in the proceedings.⁹

Although Rule 36(9) made a significant contribution in removing the element of surprise when expert evidence is presented, there are still a number of problematic aspects which need to be addressed. Some of these aspects will be discussed below.

5 *Genturico AG v Firestone SA (Pty) Ltd* 1972 1 SA 589 (A):616-617.

6 Theophilopoulos *et al.* 2020:364.

7 The rules applicable in the High Court of South Africa, published in GK 999 Government Gazette 1965.

8 *Doyle v Sentrahoer (Co-operative) Ltd* 1993 3 SA 176 (SE):180-181.

9 Theophilopoulos *et al* 2020:364.

3. TIME PERIODS

In *Clue v Provincial Administration Cape*¹⁰ the court stated that the purpose of Rule 36(9) was not to encourage one party to wait until ten days before a trial in order to satisfy himself that his opponent does not intend to call expert evidence, before himself deciding whether or not to call expert evidence on a material issue on the merits. Such an approach would in many cases result in a situation of stalemate and would in the court's opinion be contrary to the spirit of Rule 36(9). The court held that one of the purposes of Rule 36(9) was to remove the element of surprise from a trial. It was, however, also intended to enable the experts to exchange views before giving evidence and thus to reach agreement on some, if not all, of the issues, thereby limiting the duration of the trial and consequently the costs. The court stated that the Rule could not have been designed to enable the parties to play cat and mouse in the sense that neither need to prepare expert evidence until the other furnishes the summary envisaged by the Rule.

In *Mokheithi v MEC for Health, Gauteng*¹¹ the court held that:

It is further trite law that the rules regarding expert notices are to be complied with, not necessarily in sequence. It is not for the defendant to wait and see if the plaintiff is going to call expert testimony before the defendant decides whether or not its case demands the calling of expert testimony to its own benefit. The attitude disclosed in the present instance by the defendant's legal representatives amounted to just such an attitude, more akin to playing a waiting game.

The court, moreover, pointed out that Rule 36(9) does not, as in the case of certain other rules, provide that the plaintiff must take a certain step within a prescribed period whereafter the defendant has a further period to respond thereto.¹²

In *Doyle v Sentraoer (Co-operative) Ltd*¹³ it was held that the time limits provided for in Rule 36(9) were not designed to provide a litigant with a tactical advantage and that each party must prepare for trial individually.

These viewpoints can no longer be supported in a civil justice system where access to justice is now guaranteed by the *Constitution*. Why should a defendant instruct an expert witness at great cost to counter the allegations of the plaintiff's expert witness if the plaintiff, for some or other reason, decide not to call its own expert witness? In such an instance the appointment of an expert witness by the defendant will amount to wasted costs and indirectly have a detrimental effect on access to justice in civil matters.

Rule 36(9) imposed the same time limit on both parties, namely ten days before the trial to deliver a summary of the expert's opinions and reasons therefor. Van Loggerenberg rightly indicates that this position gave rise to

10 *Clue v Provincial Administration Cape* 1966 2 SA 561 (E):563.

11 *Mokheithi v MEC for Health, Gauteng* 2014 1 SA 93 (GSJ):98D-I.

12 *Mokheithi v MEC for Health, Gauteng* 2014 1 SA 93 (GSJ):98G.

13 *Doyle v Sentraoer (Co-operative) Ltd* 1993 3 SA 176 (SE):183B-C.

certain problematic aspects. If a party, for example, delivered its summary on the eleventh day before trial, was the opposing party entitled to lead evidence in rebuttal of the summary without complying with the rule, because it was impossible to file a summary of rebutting evidence in time to adhere to the rule? It had been held that the rule “was not intended to cover evidence strictly in answer to an opposing party’s summary”. In other words, such evidence could be led as of right and was not affected by Rule 36(9)(b).¹⁴

On the other hand, Van Loggerenberg points out that an argument could be made that such evidence was indeed affected by the subrule and was evidence which might be allowed without a summary by the leave of the court. In both instances there appeared to be a *lacuna* in the subrule.¹⁵

It therefore seems clear that the time periods in terms of Rule 36(9) were inadequate. Pete *et al* states that it is not uncommon for experts to be consulted for the first time just before the trial, which is hopelessly too late. These authors argue convincingly that expert evidence often forms a key aspect of a party’s case and that a consultation with the expert should therefore be arranged before the plaintiff issues its summons or the defendant delivers its plea. In many instances the expert opinions will determine whether a cause of action or proper defence exists and it is therefore most undesirable to postpone this matter until the eve of the trial.¹⁶

It is exactly for this reason why Practice Directive 6.6 of the Gauteng Division of the High Court, Pretoria states that the time periods provided in rule 36(9) of the Uniform Rules of Court are inadequate, which can result in trials not being ripe for hearing on their allocated trial dates. To prevent this, provision has been made in Practice Directive 6.13 for extended time periods with which the parties must comply in all matters where expert notices and summaries must be delivered. This Practice Directive provides that if the parties do not settle the merits of the matter and they agree on separation of certain issues, a preferential trial date will only be allocated by the Registrar if the pretrial minute shows that the notices in terms of Rule 36(9) in respect of the merits together with joint expert minutes have been served and filed.

Similarly, Practice Directive 6.5 of the Gauteng Local Division, Johannesburg provides that whenever it appears, on reasonable grounds, that the time periods for filing and exchanging of experts’ notices and reports are in the circumstances of the case, inadequate, subject to the directives in paragraph 6.15 of the Manual, the parties may, by agreement, concluded within thirty days of close of pleadings, vary the times for compliance. Provided that any variation is positively conducive to the trial being in a state of readiness on the date of the certification hearing.

Such an agreement should provide that notice of intention to call an expert witness be given not less than thirty court days before the allocated trial date and the summary of the expert’s opinion be delivered not less than twenty

14 Van Loggerenberg 2022:D1-491-492.

15 Van Loggerenberg 2022:D1-492.

16 Pete *et al* 2017:

court days before the allocated trial date. Such notice shall be given by the defendant not less than twenty five court days before the allocated trial date and the summary of the defendant's expert's opinion be delivered not less than fifteen court days before the allocated trial date. Joint minutes must be delivered not less than ten court days before the trial date.

Where one or more parties to a trial wish to enter into such an agreement, but one of the parties refuses to do so, an application may be brought in terms of Rule 27(1) of the Uniform Rules of Court for the extension of the relevant time periods, which application shall be enrolled in the interlocutory court. Such application shall be brought within ten days of the opposing parties' refusal as referred to hereinabove.

It should be noted that such an agreement, and consequently such an application, is generally conducive to the efficient conduct of a trial. Failure to conclude such an agreement without good cause, and opposition to such an application without good cause, may attract a punitive cost order either on the application by the party or the parties seeking the relief, or *mero motu* by the judge hearing the application.

In 2019 Rule 36(9) was amended in an attempt to rectify the aforementioned concerns. The rationale behind the amendment was to ensure that notices are filed timeously, thereby eliminating unnecessary delays or postponements when parties intend calling expert witnesses. Furthermore, the costs incurred by the litigants could be greatly reduced.¹⁷ The amended rule provides that:

No person shall, save with the leave of the court or the consent of all parties to the suit, be entitled to call as a witness any person to give evidence as an expert upon any matter upon which the evidence of expert witnesses may be received unless—

(a) where the plaintiff intends to call an expert, the plaintiff shall not more than 30 days after the close of pleadings, or where the defendant intends to call the expert, the defendant shall not more than 60 days after the close of pleadings, have delivered notice of intention to call such expert; and

(b) in the case of the plaintiff not more than 90 days after the close of pleadings and in the case of the defendant not more than 120 days after the close of pleadings, such plaintiff or defendant shall have delivered a summary of the expert's opinion and the reasons therefor.

Van Loggerenberg is of the opinion that by imposing different time limits and providing for the calculation of the time periods with reference to the close of pleadings, the subrule in its amended form is of a more efficient and practical nature. Amongst other things, it allows a defendant, on receipt of a plaintiff's notice of intention to call an expert witness, to consider its position and, if necessary, to find an expert to give evidence at the hearing. This has been

17 Notice by office of the Chief Justice "Amendment of Uniform Rules of Court with the insertion of case management rules", http://judiciary.org.za/images/news/2019/amendment_of_Uniform_Rules_of_Court_with_the_insertion_of_case_management_rules.pdf (accessed on 25 January 2023).

addressed by the amended subrule in two ways. First, by introducing different time periods within which the plaintiff and the defendant must deliver their expert summaries; and, secondly, by providing that the time periods are to be calculated from the date of close of pleadings.¹⁸

Although it must be conceded that these time periods are much more suitable than the previous ones, it still remains problematic for a number of reasons.

First, these time periods are still too generalised and may not be adequate in all civil matters. It may, for example, happen that the expert witness, who a party intends to use, is not available during this timeframe or that these periods are not sufficient for an expert to finalise its investigation of the matter. It is submitted that each matter should be considered on its own merits by a judge, or case management judge, during an application for permission to present expert evidence which should then, if permission is granted, also set out the respective time periods in which the reports of experts should be delivered.¹⁹

Secondly, as rightly argued by Pete *et al*, the expert opinions may determine whether a cause of action or proper defence exists and in such instances, it only makes sense that the expert's summary be delivered earlier during the pleading stage of the proceedings (long before *litis contestatio*). Once again, a judge or case management judge should give the necessary directions in this regard, during an application to present expert evidence, after taking into account all relevant considerations.²⁰

Thirdly, there should be one uniform procedure followed by all the different divisions of the High Court and not, as the case presently, contrasting time periods in some divisions relating to the presentation of expert evidence. A differentiation between these time periods should be based on the specific merits of a case and not by the practice followed in a particular division of the High Court. Parties should also not be afforded the opportunity to agree on these time periods between themselves (as in the Gauteng Local Division, Johannesburg) but it should be in the sole discretion of the presiding or case management officer after taking into consideration all relevant factors.

Finally, it doesn't make sense to have two separate notices. It can be argued that the purpose of the first notice is to inform the opponent that a party intends to use an expert at the hearing, giving the opponent thirty additional court days to source its own expert. The first notice, however, only contains the identity of the expert to be used and will therefore not be of much use in most instances. It is only when a party receives the notice in terms of Rule 36(9)(b) with the summary of the expert witness where it will be able to evaluate the expert evidence properly and subsequently appoint its own expert to counter the allegations of the opponent's expert.

18 Van Loggerenberg 2022:D1-492.

19 Similarly to the position in England and Wales and some states and territories in Australia. See the discussion in part 2 of this article.

20 Some of these considerations may even be inserted in the Uniform Rules of Court as predetermined factors which the court must take into account in exercising its judicial discretion.

In light of this, it is contended that the first notice should be abolished and replaced with only one notice containing the identity of the expert as well as her full summary or report. This is also in line with the position in foreign jurisdictions.²¹

4. ADVERSARIAL BIAS OF EXPERTS

As far back as the 1800's, presiding officers illustrated their concern about the lack of independence and objectivity when hearing expert evidence. In the seminal English decision of *Lord Arbinger v Ashton*²² it was held that:

Undoubtedly there is a natural bias to do something serviceable for those who employ you and adequately remunerate you. It is very natural, and it is so effectual that we constantly see persons, instead of considering themselves witness, rather consider themselves as the paid agents of the persons who employ them.²³

Bernstein identifies three types of adversarial bias, namely:

- conscious bias;
- unconscious bias; and
- selection bias.²⁴

Conscious bias is present when experts adapt their opinions to the needs of the client and legal practitioner who hires them. Unconscious bias is present across various categories of expertise, but it is especially problematic with regard to testimony by forensic scientists. As most forensic scientists are employed by government crime labs, they naturally identify with the prosecution's objective to convict a particular accused. As a result, the forensic expert's unconscious bias can easily have an impact on the conclusions arrived at. Selection bias, refers to the fact that the experts retained by a party will not represent a random sampling of expert opinions, but will rather represent the perspective the legal practitioner want to present at the trial.²⁵

21 In England and Wales, for example, there is only one expert report in terms of Civil Procedure Rule 35.10. In all the states and territories of Australia expert evidence is presented by way of one or more expert reports. None of these jurisdictions have a separate notice which only indicates the identity of the expert to be used at the trial. See the discussion in part 2 of this article.

22 *Lord Arbinger v Ashton* (1873) 17 LR Eq 358:374.

23 These sentiments were repeated in numerous court decisions around the world. See, for example, the decisions by the Supreme Court of the United States in *Daubert v Merrel Dow Pharmaceuticals, Inc.* 113 S. Ct. 2786 (1993); the English decisions of *Whitehouse v Jordan* [1981] All ER 267 and the seminal judgment of Creswell J in *National Justice Compania Naviera SA v Prudential Assurance Co Ltd* ('The Ikarian Reefer') [1993] 2 Lloyd's Rep 68:81-82).

24 Bernstein 2008:454, with reference to *Lord Arbinger v Ashton* (1873) 17 LR Eq 358. Also see Knoetze-le Roux 2017.

25 Bernstein 2008:454-456.

In several decisions the South African courts have held that an expert witness should remain objective despite the fact that she is called by a party to testify in support of such a party's case.

In *Stock v Stock*²⁶ the Appellate Division held that an expert must be made to understand that he is there to assist the court. If the expert is to be helpful he must be neutral. The evidence of such a witness is of little value where he is partisan and consistently promotes the cause of the instructing party.

In *Schneider NO and Others v AA and Another*²⁷ the court stated the primary duty of an expert witness as someone who “comes to court to give the court the benefit of his expertise”. In addressing the responsibilities of an expert witness, the court held that he must provide “the court with as objective and unbiased an opinion, based on his expertise” and that an “expert is not a hired gun who dispenses his expertise for the purposes of a particular case” nor does he “assume the role of an advocate”.²⁸

In *Jacobs and Another v Transnet Ltd t/a Metrorail and Another*²⁹ the SCA reaffirmed this position by stating that:

It is well established that an expert is required to assist the court, not the party for whom he or she testifies. Objectivity is the central prerequisite for his or her opinions. In assessing an expert's credibility an appellate court can test his or her underlying reasoning and is in no worse a position than a trial court in that respect.

In *Price Waterhouse Coopers v National Potato Cooperative Ltd*³⁰ Wallis JA stated that courts in this and other jurisdictions have experienced problems with expert witnesses, sometimes unflatteringly described as “hired guns”.³¹ Wallis JA referred with approval to the seminal decision in *National Justice Compania Naviera SA v Prudential Assurance Co Ltd* (“The Ikarian Reefer”)³² where Cresswell J set out the following duties that an expert witness should observe when giving evidence:

- Expert evidence should be and should be seen to be the independent product of the expert uninfluenced as to form or content by the pressures and demands of litigation.
- An expert witness should provide independent assistance to the court by way of an objective and unbiased opinion in relation to matters within

26 *Stock v Stock* 1981 3 SA 1280 (A). Also see the discussion by Knoetze-le Roux 2017:

27 *Schneider NO and Others v AA and Another* 2010 (5) SA 203 (WCC):211J – 212B.

28 For a brief discussion of this decision see Lerm 2015:36.

29 *Jacobs and Another v Transnet Ltd t/a Metrorail and Another* 2015 1 SA 139 (SCA):par. 15.

30 *Price Waterhouse Coopers v National Potato Cooperative Ltd* [2015] ZASCA 2 (4 March 2015):par. 98.

31 Also see Lerm 2015:36.

32 *National Justice Compania Naviera SA v Prudential Assurance Co Ltd* (“The Ikarian Reefer”) [1993] 2 Lloyd's Rep 68:81-82.

his or her expertise. An expert witness should never assume the role of an advocate.

- An expert witness should state the facts or assumptions on which her opinion is based. She should not omit to consider material facts which detract from her concluded opinion.
- An expert witness should make it clear when a particular question or issue falls outside of her field of expertise.
- If an expert's opinion is not properly researched because she is of the opinion that insufficient data is available, then this must be stated with an indication that the opinion is no more than a provisional one.

These sentiments by the courts are all good and well, but the main problem in this regard is that there is absolutely no regulation of expert witnesses or their duties towards the courts in South Africa. There are usually also no detrimental consequences where it is found that an expert witness clearly acted in a bias manner. The only sanction is that such an expert's evidence will be disregarded or not be afforded any real weight in the circumstances. It is contended that the problematic aspect of adversarial bias will remain until this is expressly addressed by the Rules Board. In this regard valuable insight may be gained from the position in foreign jurisdictions where experts are required to sign and/or adhere to a formal code of conduct.³³

5. COMPETENCE TO ACT AS AN EXPERT WITNESS

Another problematic aspect relating to expert evidence is the ever-growing practice where expert evidence is presented by witnesses who profess to be experts but in reality, do not qualify as experts for the purpose of giving admissible evidence or do not assist the court in any appreciable or meaningful way.

In *AM and Another v MEC for Health, Western Cape*³⁴ the Supreme Court of Appeal held that the functions of an expert witness are threefold. First, where they have themselves observed relevant facts that evidence will be evidence of fact and admissible as such. Second, they provide the court with abstract or general knowledge concerning their discipline that is necessary to enable the court to understand the issues arising in the litigation. This includes evidence of the current state of knowledge and generally accepted practice in the field in question. Although such evidence can only be given by an expert qualified in the relevant field, it remains, at the end of the day, essentially evidence of fact on which the court will have to make factual findings. It is necessary to enable the court to assess the validity of opinions that they express. Third, they give evidence concerning their own inferences and opinions on the issues in the case and the grounds for drawing those inferences and expressing those conclusions.

33 See the discussion in part 2 of this article.

34 *AM and Another v MEC for Health, Western Cape* 2021 3 SA 337 (SCA):347 par.17.

In *Uni-Erections v Continental Engineering Co Ltd*³⁵ the court held that there are two requirements for Rule 36(9) to operate. First, the evidence must be in the nature of an opinion and, secondly, the evidence must be presented by a person who is an expert.

In *Menday v Protea Assurance Co Ltd*³⁶ Addleson J held that it is not the mere opinion of an expert witness which is decisive but his ability to satisfy the court that, because of special skill, training or experience, the reasons for the opinion which he advances is acceptable. The court held that:

However eminent an expert may be in a general field, he does not constitute an expert in a particular sphere unless by special study or experience he is qualified to express an opinion on that topic. The dangers of holding otherwise - of being overawed by a recital of degrees and diplomas - are obvious; the Court has then no way of being satisfied that it is not being blinded by pure 'theory' untested by knowledge or practice. The expert must either himself have knowledge or experience in the special field on which he testifies (whatever general knowledge he may also have in pure theory) or he must rely on the knowledge or experience of others who themselves are shown to be acceptable experts in that field.³⁷

In *Gentiruco AG v Firestone (SA) (Pty) Ltd*³⁸ the court dealt with the admissibility of expert evidence in interpreting a document (patent specification). The court, with reference to a speech of Lord Tomlin in *British Celanese Ltd v Courtaulds Ltd*³⁹ held that an expert may be asked relevant questions based on assumptions or hypotheses put by counsel as to the meaning of a document. The witness may not, however, be asked what the document means to him or her. The witness (expert or otherwise) may also not be cross-examined on the meaning of the document or the validity of the hypothesis about its meaning. The court held that all this was sadly and at some cost ignored by all.⁴⁰

Lord Tomlin also emphasised the disadvantages of allowing expert evidence on the interpretation of a document as follows:

In the first place time is wasted and money spent on what is not legitimate. In the second place there accumulates a mass of material which so far from assisting the Judge renders his task the more difficult, because he has to sift the grain from an unnecessary amount of chaff. In my opinion the trial Courts should make strenuous efforts to put a check upon an undesirable and growing practice.⁴¹

35 1981 1 SA 240 W:250E-F.

36 1976 1 SA 565 E:569-570.

37 *Menday v Protea Assurance Co Ltd* 1976 1 SA 565 E:570.

38 *Gentiruco AG v Firestone (SA) (Pty) Ltd* 1972 1 SA 589 (A):617F-618C.

39 *British Celanese Ltd v Courtaulds Ltd* (1935) 52 RPC 171 (HL).

40 Dealing with an argument that a particular construction of a document did not conform to the evidence, Aldous LJ in *Scanvaegt International A/s v Pelcombe Ltd* 1998 EWCA Civ 436 responded with "So what?"

41 *British Celanese Ltd v Courtaulds Ltd* (1935) 52 RPC 171 (HL):198.

In *KPMG Chartered Accountants v Securefin Ltd*⁴² the Supreme Court of Appeal noted that although this speech was delivered in 1935, the chaff is still heaping up, that the undesirable practice keeps growing and that courts make no effort to curtail it.

In *Price Waterhouse Coopers v National Potato Cooperative Ltd*⁴³ the court held that an opinion based on facts not in evidence has no value for the court. With respect to its probative value, the testimony of an expert is considered in the same manner as the testimony of an ordinary witness. The court is not bound by the expert witness's opinion. An expert witness's objectivity and the credibility of his opinions may be called into question, namely, where he:

- accepts to perform his or her mandate in a restricted manner;
- presents a product influenced as to form or content by the pressures and demands of litigation;
- shows a lack of independence or a bias;
- has an interest in the outcome of the litigation, either because of a relationship with the party that retained his or her services or otherwise;
- advocates the position of the party that retained his or her services; or
- selectively examines only the evidence that supports his or her conclusions or accepts to examine only the evidence provided by the party that retained his or her services.⁴⁴

The court held that the plaintiff's expert witness did not measure up to these standards. His area of expertise was said to be that of a qualified chartered accountant and auditor. The primary thrust of his evidence was to explain how an auditor should have gone about the audit of the defendant's financial statements in the years in question and to criticise the audits undertaken. His only qualification to give expert evidence of this nature arose from the fact that he held the degrees *B Comm* in 1979 and *Hons B Compt* in 1981 and had passed his board examinations and qualified as a chartered accountant in 1983. His only practical experience had been acquired while he was in training. He gave no evidence to suggest that he had kept abreast of developments in the profession since he had left it fourteen years prior to commencing his investigation and twenty two years prior to his giving evidence. He had never been responsible for an audit and had only once had some involvement in the audit of an agricultural cooperative. The plaintiff's expert evidence therefore went far beyond that of an expert witness in auditing matters.⁴⁵

It is clear from the above that certain witnesses do not qualify as experts for the purpose of presenting admissible opinion evidence. While other experts may have the necessary expertise, their testimony also does not assist the

42 *KPMG Chartered Accountants v Securefin Ltd* 2009 2 All SA 523 (SCA):533-534.

43 *Price Waterhouse Coopers v National Potato Cooperative Ltd* [2015] ZASCA 2 (4 March 2015):par. 99.

44 *Widdrington (Estate of) v Wightman* 2011 QCCS 1788 (Can LII):par. 330.

45 *Price Waterhouse Coopers v National Potato Cooperative Ltd* [2015] ZASCA 2 (4 March 2015):paras. 100-101.

court in an appreciable or meaningful way. The only way to curb this practice is to give the court more involvement as gatekeepers where a party wants to present expert evidence. A judge should only give permission for expert evidence to be presented if it seems clear to the court that, first, the witness indeed qualifies as an expert for purposes of adducing admissible opinion evidence and secondly, that the expert's evidence will in fact be helpful to the court.⁴⁶

6. SCOPE OF AN EXPERT WITNESS REPORT

In *Boland Construction Co (Pty) Ltd v Lewin*⁴⁷ the court held that Rule 36(9) made serious inroads upon the common law right of a party to exercise the fundamental and valuable right to call a witness without a warning to her opponent. It also places such a party at a disadvantage in having to indicate in advance what her expert witness is going to testify. This disadvantage does not apply to normal witnesses, who can be called without warning, no matter how much the evidence may take the other party by surprise. The main purpose of Rule 36(9) was only to remove this element of surprise and the court therefore held that the rule should be restrictively construed in that the summary should be no more than a summary.

In *Coopers (South Africa) (Pty) Ltd v Gesellschaft für Schädlingsbekämpfung MBH*⁴⁸ the Appellate Division held that, in deciding whether there has been due compliance with rule 36(9)(b), the court must have regard to the main purpose thereof, namely to require the party intending to call an expert witness to give the opponent such information about the evidence to remove the element of surprise. In earlier times the presentation of expert evidence was regarded as affording a tactical advantage to a party, but this frequently caused delays in the conduct of trials. Indeed, all the subrules of Rule 36 were formulated with this specific purpose in mind.

Consequently, when summarising the facts or data on which the expert witness based his opinions, the draughtsman should ensure that no information is omitted, which might lead to the other side being taken by surprise.⁴⁹ The court stated that even though the addressee of the summary is probably also an expert, she may not be able to properly evaluate the opinion to enable her to advise the instructing party if she is not informed in the summary of the reasons for the opinion. Having regard to the meaning of the word "reasons" in the context of the subrule as a whole and the purpose thereof, the court held that the expert summary must at least state the sum and substance of the facts and data which lead to the reasoned conclusion.⁵⁰

46 This is also the position in many foreign jurisdictions. See the discussion in part 2 of this article.

47 *Boland Construction Co (Pty) Ltd v Lewin* 1977 2 SA 506 (C):508.

48 *Coopers (South Africa) (Pty) Ltd v Gesellschaft für Schädlingsbekämpfung MBH* 1976 3 SA 352 (A):371C-D.

49 *Coopers (South Africa) (Pty) Ltd v Gesellschaft für Schädlingsbekämpfung MBH* 1976 3 SA 352 (A):371D-E.

50 *Coopers (South Africa) (Pty) Ltd v Gesellschaft für Schädlingsbekämpfung MBH* 1976 3 SA 352 (A):371G-H.

Where the process of reasoning is not simply a matter of ordinary logic, but involves, for example, the application of scientific principles, it will ordinarily also be necessary to set out the reasoning process in summarised form. The addressee should then be in a position to evaluate the opinion, and be in a position to advise the party consulting him whether the opinion can be controverted and, if so, what evidence is required to do so. To hold otherwise would encourage a practice inconsistent with the main purpose of Rule 36(9) which is to remove the element of surprise.⁵¹

Before an expert witness may be called it is necessary to deliver a summary of the witness's opinions and the reasons therefor in terms of rule 36(9)(b).⁵² In *Coopers*⁵³ the court held that the summary must at least include the facts or data on which the opinion is based. The facts or data would include those personally or directly known to or ascertained by the expert witness, for example, from general scientific knowledge, experiments, or investigations conducted by him, or known to or ascertained by others of which he has been informed in order to formulate his opinions, for example, experiments or investigations by others, or information from textbooks, which are to be duly proved at the trial.

In *Coopers*⁵⁴ Wessels JA stated:

(A)n expert's opinion represents his reasoned conclusion based on certain facts or data, which are either common cause, or established by his own evidence or that of some other competent witness. Except possibly where it is not controverted, an expert's bald statement of his opinion is not of any real assistance. Proper evaluation of the opinion can only be undertaken if the process of reasoning which led to the conclusion, including the premises from which the reasoning proceeds, are disclosed by the expert.

The need for clarity as to the facts on which an expert's opinion is based has been stressed in a number of cases. In *Price Waterhouse Coopers v National Potato Cooperative Ltd*⁵⁵ the following passage from *Widdrington (Estate of) c. Wightman*⁵⁶ was cited with approval:

Before any weight can be given to an expert's opinion, the facts upon which the opinion is based must be found to exist. As long as there is some admissible evidence on which the expert's testimony is based it cannot be ignored; but it follows that the more an expert relies on facts not in evidence, the weight given to his opinion will diminish. An opinion based on facts not in evidence has no value for the Court.

51 *Coopers (South Africa) (Pty) Ltd v Gesellschaft für Schädlingsbekämpfung MBH* 1976 3 SA 352 (A):371H-372.

52 *AM and Another v MEC for Health, Western Cape* 2021 3 SA 337 (SCA):347 par.18.

53 *Coopers (South Africa) (Pty) Ltd v Gesellschaft für Schädlingsbekämpfung MBH* 1976 3 SA 352 (A):371G-H.

54 *Coopers (South Africa) (Pty) Ltd v Gesellschaft für Schädlingsbekämpfung MBH* 1976 3 SA 352 (A):371A-B.

55 *Price Waterhouse Coopers v National Potato Cooperative Ltd* [2015] ZASCA 2 (4 March 2015):par. 98.

56 *Widdrington (Estate of) v Wightman* 2011 QCCS 1788 (Can LII):paras. 326-327.

The opinions of expert witnesses involve the drawing of inferences from facts. The inferences must be reasonably capable of being drawn from those facts. If they are tenuous, or farfetched, they cannot form the foundation for the court to make any finding of fact. Furthermore, in any process of reasoning the drawing of inferences from the facts must be based on admitted or proven facts and not matters of speculation.⁵⁷ In this regard the court quoted from the following speech by Lord Wright in *Caswell v Powell Duffryn Associated Collieries Ltd.*⁵⁸

Inference must be carefully distinguished from conjecture or speculation. There can be no inference unless there are objective facts from which to infer the other facts which it is sought to establish. . . . But if there are no positive proved facts from which the inference can be made, the method of inference fails and what is left is mere speculation or conjecture.

In *AM and Another v MEC for Health, Western Cape*⁵⁹ the appellants instituted an action against the Western Cape MEC for Health for damages due to brain injuries suffered by their child as a result of the alleged medical negligence of a treating doctor at the trauma unit of the Red Cross Memorial Hospital, in Rondebosch, Cape Town. The court held that the experts instructed on behalf of the appellants were in certain respects not instructed on the basis of facts that could be, or were, proved at the trial in regard to the mechanics of their child's brain injury. There was no endeavour to clarify the facts known to the treating doctor, or the facts about her diagnosis and treatment of the patient. She was criticised in relation to matters that were known to be irrelevant. Her notes and other documents were subjected to forensic scrutiny and criticism of a type one encounters with the most pedantic lawyers. The medical literature was used selectively to bolster arguments and not for the purpose of informing the court of the current approach to the clinical assessment of head injuries in children and the range of accepted medical views. Instead, it was directed at justifying exceptions to the established consensus.

In the result, the court held that the eventual argument that the treating doctor negligently diagnosed the patient with a minor injury proceeded on a basis that was not pleaded; was not reflected in the expert's summaries; was not debated at the pretrial meetings between the experts; was referred to in passing during counsel's opening address; and first emerged in evidence on the fourth day of the trial. All the other arguments directed at suggesting that the treating doctor was negligent in arriving at her diagnosis have been abandoned. The court held that this was an unsatisfactory state of affairs which resulted in a lengthy trial, much of which was devoted to ploughing through the minutiae of academic articles.⁶⁰

57 *AM and Another v MEC for Health, Western Cape* 2021 3 SA 337 (SCA):347 par.21.

58 1939 3 All ER 722:733.

59 *AM and Another v MEC for Health, Western Cape* 2021 3 SA 337 (SCA):par. 22.

60 *AM and Another v MEC for Health, Western Cape* 2021 3 SA 337 (SCA):par. 23.

The court held that a proper use of the provisions of rules 37 and 37A of the Uniform Rules would have avoided many of these problems and enabled the trial to proceed and finish in the estimated three to four days instead of taking ten days spread over three months. The ten pretrial meeting minutes, or progress certificates in relation to such meetings, show that the “meetings” were conducted telephonically or by way of correspondence, without any engagement on the nature of the disputes between the parties or any real endeavour to clarify and limit the issues. The court held that this created the overwhelming impression that the aforementioned were seen as nothing more than a necessary formality in order to secure a trial date. What should have happened in an endeavour to narrow the issues was that witness statements should have been delivered from both the first appellant and the treating doctor. The court held that is what rule 37A(10)(e) contemplates and that this practice is also customary in many foreign jurisdictions.⁶¹

These sentiments by the court have real merits. All that is required in terms of Rule 36(9)(b) is a summary of the expert and his or her reasons therefore. In many instances this is not nearly sufficient and it is therefore contended that the rule should be amended to provide that an expert’s comprehensive report should be made available to the opponent, which should include all relevant information to prevent the opponent being taken by surprise at the trial and to enable the other party to give proper instructions to her expert.⁶²

7. SINGLE JOINT EXPERT

In 2019 a new rule 36(9A) was inserted in the Uniform Rules of Court which provides that:

The parties shall—

- (a) endeavour, as far as possible, to appoint a single joint expert on any one or more or all issues in the case; and
- (b) file a joint minute of experts relating to the same area of expertise within 20 days of the date of the last filing of such expert reports.

According to van Loggerenberg, the purpose of the new rule is to enable experts to exchange views and to reach agreement on the issues, or at least some of them. This will hopefully facilitate the appointment of a single joint expert or the preparation of a joint minute thus saving costs and the time of the court.⁶³

In *Ntombela v Road Accident Fund*⁶⁴ Sutherland J disallowed all costs for joint minutes (save in respect of the neurosurgeons) following noncompliance with the provisions of the *Practice Manual* of the High Court, Johannesburg, and issued a stern warning that such failure ought in future to be met with a

61 *AM and Another v MEC for Health, Western Cape* 2021 3 SA 337 (SCA);par. 24.

62 The information that should be contained in the report should be clearly spelt out in the Uniform Rules of Court. See the discussion in part 2 of this article.

63 Van Loggerenberg 2021:D1-493.

64 2018 4 SA 486 (GJ):496A-497E and 498B-C.

refusal to hear the matter. In *Bee v Road Accident Fund*⁶⁵ the majority held that effective case management required parties to stick to the facts agreed in a joint minute. If a litigant wished to depart from it, it had to give due warning to the opponent, and the same went for the experts themselves. Therefore, if the defendant's expert had wished to testify inconsistently with the agreement in the joint minute, it should have notified the other side before the start of the trial. The defendant's conduct in this case amounted to impermissible trial by ambush. The trial court was entitled, if not bound, to accept the matters agreed by the experts, and its decision not to ask them to lead further evidence was therefore entirely justified.

Although this new rule is a move in the right direction, it is contended that it is still not sufficient enough as it only requires the parties "to endeavour, as far as possible, to appoint a single joint expert on any one or more or all issues in the case". There are however, for the most part, no judicial control and no sanctions where it seems clear that there was no real attempt by the parties to appoint a single joint expert. It is contended that this rule should be abolished and replaced by a provision which states that the presentation of expert evidence falls within the full control of the courts and that permission should first be obtained by way of a formal application before a party will be allowed to adduce any expert evidence. During such an application the judge or case management judge should then have the sole discretion to order that a single joint expert be appointed in one or more of the issues in dispute between the parties.⁶⁶

8. JUDICIAL CONTROL OVER THE PRESENTATION OF EXPERT EVIDENCE

The proviso to Rule 36(9) states that:

Provided that the notice and summary shall in any event be delivered before a first case management conference held in terms of rules 37A(6) and (7) or as directed by a case management judge.

Rule 37(4)(c) provides that each party must provide the other, not later than ten days prior to a pre-trial conference with a list containing inter alia "other matters regarding preparation for trial that will be raised for discussion." Van Loggerenberg is of the opinion that this will include expert evidence and meetings between experts and joint minutes prepared by them.

Rule 37A(9)(d) provides that, subject to rule 36(9), the parties must address certain issues, including the instruction of witnesses to give expert evidence and the feasibility and reasonableness in the circumstances of the case that a single joint expert be appointed by the parties in respect of any issue.

65 2018 4 SA 366 (SCA):386A–388A.

66 This is also in line with the position in England and Wales and some of the states and territories in Australia. See the discussion in part 2 of this article.

If one has regard to the aforementioned provisions, it seems clear that judicial intervention relating to the presentation of expert evidence is still very limited and that party control prevails for the most part. It is contended that the court should be afforded more control over the presentation of expert evidence and that party control in this instance should yield to the greater ideal of access to justice in civil matters.⁶⁷

9. COSTS OF EXPERT WITNESSES

In 2019 the South African Law Reform Commission (hereafter the *SALRC*) undertook an in-depth investigation into legal fees and its symbiotic relationship with access to justice. After considering various submissions the Commission published Paper 150 with certain preliminary recommendations.⁶⁸

The *SALRC* came to the conclusion that the cost of factual and expert evidence will inevitably impact on access to justice. Where parties agree to a single expert, this will reduce costs. Expert evidence should be avoided when it is not necessary because it leads to excessive legal fees. The Commission concurred with the recommendations made by the respondents that:

- The rules relating to expert evidence require revamping to improve the advice rendered to court and to ensure that the costs are curtailed.
- Fees charged by experts should be regulated by the relevant professional bodies. The fees should be reasonable and relate to work done by the expert and not a repetition of what had been done by others.
- Expert reports must be truthful, impartial and only relate to the area of expertise for which the expert is qualified.
- The Legal Practice Council should inform all relevant professional bodies of the need for guidelines to be determined with regard to the fees that may be charged. The guidelines should be published for purposes of transparency and that disciplinary action will be taken where experts charge unreasonable and disproportionate fees.

These sentiments of the South African Law Reform Commission should be supported. It is contended that any party who wants to present expert evidence should first obtain permission from the court and also provide an estimate of the costs relating thereto.⁶⁹

67 This is also the position in many foreign jurisdictions. See the discussion in part 2 of this article.

68 The South African Law Reform Commission "Investigation into legal fees including access to justice and other interventions" Discussion Paper 150, Project 142 (2020).

69 This is similar to the position in England and Wales. See the discussion in part 2 of this article.

10. CONCLUSION

Although considerable progress has been made in the regulating of expert evidence in South Africa, it is still not sufficient enough to make a significant contribution to access to justice in civil matters as guaranteed by the *Constitution*. In part 2 of this article, the position in relation to the presentation of expert evidence in England and Wales, as well as Australia, will be critically discussed. It will be argued that some of the provisions in these foreign jurisdictions relating to the presentation of expert evidence can make a valuable contribution in reducing legal costs and the duration of civil trials in South Africa.

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