Speculum Juris

Vol 38 No 2 (2024)
Published 31 December 2024

ISSN 2523-2177

University of Fort Hare
Together in Excellence

Cite as: Bekker "The Presentation of Witness Testimony in Civil Matters — Time for a New Approach? (Part 1)" 2024 (38) Spec Juris 384–405

The Presentation of Witness Testimony in Civil Matters — Time for a New Approach? (Part 1)

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Abstract

The problems in relation to access to justice in civil matters are not unique to South Africa but are of global concern. After the adoption of the final Constitution in 1996, several initiatives have been implemented in South African law in an attempt to enhance access to justice in civil matters as guaranteed by section 34 of the Constitution. Some of these initiatives are related to the presentation of evidence at the trial of a civil action. More than twenty years ago, there were several unsuccessful pleas from academic writers advocating that a similar position to England and Wales should be considered in South African law in relation to the compulsory exchange of witness statements before trial. It therefore seems like an opportune time to revisit the development relating to the exchange of witness statements in South Africa over the past few decades. Moreover, it is important to not only embark on an analysis of the exchange of witness statements, but also to look at the presentation of all evidence during action trials, including affidavit evidence. Part 1 of this article provides a comparative study between the presentation of witness evidence at trial in South Africa,England and Wales. The discussion firstly focuses on the presentation of witness testimony in South Africa and the exceptions to the general rule that it should be presented orally in court. Secondly, the position in

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England and Wales will be critically evaluated, as well as the newest developments relating to the presentation of witness evidence during trial. In part 2 of this article, some of the developments concerning the presentation of witness evidence in trial actions in Australia are critically examined. Lastly, some possible alternatives to the current presentation of witness testimony in South Africa are considered.

Keywords: Witness statement; witness summary; England and Wales; Australia; affidavit evidence; oral evidence; evidence at trial; section 34 of the Constitution

1 INTRODUCTION

Section 34 of the South African Constitution guarantees access to justice in civil matters. This includes that the duration and legal costs of civil litigation should be reasonable. Since 1996, despite several initiatives in the field of civil procedure, the ideal of access to justice for all, unfortunately, still proves to be elusive. For the most part, the enforcement and defense of civil rights remain exclusively in the domain of a fortunate few as civil litigation is still, for the most part, costly and time-consuming. Despite this, the court rolls keep clogging up with matters that are not ripe for trial or that should have been settled early. It is therefore imperative that the amendment and/or modification of court procedures should be encouraged on an on-going basis. It is especially the presentation of unrestricted oral witness testimony during civil trials that takes up most of the court's time and resources.

The problems with access to justice in civil matters are not unique to South Africa. As recently as 1997, Lord Woolf compiled a comprehensive report outlining the barriers that impede access to justice in civil matters in England and Wales. Lord Woolf's final report consequently resulted in the overhaul of almost the entire civil procedural system applicable to England and Wales, culminating in the adoption of the Civil Procedure Rules in 1999. One of the most drastic departures from the previous position was the introduction of the mandatory disclosure of witness statements, standing as a witness's evidence in chief, before the commencement of a civil trial.

Similarly, there have been several new developments in Australia about the presentation of evidence during trial. Some of these provisions may provide a valuable blueprint for the possible reform of South African law in relation to the presentation of evidence at trial.

More than twenty years ago, there were several pleas from academic writers advocating that a similar position should be considered in South African law with the compulsory exchange of witness statements before trial.[1] It therefore seems like an opportune time to revisit the development relating to the exchange of witness statements in South Africa over the past few decades. Moreover, it is important to not only analyse the exchange of witness statements, but also to look at the presentation of all evidence during action trials, including affidavit evidence.

Part 1 of this article provides a comparative study of the presentation of witness evidence[2] at trial in South Africa, England and Wales. The discussion firstly focuses on the presentation of witness testimony in South Africa and the exceptions to the general rule that it should be presented orally in court. Secondly, the position in England and Wales will be critically

1 See De Vos "Die Openbaarmaking van Getuieverklarings voor 'n Siviele Vehoor" 1993 *TSAR* 261 and Van Heerden "Chronicle of a Death Foretold: The End of Trial by Ambush and the Dawn of Exchange of Civil Witness Statements" 2005 *TSAR* 330.

2 Although the focus is mainly on the presentation of lay witness evidence, some of the proposals made also relate to the presentation of expert witness evidence during a trial. This distinction will be made clear in the text of this article. For a discussion on the presentation of expert witness evidence during civil trials, see Bekker "The Role of Expert Evidence in Civil Matters: A Critical Analysis (Part 1)" 2023 *JJS* 160 and Bekker "The Role of Expert Evidence in Civil Matters: A Critical Analysis (Part 2)" 2024 *JJS* 1.

evaluated, as well as the newest developments concerning the presentation of witness evidence during trial. In part 2 of this article, some of the developments regarding the presentation of witness evidence in trial actions in Australia are critically examined. Lastly, some possible alternatives to the current presentation of witness testimony in South Africa are considered.

In conclusion, it is contended that the default position that witnesses should present their testimony *viva voce*, should remain. It is, however, recommended that the Rules of Court for the presentation of witness testimony should be amended to provide for the compulsory disclosure of detailed witness summaries before trial and the presentation of affidavit evidence and witness statements as part of the judicial case management process[3] or by agreement between the parties. The scope of the presentation of affidavit evidence during the trial and applications for default judgment, without judicial intervention, should also be broadened. This should result in a drastic reduction of the time spent on the examining of witnesses in civil matters and therefore indirectly make a valuable contribution to access to justice as enshrined in section 34 of the Constitution.

2 SOUTH AFRICA

2 1 Introduction

In common law jurisdictions worldwide, there are basically four ways in which a witness's evidence may be presented at the trial proceedings, namely:

(a) by way of oral evidence;

(b) by way of affidavit;

(c) by way of witness statement/witness summary;

(d) by way of deposition.[4]

The overwhelming majority of witness evidence in South Africa is still presented orally in court, with exceptional presentation by affidavit. The concept of witness statements and/or summaries are, however, not foreign to South African law. Despite recommendations from several commentators,[5] several attempts to incorporate these procedures in the Uniform Rules of Court proved to be in vain. The position in relation to the presentation of witness evidence during civil trials in South Africa will be discussed in more detail below.

3 Or even at the discovery stage.

4 Witness depositions are mostly utilised in the United States of America and are governed by Rule 30 of the Federal Rules of Civil Procedure. This rule provides that a party may depose any witness, by oral questions and basically entails taking down the sworn out-of-court oral testimony of a witness that may be used for discovery or trial purposes. This procedure also finds application in Canada where it is referred to as "examination for discovery". In other common law countries, such as South Africa, England and Wales, "depositions" are only used in circumstances where a witness is unable to testify orally at the trial of a matter. The discussion of depositions as a general tool to present evidence at trial falls outside the scope of this article.

5 See De Vos 1993 *TSAR* 261 and Van Heerden 2005 *TSAR* 330.

2 2 General Rule

Uniform Court Rule 38(2) sets out the general rule about witness testimony and provides as follows:

> The witnesses at the trial of any action shall be orally examined ...

There are several exceptions to this rule, such as the presentation of witness evidence by way of affidavit, interrogatories and cross-interrogatories[6] as well as commissions *de bene esse*.[7]

2 3 Affidavit

Uniform Court Rule 38(2) further provides that:

> … 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 …

The proviso to this rule, however, makes it clear that where it seems to the court that any other party reasonably requires the attendance of a witness for cross-examination, and such a witness can be produced, it is not allowed for such a witness to adduce evidence on affidavit.[8] The court has the discretion to allow evidence by affidavit that must be exercised judicially after considering all the facts. The court should exercise this discretion carefully and clear evidence of a sufficient reason should be canvassed in the affidavit in support of the application.[9]

The correct approach in accepting evidence by way of affidavit was stated as follows by the Supreme Court of Appeal in *Madibeng Local Municipality v Public Investment Corporation Ltd*:[10]

> 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 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.

Other factors that may be taken into consideration by the court include serious illness, lack of means and distance from the court.[11]

In general, the courts seem to be cautious in their approach to allowing evidence by way of affidavit, especially where there is something contentious about the evidence to be presented

6 A set of questions drawn up by the parties, submitted to the court for approval and then provided to a commissioner who puts them to the witness. See Peté *et al*. *Civil Procedure A Practical Guide* (2024) 333–334.

7 Also referred to as evidence on commission. Evidence is presented before a court-appointed commissioner by a witness who is unable to testify at the trial of the matter. See Peté et al. *Civil Procedure* 331–332.

8 Uniform Court Rule 38(2). Also see the commentary on Rule 38(2) in Van Loggerenberg *Erasmus Superior Court Practice* (2021) Vol 2 D1 Rule 38-8–38-9.

9 *Davis v Davis* 1894 11 SC 253; *Hartung v Hartung* 1913 EDL 62.

10 2018 6 SA 55 (SCA) 61F-H. Also see *Mnisi v Road Accident Fund and Seven Similar Matters* (unreported ZAMPMBHC case dated 1 April 2022) para 52.

11 *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.

by affidavit. If there is reason to believe that the other party will contest the evidence, the court will usually order that the evidence be presented orally in court so it can be tested under cross-examination.[12] The courts have therefore been more willing to admit formal evidence[13] by way of affidavit.[14]

Even in applications for default judgment, the courts seem reluctant to admit evidence on affidavits. In terms of Uniform Court Rule 31(2)(a), if a claim is not for a debt or liquidated demand and the defendant is in default of delivery of a notice of intention to defend or a plea, the plaintiff may set the action down for default judgment and the court may, after hearing evidence, grant judgment against the defendant. In, for example, an action for damages sustained in a motor vehicle collision, the plaintiff must lead evidence.[15]

Under certain circumstances, evidence of damages may be given on affidavit, but in some reported decisions it was held that the proving of damages by affidavit of a medical practitioner could be dangerous.[16] This is in stark contrast with the position in the magistrates' courts where Magistrates' Court Rule 12(4) provides that the registrar or clerk of the court shall refer to the court any request for judgment for an unliquidated amount and the plaintiff shall furnish to the court evidence either orally "or by affidavit" of the nature and extent of the claim, whereafter the court shall assess the amount recoverable by the plaintiff and give an appropriate judgment.

The Civil Proceedings Evidence Act[17] also makes provision for the presentation of witness testimony on affidavit. Section 22 provides that:

> Whenever any fact ascertained by any examination or process requiring any skill in bacteriology, biology, chemistry, physics, astronomy, anatomy or pathology is or may become relevant to the issue in any civil proceedings, a document purporting to be an affidavit made by a person who in that affidavit alleges that he is in the service of the Republic or of a province or in the service of or attached to the South African Institute for Medical Research or any university in the Republic or any other institution designated by the Minister for the purposes of this section by notice in the Gazette, and that he has ascertained such fact by means of such examination or process, shall, subject to the provisions of subsections (2) and (3), on its mere production by any party in such proceedings be admissible in evidence to prove that fact.[18]

The presiding officer may, upon the application of any party, order that the person who made the affidavit be called to give oral evidence in the proceedings or that written interrogatories be submitted to the court. Such interrogatories and the reply thereto given on affidavit, shall be

12 Peté *et al*. *Civil Procedure* 334.

13 According to Peté *et al*. *Civil Procedure* 334, an example would be the testimony of a banking official providing the exchange rate on a certain date.

14 *Ex Parte Atkinson* 1918 CPD 127.

15 *Mashifane v Suliman* 1931 TPD 329; *Eloff v Sprinz's Executors* 1920 TPD 93; *Knight v Harris* 1962 2 SA 317 (SR).

16 *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); *Marshall v Pillay* (unreported, WCC case no 3761/17 dated 28 April 2023) para 25; *Phumudzo v Road Accident Fund* (unreported, ZAGPPHC case no 8651/2019 dated 24 March 2023) and *Ubisi v Road Accident Fund* (unreported, ZAMPMBHC case no A40/2023 dated 28 March 2024). In *Dorfling v Coetzee* 1979 2 SA 632 (NC) the court held that in motor vehicle collision matters oral evidence should not be confined to the *quantum* of damages suffered but should also set out the cause of action, if there has been contributory negligence and if the damages should be apportioned. Van Loggerenberg *Erasmus Superior Court Practice* Vol 2 D1 Rule 31-9 fn 54 points out that the practice in this respect is, unfortunately, not uniform. In *Venter v Nel* 1997 4 SA 1014 (N) at 1016A it was, for example, held that the practice in that division is to hear "some" oral evidence on claims for damages but that the inquiry is not as detailed or controversial as it would be if the matter was defended.

17 25 of 1965.

18 In terms of subrule 2 such affidavit evidence shall not be admissible unless a copy thereof has been delivered to every other party to the proceedings at least seven days before the date of production thereof.

admissible in evidence in such proceedings.[19]

2 4 Witness Statements and Summaries

2 4 1 Hoexter Commission

In 1997 the Hoexter Commission of Inquiry released a report on the rationalisation of the provincial and local divisions of the Supreme Court.[20] One of the points of discussion by the commission related to the compulsory exchange of witness statements or summaries by the parties before trial. At a public sitting in Durban on 28 November 1995, Wallis, on behalf of the General Council of the Bar, made the following submissions to the commission in this regard:

> (a) The underlying theory of exchanging witness statements is that it avoids trial by ambush and surprise.[21]
>
> (b) In principle this is acceptable, but it becomes problematic in actions where questions of fraud arise.[22]
>
> (c) Where the witness statement stands as evidence in chief, it is grossly unfair to the witnesses as they get no feel of the witness box before they are confronted with hostile cross-examination.[23]
>
> (d) Witness statements are prepared by lawyers and not the witnesses themselves. They read these statements as laypersons which becomes problematic when they are confronted with the true facts during cross-examination.[24]
>
> (e) The real flaw with the exchange of witness statements is that there is no management and ethos to do it. The key to the success of this practice is the ability and willingness of a judge to overcome the lack of co-operation between the parties.[25]

As a result of these concerns, the Commission recommended, as part of the implementation of case management in the High Court, that parties should only be obliged to exchange *witness summaries* before a progress conference is held.[26]

2 4 2 Commercial Court

During the 1990s a commercial court was created to manage commercial cases on a structured basis.[27] In terms of the rules of the commercial court, any party in a commercial action could, with notice to all other parties, apply to a designated judge in chambers for directions to deal with the case. The designated judge could then make an order to adjudicate justly, swiftly and satisfactorily upon the disputes between the parties. These directions could include provisions regarding the disclosure of identity of witnesses, facts and the exchange of witness statements

19 Section 22(3).

20 Third and final report of the Hoexter Commission of Inquiry into the Rationalisation of the Provincial and Local Divisions of the Supreme Court 1997.

21 Paragraph 1.1.17.

22 *Ibid.*

23 Paragraph 1.1.19.

24 *Ibid.*

25 Paragraph 1.1.22.

26 Paragraph 10.1.12. For a more detailed discussion of the Hoexter Commission, see Van Heerden 2005 *TSAR* 339 and 341.

27 This court formed part of the Witwatersrand Local Division (as it was then) of the High Court.

or summaries.[28]

As pointed out by Van Heerden, there was a negative attitude towards the prior exchange of witness statements by legal practitioners, and as a result the rules were amended to provide that the exchange of witness statements before trial was only allowed if all the parties to a case consented thereto.[29]

Schutz and Plewman were in favour of this approach by the commercial court and stated that a controlled system of exchange of witness statements would help considerably in allowing judges and practitioners to concentrate on the things that matter.[30]

The commercial court was abolished after being in existence for only a short period because of minimal use by practitioners and with that, the exhange of witness summaries also ceased to exist.[31]

2 4 3 Experimental Cape Rule 37A

In 1997 a second experimental Cape Court Rule 37A was introduced, dealing, *inter alia*, with case management in the Cape High Court.[32] In terms of this rule, it was provided that the parties would, during a progress conference, agree on the date by which witness summaries and further witness summaries had to be exchanged and whether it had to be filed at court.[33] The summary of each witness had to identify the witness, summarise the essence of the evidence that the witness would give on each issue with sufficient particularity to comply with the purpose of the summary, and be affirmed by the signature of the witness.[34] If a witness summary had not been delivered, no evidence could be presented at the trial except by consent of the court.[35]

This experimental rule did not, however, enjoy much support in practice and was repealed on 30 April 2001.[36]

2 4 4 Erasmus Core Rule

In 1998 Erasmus drafted a core set of rules that would operate in both the high and magistrates' courts.[37]

As part of these core rules, Erasmus advocated for the exchange of witness summaries in most opposed civil actions, where each party would be required to furnish a summary of the lay

28 Paragraph 2 of the 1996 WLD Practice Direction.

29 Van Heerden 2005 *TSAR* 340; para 10 of the 1996 WLD Practice Direction.

30 Schutz and Plewman "The Commercial Court: The Fear of Exchange of Witness Statements is it Justified?" 1994 *De Rebus* 411 412.

31 Van Heerden 2005 *TSAR* 342. For a more detailed discussion of the commercial court, see Van Heerden 2005 *TSAR* 339–340 and 341–342. On 3 October 2018, the Judge President of the Gauteng Division of the High Court issued a Commercial Court Practice Directive, establishing a new Commercial Court, which is administered as part of the High Court of the Gauteng Division, Pretoria and Gauteng Local Division, Johannesburg.

32 As promulgated in GN R1352 of 10 October 1997. For a more detailed discussion of this rule, see Van Heerden 2005 *TSAR* 340–341.

33 Rule 37A(1)(f) and (h).

34 Rule 37A(12)(b)(i) to (iii).

35 Rule 37A(12)(d).

36 Some of the reasons for the repeal of the rule included a lack of promised infrastructure making it impossible for the Registrar's staff to monitor and police the system, legal practitioners undermining the spirit of the rule by treating the progress conference as yet another obstacle placed in the way of busy practitioners and the general feeling that the rule was unduly complicated and cumbersome. For a more detailed discussion relating to the repeal of experimental Uniform Court Rule 37A, see Griesel "Cape Rule 37A - What Went Wrong? The Demise of Judicial Case Management or a New Beginning?" 2001 *De Rebus* 8.

37 Van Heerden 2005 *TSAR* 343.

witness evidence that such party intended to present at the trial.[38]

The purpose of the exchange of the witness summaries was to clarify the issues and evidence in respect thereof, and also to facilitate meaningful settlement negotiations between the parties.[39] The summary had to identify the witness by name and indicate the evidence that the witness was expected to present regarding each issue with enough particularity to serve the purpose of the rule. It also had to be verified by the witness' signature.[40]

Provision was also made for the parties to file further witness summaries in reply to an issue raised in another party's witness summary where such issue had not already been dealt with in the relevant summary.[41] If a witness summary had not been delivered, no evidence could be presented at the trial except by consent of the court.[42]

2 5 Pre-trial Conference

In terms of Uniform Rule 37(2)(a), in cases not subject to judicial case management as contemplated in Rule 37A, a plaintiff who receives notice of the trial date of an action, shall within 10 days deliver a notice in which the plaintiff appoints a date, time and place for a pre-trial conference. Rule 37(6)(i) provides that the minutes of the pre-trial conference shall be prepared and signed by or on behalf of every party which should, *inter alia*, set out any agreement regarding the production of proof by way of an affidavit.

Even if the parties come to an agreement at the pre-trial conference that certain evidence will be presented by way of affidavit, it seems as if the agreement will not bind the court and that, in the exercise of its discretion under Rule 38(2), it would only constitute another factor for consideration in determining whether sufficient reason exists for granting an order for the presentation of the evidence by affidavit.[43]

This is the only provision in Rule 37 relating to evidence the parties wish to present at trial. There are no provisions dealing with the number of lay witnesses to be called or a statement and/or summary of the evidence that the witnesses are going to present at trial.[44]

2 6 Judicial Case Management (Rule 37A)

In 2019, a new Uniform Court Rule 37A was enacted to make provision for extensive judicial case management in the High Court. In terms of Rule 37A, a judicial case management system shall apply, at any stage after a notice of intention to defend is filed to such categories of defended actions as the Judge President of any Division may determine in a Practice Note or Directive,[45] and to any other proceedings in which judicial case management is determined by

38 Core Rule 8(1)(a).

39 Core Rule 8(1)(b).

40 Core Rule 8(1)(c).

41 Core Rule 8(1)(c).

42 Core Rule 8(1)(d). For a more detailed discussion of this rule, see Van Heerden 2005 *TSAR* 343–344.

43 Van Loggerenberg *Erasmus Superior Court Practice* Vol 2 D1 Rule 38-8.

44 In terms of para 10.2.4 of the Gauteng Consolidated Practice Directive 1 of 2024 applicable in Pretoria and Johannesburg, the pre-trial conference minutes must also particularise the parties' agreement or respective positions on the identity of the witnesses the parties intend to call and in broad terms the nature of such evidence to be given by each witness.

45 In terms of Practice Directive 2 of 2019 in Gauteng these categories currently consist of matters where the defendant is the Road Accident Fund, the MEC Health, Gauteng or the Passenger Rail Agency of South Africa (PRASA).

the Judge President, of own accord, or upon the request of a party, to be appropriate.

According to Van Loggerenberg, the purpose of Rule 37A is, evidently, to promote the effective disposal of defended actions or other opposed proceedings which, at the discretion of a Judge President, call for case management through judicial intervention. Ultimately, however, as is clear from the provisions of Rule 37A(2)(c),[46] the South African adversarial system of civil procedure and, in particular, party control prevails.[47]

Rule 37A(10)(b) provides for the soliciting of admissions and the making of enquiries from and by the parties to narrow the issues or curtailthe need for oral evidence. The parties must furthermore provide the identity of the witnesses they intend to call and in broad terms the evidence they are going to present.[48] Rule 37A(11)(b) provides for the promotion of agreement on the number of witnesses that will be called at the trial.

Parties must only "address" these issues and there is nothing forcing the parties to come to an agreement.[49] Surprisingly, there are no provisions contained in Rule 37A about the presentation of affidavit evidence at the trial or the exchange of witness statements, or summaries before the trial as was set out in the previous experimental Rule 37A or Erasmus Core Rule 37A.

2 7 Practice Directive 1 of 2024 in Gauteng

Practice Directive 1 of 2024 in Gauteng provides that at a conference, without limiting the scope of judicial engagement, the Judge "shall endeavour to promote agreement" on limiting the number of witnesses that will be called at the trial eliminating pointless repetition or evidence covering facts already admitted.[50]

3 ENGLAND AND WALES

3 1 Position before 1986

Before 1986, witnesses in England and Wales used to give all their evidence in the witness box during civil court trials. This was considered the gold standard, as lawyers were in a position to test a witness's account of events. It, however, took up a lot of court time.[51] The disclosure of witness statements was prohibited as it was seen as privileged.[52] As a result, the surprise element played an important role in the presentation of oral evidence at trial[53] and was even

46 This subrule provides that case management through judicial intervention shall be construed and applied in accordance with the principle that, notwithstanding the provisions herein providing for judicial case management, the primary responsibility remains with the parties and their legal representatives to prepare properly, comply with all rules of court, and act professionally in expediting the matter towards trial and adjudication.

47 Van Loggerenberg *Erasmus Superior Court Practice* Vol 2 D1 Rule 37A-4.

48 Rule 37(A)(10)(e).

49 Rule 37(A)(10).

50 Paragraph 11.2.

51 Hawthorne "New English Court Witness Statement Rules have Positive Early Effect" https://www.pinsentmasons.com/out-law/analysis/new-english-court-witness-statement-rules-have positive-early-effect (accessed 26-06-2024).

52 Tapper *Cross on Evidence* (1990) 431; De Vos 1993 *TSAR* 263; Van Heerden 2005 *TSAR* 334.

53 Langan and Henderson *Civil Procedure* (1983) 170; De Vos 1993 *TSAR* 263; Van Heerden 2005 *TSAR* 334.

referred to by Jacob as a system of "trial by ambush".[54]

3 2 Position after 1986

In 1986 Order 38 Rule 2A was promulgated in England and Wales. This Rule made provision for the exchange of witness statements between the parties in the chancery division, commercial court, admiralty court, and the court for official referees. The procedure was extended to all divisions of the High Court, including the Queen's Bench in 1988.[55]

The purpose of putting the witnesses' primary evidence in writing at the pre-trial stage was to save valuable court time while still allowing the other parties to cross-examine the witnesses on their statements at trial.[56]

In 1995 a practice direction was issued jointly by the Lord Chief Justice and the Vice-Chancellor to provide for such witness statements to stand as the evidence in chief of a witness.

3 3 The Woolf Reforms

In 1997, Lord Woolf compiled a comprehensive report outlining the barriers that impede access to justice in civil matters in England and Wales.[57] In his interim report, Lord Woolf stated that no one has informed him that the principle of openness on which the exchange of witness statements is founded is wrong and should be discontinued. He was of the opinion that the "cards on the table" approach is universally accepted as the proper way to conduct civil litigation.[58]

Lord Woolf, however, noted a serious problem with witness statements, namely that they ceased to be the authentic account of lay witnesses, but instead have become an elaborate, costly branch of legal drafting. The general view of judges seems to be that the use of witness statements reduces trial time, but the majority of cases do not proceed to trial. The costs of preparation are therefore incurred in all matters but the savings of trial time in only a few.[59]

According to Lord Woolf, a large part of the problem was the fear that a witness would not be allowed to depart from or amplify his or her statement at the trial itself. This has led to elaborate

54 Jacob *The Reform of Civil Procedural Law and Other Essays in Civil Procedure* (1982) 72; De Vos 1993 *TSAR* 263.

55 O' Hare and Hill *Civil Litigation* (2001) 454; De Vos 1993 *TSAR* 263–264; Van Heerden 2005 *TSAR* 334.

56 Hawthorne *New English Court Witness Statement Rules have Positive Early Effect*.

57 Lord Woolf *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (1996).

58 *Ibid* Ch 12 para 53.

59 *Ibid* para 54.

over-drafting to ensure that the witness statement is complete in every detail.[60]

Lord Woolf therefore made the following recommendations about the content and form of witness statements:

(a) they should, as far as possible, be in the witness's own words;

(b) they should not discuss legal propositions;

(c) they should not comment on documents;

(d) they should conclude with a statement, signed by the witness, that the evidence is a true statement and that it is in his or her own words.[61]

3 4 The Civil Procedure Rules

3 4 1 The Overriding Objective

Lord Woolf's final report consequently resulted in the overhaul of almost the entire civil procedural system applicable in England and Wales, culminating in the adoption of the Civil Procedure Rules in 1999. The Civil Procedure Rules (CPR)[62] provides in the very first rule a statement of the overall purpose of the civil justice system. In terms of CPR 1, the CPR is a procedural code with the overriding objective of enabling the court to deal with cases justly and at proportionate cost, which includes, so far as is practicable, the following:

(a) ensuring that the parties are on an equal footing and can participate fully in proceedings, and that parties and witnesses can give their best evidence;

(b) saving expense;

(c) dealing with the case in ways which are proportionate

  (i) to the amount of money involved;

  (ii) to the importance of the case;

  (iii) to the complexity of the issues; and

  (iv) to the financial position of each party;

(d) ensuring that it is dealt with expeditiously and fairly;

(e) allotting to it an appropriate share of the court's resources, while taking into consideration the need to allot resources to other cases; and

(f) enforcing compliance with rules, practice directions and orders.[63]

Moreover, the court must seek to give effect to the overriding objective when it exercises any power given to it by the CPR.[64] The parties are also required to assist the court to further the

60 Lord Woolf *Access to Justice* Ch 12 para 55.

61 *Ibid* para 59.

62 Hereafter referred to as the "CPR".

63 CPR 1.1(2).

64 CPR 1.2.

overriding objective.[65]

CPR 1.4 requires the court to further the overriding objective by actively managing cases.

3 4 2 Affidavit Evidence

Before the adoption of the CPR, written evidence was generally presented by affidavits. The CPR introduced the exchange of witness statements and as a result modern practice has encountered some blurring of the distinction between witness statements and affidavits.[66]

In terms of Rule 32.15 of the CPR, evidence must be given by affidavit instead of or in addition to a witness statement if this is required by the court, by a provision contained in any other rule, a practice direction or any other enactment.[67]

3 4 3 The Power of the Court to Control Evidence

CPR 32(1) provides that the court may control the evidence presented at trial by giving directions as to:

(a) the issues on which it requires evidence;

(b) the nature of the evidence that it requires to decide those issues; and

(c) the way in which the evidence is to be placed before the court.

The court may also use its power to exclude evidence that would otherwise be admissible[68] and may limit cross-examination.[69]

3 4 4 The General Rule

In terms of CPR 32(2), any fact that needs to be proved by the evidence of witnesses is to be proved at trial, by their oral evidence given in public, and at any other hearing, by their evidence in writing.

The court may give the following directions:

(a) identifying or limiting the issues to which factual evidence may be directed;

(b) identifying the witnesses who may be called or whose evidence may be read; or

(c) limiting the length or format of witness statements.[70]

3 4 5 Witness Statements

CPR 32.4 provides that a witness statement is a signed written statement that contains the

65 CPR 1.3.

66 Sime *A Practical Approach to Civil Procedure* (2010) 435.

67 Rule 32.16 sets out the form in which an affidavit must be set out, which is basically similar to the form for witness statements.

68 CPR 32.1(2).

69 CPR 32.1(3).

70 CPR 32.2(3).

evidence which the witness would be allowed to give orally.

The court will order a party to serve on the other parties any witness statement of the oral evidence which that party intends to rely on in relation to any issues of fact to be decided at the trial.[71]

The court may give directions as to the order in which witness statements are to be served and whether or not the witness statements are to be filed.[72]

If a party has served a witness statement and he wishes to rely at trial on the evidence of the witness who made the statement, he must call the witness to give oral evidence unless the court orders otherwise or he puts the statement in as hearsay evidence.[73]

Where a witness is called to give oral evidence, his witness statement shall stand as his evidence in chief unless the court orders otherwise.[74]

A witness giving oral evidence at trial may with the permission of the court amplify his witness statement and give evidence in relation to new matters which have arisen since the witness statement was served on the other parties.[75]

If a party who has served a witness statement does not call the witness to give evidence at trial or put the witness statement in as hearsay evidence, any other party may put the witness statement in as hearsay evidence.[76]

The witness statement must be expressed in the first person, if practicable, be in the intended witness's own words and must in any event be drafted in their own language.[77]

A witness statement must also indicate which of the statements in it are made from the witness's own knowledge and which are matters of information or belief, and the source for any matters of information or belief.[78]

A witness statement must also include a statement by the intended witness, in their own language, that they believe the facts in it are true.[79]

If a witness statement or a witness summary for use at trial is not served in respect of an intended witness within the time specified by the court, then the witness may not be called to give oral evidence unless the court grants permission.[80]

Where a witness is called to give evidence at trial, he may be cross-examined on his witness statement whether or not the statement or any part of it was referred to during the witness's

71 CPR 32.4(2).

72 CPR 32.4(3).

73 CPR 32.5(1).

74 CPR 32.5(2).

75 CPR 32.5(3). In terms of subrule 4, the court will give permission only if it considers that there is good reason not to confine the evidence of the witness to the contents of his witness statement.

76 CPR 32.5(5).

77 Practice Direction 32 para 18.1. All witness statements must comply with the requirements as set out in Practice Direction 32 and be in the format as required by Rule 32.19.1.

78 Practice Direction 32 para 18.2.

79 Practice Direction 32 para 20.1. Paras 22.1 and 22.2 of Practice Direction 32 deal with alterations to witness statements.

80 CPR 32.10.

evidence in chief.[81]

3 4 6 Witness Summaries

CPR 32.9 provides that a party who is required to serve a witness statement for use at trial, but is unable to obtain one, may apply, without notice, for permission to serve a witness summary instead.

A witness summary is a summary of the evidence, if known, which would otherwise be included in a witness statement, or if the evidence is not known, the matters about which the party serving the witness summary proposes to question the witness.[82]

Unless the court orders otherwise, a witness summary must include the name and address of the intended witness[83] and must be served within the period in which a witness statement would have had to be served.[84]

3 5 The Jackson Reforms

In 2013, Lord Jackson presented his final report on his wide-ranging review of the civil litigation costs system in England and Wales.[85] He pointed out that there are few restrictions in practice on a party's ability to produce and rely upon witness statements in civil proceedings. Although CPR 32 gives the court the power to do so, the courts do not generally inquire as to how many witnesses a party proposes to call, upon what matters they will give evidence (and whether those matters are relevant to the real issues in dispute) and how long their witness statements will be.[86]

Lord Jackson was of the opinion that the best way to avoid incurring costs because of lengthy and irrelevant witness statements was for the court to hear argument at an early case management conference about what matters need to be proved and then to give specific directions relating to witness statements.[87]

Lord Jackson also referred to the similar approach of German civil procedure namely the *Relationsmethode*. In terms of this procedure each party is required to identify the witnesses whom they intend to rely upon to prove the factual matters contained in the pleadings. After the pleadings are delivered, the presiding judge will review them and identify which factual matters are in dispute and which witnesses the judge will receive evidence from on particular matters.[88]

The aspect of the "Relationsmethode" that Lord Jackson believed should be adopted in civil litigation in England and Wales is the identification of proposed witnesses by reference to the pleadings. If in any given case the court so directs, each party should identify the factual witnesses whom it intends to call and which of the pleaded facts the various witnesses will prove. Jackson opined that this is a task which the parties will be doing internally anyway, so

81 CPR 32.11.

82 CPR 32.9(2).

83 CPR 32.9(3).

84 CPR 32.9(4). Rules 32.4 (requirement to serve witness statements for use at trial), 32.5(3) (amplifying witness statements), and 32.8 (form of witness statement) shall *mutatis mutandis* apply to the witness summary.

85 Lord Jackson *Review of Civil Litigation Costs Final Report* (2013).

86 *Ibid* 376. Lord Jackson stated that the Commercial Court is now exercising these powers, as part of that court's commitment to more active case management.

87 Lord Jackson *Review of Civil Litigation Costs* 376.

88 *Ibid* 377.

hopefully it will not contribute unduly to costs.[89]

3 6 New Developments

3 6 1 Witness Statement Working Group

In 2018 the Witness Evidence Working Group[90] was set up under the auspices of the Commercial Court Users' Committee. The reason was a concern on the part of the judges of the Commercial Court that factual witness statements were often ineffective in performing their core function of achieving the best evidence at proportionate cost in Commercial Court trials.[91] In its final report, the Witness Evidence Working Group stated the following advantages of witness statements:

(a) Consistently with the modern "cards on the table" approach, it enables the parties to identify at a relatively early stage the evidential case they have to meet. It thereby enables informed advice to be given as to the merits and promotes the prospect of settling disputes well in advance of trial. [92]

(b) It also serves to identify the evidential issues for the purposes of the expert evidence in a case and for the efficient management of the pre-trial process and the trial itself.[93]

(c) Signed witness statements also reduce the room for misunderstandings over proposed evidence and reduce witnesses' ability credibly to distance themselves from the evidence in their statements.[94]

(d) Moreover, certainty as to what the witnesses' evidence will be at trial, at least in theory, allows for cross-examination to be more efficient.[95]

The WEWG, however, also emphasised the following disadvantages of witness statements:

(a) First, there are real concerns that it does not always achieve the best evidence. The experience in civil trials before the introduction of witness statements shows that best evidence is often obtained by a traditional examination-in-chief, when witnesses present their evidence in their own words and give a more genuine version of their recollection.[96]

(b) Developing statements through numerous drafts and requiring the witness to retell the version of facts over and over, is a process which may corrupt memory. This may render the final product less reliable than the first "unvarnished" recollection.[97]

(c) Throwing a witness into cross-examination straightaway puts them on the defensive from the outset, deprives them of the opportunity of making a favourable impression by evidence-in-chief, and encourages counterproductive over-lawyering and lengthening of

89 *Ibid.*

90 Hereafter referred to as the "WEWG".

91 Witness Evidence Working Group *Factual Witness Evidence in Trials before the Business and Property Courts Final Report* (2018) 1.

92 WEWG *Final Report* 5.

93 *Ibid.*

94 *Ibid*.

95 *Ibid.*

96 WEWG *Final Report* 5.

97 *Ibid.*

witness statements in an attempt to anticipate cross-examination.[98]

(d) The vast majority of practitioners and judges have little or no experience of trying commercial disputes under the previous system which required oral evidence-in-chief at trial.[99]

(e) Witness statements frequently stray far beyond any evidence the witness would in fact give if asked proper questions in chief. They often cover matters of marginal relevance or stray into comment and "spin".[100]

(f) The time and cost savings of the current practice are often somewhat illusory. Cross-examination under the present system takes much longer (both at trial and in terms of preparation) because of the ground that the cross-examiners fear they have to cover. As a result, the supposed advantage of efficiency and cost saving at trial is often not realised.[101]

(g) The witness statement phase of the pre-trial process has become very time-consuming thereby increasing costs and lengthening the pre-trial timetable. It is clear that the introduction of witness statements has resulted in a substantial increase and front loading in costs, which may result in the inhibiting rather than promoting of settlement.[102]

The WEWG pointed out that the Business and Property Courts decide cases that differ widely in their nature, size and complexity. The practice in relation to factual witness evidence must be tailored to the circumstances of individual cases and it is not desirable to adopt a prescriptive "one size fits all" approach. In most cases before these courts, however, the current practice involves the exchange of witness statements, and reforms to such a system should be available in all courts to achieve uniformity of practice.[103]

The WEWG stated that the great majority of those consulted showed little enthusiasm for radical reform of the system of exchange of witness statements.[104] Therefore, the WEWG identified a number of non-radical ways in which the use of witness statements in the BPCs could be improved.[105]

3 6 2 Practice Direction 57AC

The recommendations of the WEWG has led to the promulgation of Practice Direction 57AC. The intention of this Practice Direction is to improve the authenticity of witness statements by encouraging an oral evidence-in-chief-style approach to preparation, whilst maintaining the efficiencies of "cards on the table" litigation generated by pre-prepared witness statements.[106]

This Practice Direction states the purpose of a trial witness statement as setting out in writing the evidence in chief that a witness of fact would give if they were allowed to give oral evidence

98 *Ibid.*

99 WEWG *Final Report* 6–7.

100 *Ibid.*

101 *Ibid.*

102 *Ibid.*

103 WEWG *Final Report* 1.

104 *Ibid.*

105 For a list of these recommendations, see the WEWG *Final Report* 17.

106 Leitch, Thorne and Robb "Practice Direction 57AC: Combatting 'Over-Lawyered' Witness Statements" https://www.paulhastings.com/insights/client-alerts/practice-direction-57ac-combatting-over-lawyered-witness-statements (accessed 27-06-2024).

at trial without having provided the statement.[107]

Trial witness statements are important in informing the parties and the court of the evidence a party intends to rely on at trial. Their use promotes the overriding objective by assisting the court to deal with cases justly, efficiently and at proportionate cost, by putting parties on an equal footing, saving time at trial, and promoting settlement before trial.[108]

A trial witness statement must contain only:

(a) evidence as to matters of fact that need to be proved at trial by the evidence of witnesses in relation to one or more of the issues of fact to be decided at trial, and;

(b) the evidence as to such matters that the witness would be asked by the relevant party to give and the witness would be allowed to give, in evidence in chief if they were called to give oral evidence at trial.[109]

A trial witness statement must set out only matters of fact of which the witness has personal knowledge that are relevant to the case, and must identify by listing what documents, if any, the witness has referred to or been referred to for providing the evidence set out in their trial witness statement.[110]

Trial witness statements should be prepared in accordance with the Statement of Best Practice.[111]

A trial witness statement must be verified by a statement of truth as required by rule 22.1(b) and paragraph 20.2 of Practice Direction 32 and, unless the court otherwise orders, must also include the following confirmation, signed by the witness:

> I understand that the purpose of this witness statement is to set out matters of fact of which I have personal knowledge. I understand that it is not my function to argue the case, either generally or on particular points, or to take the court through the documents in the case. This witness statement sets out only my personal knowledge and recollection, in my own words. On points that I understand to be important in the case, I have stated honestly (a) how well I recall matters and (b) whether my memory has been refreshed by considering documents, if so how and when. I have not been asked or encouraged by anyone to include in this statement anything that is not my own account, to the best of my ability and recollection, of events I witnessed or matters of which I have personal knowledge.[112]

A trial witness statement must be endorsed with a certificate of compliance signed by the relevant legal representative.[113]

If a party fails to comply with any part of this Practice Direction, the court has extensive powers in ordering the striking out or redrafting of witness statements, the making of an adverse cost order, or the ordering of a witness to give some or all of their evidence in chief orally.[114]

Leitch *et al*. made the following statement regarding the new Practice Direction:

> Only time will tell as to whether the intentions of PD 57AC feed into practice. Whilst the changes are not radical, the practical effect could be substantial, not least given the more pronounced onus on lawyers and witnesses alike to make concerted efforts to aim for concision, fact, and relevance. If sanctions are applied with 'Woolfian' rigour, PD 57AC could mark a

107 Paragraph 2.1.

108 Paragraph 2.2.

109 Paragraph 3.1.

110 Paragraph 3.2.

111 Paragraph 3.4. Contained in the appendix of the Practice Direction.

112 Paragraph 4.1.

113 Paragraph 4.3.

114 Paragraph 5.2.

significant change in approach.[115]

4 CRITICAL ANALYSIS

4 1 Introduction

As far back as 1993, De Vos argued that the South African law of civil procedure had a strong common law-orientated character and that the disclosure of witness statements before trial is quite reconcilable with the same.[116] He was of the opinion that the expressed aims of the English procedure relating to the exchange of witness statements, expedited the proceedings and saved costs.[117]

According to De Vos, the rule would also serve to facilitate and encourage settlements (since the parties would be in a better position to assess the strength of their respective cases), improve pre-trial preparation and shorten trials by helping to identify the real issues and reducing the need of oral evidence. He therefore expressed the view that consideration should be given to introducting a similar measure in the South African process. Such an innovation would be in step with modern developments world-wide aimed at achieving effective access to justice.[118]

As already discussed, several initiatives have been implemented since these remarks in the South African law in an attempt to introduce the exchange of witness statements before trial. All of these attempts were abolished, mainly due to the reluctance of legal practitioners to fully endorse these proposed procedures.[119]

In 2005, Van Heerden advocated strongly for the compulsory exchange of witness statements in action proceedings before trial. She opined that retaining the element of surprise in respect of oral evidence has lost its right of existence and that the exchange of witness statements is a procedure that facilitates time and cost-effective preparation for trial which will promote a fair trial not only by saving time and costs but also by "equalizing the playing field" due to eliminating the element of surprise.[120] Van Heerden then also made certain suggestions for reform mainly based on the English procedure at the time.[121]

The viewpoints of both De Vos and Van Heerden could not be faulted at the time when they presented their arguments. In theory at least, the exchange of witness statements before trial made perfect sense if viewed against the ideals of reducing the time and costs involved in civil trials, thereby enhancing civil access to justice.

Unfortunately, it seems as if the exchange of witness statements before trial did not have the desired effect in England and Wales as hoped for. The development of the presentation of evidence at trial by affidavits, witness statements and witness summaries in South Africa and England and Wales will be critically discussed below.

4 2 Overriding Objective

Over the past twenty years there has been very little development of the presentation of witness evidence during action trials in the South African law. The position in South Africa stands in

115 Leitch *et al*. "Practice Direction 57AC: Combatting 'Over-Lawyered' Witness Statements".

116 De Vos 1993 *TSAR* 276.

117 *Ibid* 275.

118 *Ibid.*

119 See the discussion above 6–10.

120 Van Heerden 2005 *TSAR* 345.

121 *Ibid* 345–346.

stark contrast to that of England and Wales where the exchange of witness statements, standing as the evidence in chief of a witness, is now securely entrenched in the English civil justice system. As the South African procedural system is to a large extent based on the English model it is quite surprising that South Africa's development in this regard was so limited.

It is contended that the main reason for this is the concept of party control. Since the introduction of the CPR in England and Wales, party control has been significantly reduced in favour of the overriding objective. In South Africa, however, policy-makers still seem reluctant to reduce party control to such an extent that it will make a real contribution to access to justice in civil matters. There are several reasons for this.

First, there are no similar provisions in the Superior Courts Act[122] or Uniform Rules of Court comparable to the overriding objective of the CPR. The only provision that relates in some way to the overriding objective is found in Rule 37A(2)(a) which provides that case management through judicial intervention shall be used in the interests of justice to alleviate congested trial rolls and to address the problems which cause delays in the finalisation of cases. This provision is, however, only applicable to those matters that are subject to judicial case management.

Secondly, substantial party control is still entrenched in the Rules of Court. Even in matters that are subject to judicial case management, the primary responsibility remains with the parties and their legal representatives to prepare properly, comply with all rules of court, and act professionally in expediting the matter towards trial and adjudication.[123] It is therefore clear that South Africa's adversarial system of civil procedure, and, in particular, party control prevails. In line with this, a case management judge has limited powers, for example, he or she can only endeavour to promote agreement on limiting the number of witnesses that will be called at the trial, eliminating pointless repetition or evidence covering facts already admitted. The parties to civil litigation remain therefore, for the most part, in full control concerning the evidence that they are going to present at trial.

Thirdly, the orality principle remains firmly entrenched in the South African civil legal tradition. It therefore only seems natural that there will be severe reluctance from the legal fraternity to make a complete u-turn from examining witnesses in chief to the exchange of written witness statements before trial.

The lack of a general provision providing for an overriding objective in line with the CPR in England and Wales is therefore currently a serious deficiency in the South African law of civil procedure and should be addressed urgently.

4 3 Affidavit Evidence in England and Wales

After the CPR introduced the exchange of witness statements in England and Wales modern practice has encountered some blurring of the distinction between witness statements and affidavits.

As the default position that evidence in chief should generally be adduced by way of witness statement is now firmly entrenched in the English system, it doesn't seem as if the presentation of affidavit evidence in England and Wales will add much value to the reform of South African law.

4 4 Witness Statements in England and Wales

If one critically analyses the English experience in relation to the exchange of witness

122 10 of 2013.

123 Uniform Court Rule 37A(2)(c).

statements, it seems clear that the procedure only had limited success. Only six per cent of the WEWG's participants believed that the current system fully achieved the aim of procuring the best witness evidence possible, while 45 per cent of them considered that it did so only partly or not at all. The overall sentiment from the participants focused mainly on the over-lawyered nature of witness statements.[124]

A substantial majority of the judges of the Commercial Court in England and Wales believed that factual witness statements were often ineffective in performing their core function of achieving best evidence at proportionate cost in Commercial Court trials.[125]

Since the introduction of the compulsory exchange of witness statements in the Civil Procedure Rules, there have been several court decisions where this procedure has been criticised.

In *Moore v Moore*,[126] the court criticised the witness statements for their lack of brevity, repetition of documentary evidence, argumentative nature, and attempts to introduce expert evidence and inadmissible opinion evidence. The court held that inappropriate and verbose witness evidence would only weaken a witness's credibility and the relevance of the evidence presented.

In *Bates v Post Office (Ltd)*,[127] the court had several concerns relating to the preparation of factual witness evidence. In one example, the witness's cross-examination led to a "far greater understanding" of the critical issues in the case, which had been left out of the relevant witness statement. The court held that the written evidence was "extraordinarily one-sided," that making "statements that are the exact opposite of the facts is never helpful," and that it is "the opposite of what witness statements are supposed to be".

Even after introducing Practice Direction 57AC, the exchange of witness statements in the Business and Property Courts of England and Wales remained problematic. In *Mackenzie v Rosenblatt Solicitors*,[128] for example, the High Court has criticised a number of trial witness statements for noncompliance with Practice Direction 57AC and found that the content of witness statements was unreliable. The Court raised several issues with the defendants' witness statements for failure to comply with the rules. These concerns included:

> (a) failure to identify the documents from which they had refreshed their memory, or at which they had otherwise looked in the course of preparing their statements;
>
> (b) the inclusion of passages arguing the defendant's case; and
>
> (c) statements which failed to make clear how well the witnesses could recall certain matters.

The Court was also highly critical of the claimant's witness statements, which resulted in the conclusion that the content of the witness statements could not be relied on. At the heart of the criticisms was the concern that the statements had been carefully crafted by the lawyers but failed to reflect the witnesses' own evidence. The court observed that the true voice of the relevant witnesses did not appear from their witness statements. The court held that:

> [h]aving seen all four witnesses give evidence, it is clear to me that none of the four statements are written using the witness's own words. The four witnesses were different personalities and had very different levels of recall of events (and, indeed, willingness to engage with the facts), but the four witness statements are of a uniform style and tone, giving the impression of a person with a clear overview of events, if not their detail, and a clear picture of the case to be

124 WEWG *Final Report* 9.

125 WEWG *Final Report* 1.

126 [2016] EWHC 2202 (Ch).

127 [2019] EWHC 3408 (QB).

128 [2023] EWHC 331 (Ch).

advanced on behalf of BM.

It is contended that witness statements standing as evidence in chief will remain problematic where the evidence is contentious or where the credibility of witnesses is at stake, notwithstanding any amendments to the CPR or the issuing of any new practice directions. Legal practitioners will always make every attempt to show a witness's evidence in chief in the best light possible and the (conscious or unconscious) over-lawyering of witness statements therefore seems almost inevitable.

On the other hand, it seems clear that the exchange of witness statements, standing as evidence in chief, may be productive and may indeed further the objectives of the overriding objective in some cases. Almost half (48 per cent) of the participants of the WEWG, felt that the current system of the exchange of witness statements achieved the aim of producing the best evidence "substantially".[129]

It is contended that in those matters where the witness's evidence in chief is not contentious and the credibility of the witness is not in question, the exchange of witness statements standing as evidence in chief can indeed play a crucial role in reducing valuable court time and costs.

The evidence of some witnesses may be uncontentious, credible and not subject to any cross-examination by the opponent. If, for some or other reason, the opponent does not wish to admit this evidence as common cause facts, the evidence should be presented by way of affidavit without any judicial intervention and without the need for the witness to attend the trial.

Nevertheless, the evidence of some witnesses may be uncontentious and generally credible but the opponent, or the case management judge, may feel that cross-examination of the witness may be necessary in the circumstances. In such instances, the evidence should be presented by the exchange of a witness statement before trial, which evidence should then stand as the evidence in chief of the witness concerned. The witness statement should then be affirmed under oath by the witness at the trial and the witness can thereafter be cross-examined by the other parties.

This is in full accordance with Rule 32(2) which provides that the court may identify or limit the issues to which factual evidence may be directed, identify the witnesses who may be called or whose evidence may be read, or limit the length or format of witness statements. As pointed out by Lord Jackson, the English courts do not, however, in general, inquire as to how many witnesses a party proposes to call, upon what matters they will give evidence (and whether those matters are relevant to the real issues in dispute) and how long their witness statements will be.

From the above, it is contended that every matter where witnesses are going to testify at trial, should be considered on its own merits.

4 5 Witness Summaries in England and Wales

From the above it seems clear that the exchange of witness statements before trial where evidence is contentious, or where the credibility of witnesses is in question, gives rise to considerable problems in practice in England and Wales. What should the position therefore be in matters like these? Should the exchange of witness statements be abolished in its entirety?

It is contended that the main advantage of the exchange of witness evidence before trial is the possibility of early settlement. It is not uncommon for a plaintiff or defendant to only disclose the evidence that is favourable to him or her to the legal representative, or to put this evidence in the best light possible. In many instances, it is only during a trial where the true version of

129 WEWG *Final Report* 9.

the evidence comes to light and it is not uncommon for the legal representative to be caught by surprise by evidence never alluded to by his or her client during prior consultations.

This situation may be prevented by the earlier exchange of evidence that the opponent intends to adduce at the trial. This will also open the door for more fruitful settlement negotiations before a matter proceeds to trial. In this regard, it is fully agreed with Van Heerden that in a fair civil trial, retaining the element of surprise in respect of oral evidence has lost its right of existence, and with De Vos that the "cards on the table" approach would be in step with modern developments world-wide aimed at achieving effective access to justice.

As Lord Woolf, however, also rightly pointed out, the majority of cases never proceed to trial and the costly preparation of elaborate witness statements will in most instances only lead to a substantial increase in the front-loading costs of litigation. This in turn will have a negative effect on access to justice in civil matters.

A possible solution to this conundrum may be the compulsory exchange of witness summaries instead of witness statements. In England and Wales, this is only an option if a witness statement cannot be obtained. However, the compulsory exchange of witness summaries before trial may pave the way for the early settlement of a matter without the problematic aspects experienced with witness statements in England and Wales.

5 CONCLUSION

In conclusion, it seems as if the English model relating to the presentation of evidence at trial may not be the best example to follow on a full-scale basis in the South African context. It is especially the default position regarding the compulsory exchange of witness statements standing as the evidence in chief of a witness in England and Wales that proved problematic. However, there are certain provisions in the CPR and Practice Direction 57AC that could be successfully incorporated into the South African civil system. Some of these include the addition of an overriding objective in the rules of court, the exchange of witness summaries before trial, and in those instances where witness statements may indeed shorten the duration of a trial, the content and certification thereof. In the second part of this article the position concerning the presentation of witness evidence at trial in some of the states of Australia will be critically examined. After this analysis, detailed recommendations for legal reform will be made based on the English and Australian models.