

SOUTH AFRICA / JUDGMENT

Union-Swiss (Proprietary) Limited v Govender and Others (5903/2017) [2020] ZAKZDHC 30; 2021 (1) SA 578 (KZD) (7 August 2020)

[2020] ZAKZDHC 30

COURT

Kwazulu-Natal High Court, Durban

BEFORE

Chetty

CASE / FILE NUMBER

5903/2017

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IN

THE HIGH COURT OF SOUTH AFRICA,
KWAZULU-NATAL LOCAL DIVISION,
DURBAN

CASE

NO: 5903/2017

In

the matter between:

UNION-SWISS
(PROPRIETARY) LIMITED
Applicant / Plaintiff
And
DARLTON
LOGAN GOVENDER
First Respondent / Defendant
ROYAL
BRIGHTON TRADING
(PROPRIETARY)
LIMITED
Second Respondent / Defendant
AARON SIBUSISO
GINA
Third Respondent / Defendant
KHAANA
BRAND MANAGEMENT CC
Fourth Respondent / Defendant
RAPTOREX
(PROPRIETARY)
LIMITED

Fifth Respondent / Defendant

MOHAMED

FAEZAL SAHIB

Sixth Respondent / Defendant

MINISTER OF

POLICE

Seventh

Respondent / Defendant

This

judgment was handed down electronically by circulation to the parties' representatives by email and released to SAFLII.

The

date and time for hand down is deemed to be 09h30 on 7 August 2020.

ORDER

1.

The application is dismissed;

2.

Each party is to pay its own costs.

JUDGMENT

Chetty J:

- [1] This is an application in which the applicant, who is the plaintiff in the action, seeks an order that the trial set down for a period of 10 days, commencing 24th August 2020, be conducted remotely via the electronic platform of Microsoft Teams, in accordance with the procedures set out in a letter to the Judge President dated 5 June 2020, and subject to any further directions that the court deems fit.
- [2] For convenience, I will refer to the parties as they are referred to in the action. In the action, the plaintiff is seeking interdictory and ancillary relief against the defendants arising from an alleged infringement of the plaintiff's trade mark of the product known as Bio Oil in terms of the Trade Marks Act 194 of 1993, and the alleged counterfeit manufacture of the plaintiff's protected goods in terms of the Counterfeit Goods Act 37 of 1997.
- [3] It is necessary to briefly set out the facts as pleaded in the action, as this provides the backdrop against which the application must be assessed. The plaintiff, who is the proprietor in South Africa of the Bio Oil trade mark, has spent significant amounts of money and put considerable effort into the advertisement of its products. In April 2017 members of the South African Police Services executed a search and seizure warrant at certain business premises in Springfield Park, Durban and seized significant amounts of product bearing the Bio Oil trade mark, as well as plastic bottles and packaging material resembling the Bio Oil trade mark. The goods were seized on the basis that they were counterfeit.

- [4] It is alleged that the defendants were co-conspirators from March 2015 onwards in the manufacture and production of counterfeit Bio Oil products, causing the plaintiff loss of royalties in the amount of approximately R8,3 million. Apart from the monetary claim, the plaintiff seeks an order interdicting the first to sixth defendants from infringing its trade mark and to deliver up the offending goods, packaging and raw material used in the production of the counterfeit products.
- [5] The first defendant, who is represented by Amod Attorneys of Durban, has defended the action, and admits to being an employee of the second defendant whose business is located in Springfield Park, but denies being in control of any manufacture of counterfeit goods, or that he acted unlawfully at any stage. Amod Attorneys also represent the second and third defendants, who deny any allegations pertaining to the infringement of the copyright or the trade mark of the Bio Oil label, and consequently deny that they are liable for any amounts claimed by the plaintiff.
- [6] The fourth, fifth and sixth defendants were legally represented at the time of the filing of their plea by attorney Shaida Banoo and Associates of Durban, in which it appears that the registered office of the fourth and fifth defendants is the same as the residential address of the sixth defendant, Mr Sahib. Other than admitting to the fourth defendant hiring premises in Springfield Park, these defendants deny the allegations pertaining to the infringement of the copyright and the Bio Oil trade mark.
- [7] In June 2020 the plaintiff gave notice of its intention to amend its particulars of claim in which it particularised the basis on which royalties of approximately R8,3 million is claimed from the first to sixth defendants, contending that the amount is calculated based on the average contribution margin that the plaintiff achieved between 2015 to 2016 on the legitimate sales of its Bio Oil products to authorised distributors. It is unclear whether there has been any objection to the amendment.
- [8] Against this factual matrix, the plaintiff wishes to proceed with the trial set down for a period of 10 days, commencing on 24 August
2020. On 5 June 2020 the attorneys acting for the plaintiff, Adams and Adams of Pretoria, wrote to the Judge President of this division in light of his directive dated 1 May 2020 which states that in light of the pandemic due to Covid 19, open hearings in court were to be discouraged, and should be a last resort. The plaintiff's attorneys requested that the trial proceed on the allocated date, but instead of an open court, they contend that the trial be conducted by way of an audio visual conference using Microsoft Teams as the preferred platform, accessible via an internet connection. Microsoft Teams is not the only audio visual conferencing platform available. Equally popular is Zoom, which operates in a very similar manner to Microsoft Teams. The plaintiff's attorneys set out in detail the basis on which they propose the 'virtual trial' to take place, and to the extent that any of the defendants are unable to shoulder the burden of any costs associated with internet connectivity or infrastructure, the plaintiff has made available its offices in Durban for this

purpose. At the same time, they contend to have witnesses based in Cape Town, Johannesburg and Durban, whom they propose would testify in their respective offices in those regions, through the same audio visual conference platform as opposed to travelling during the pandemic. Cross- examination of the witnesses would be done in the same manner from wherever the defendants' counsel is based, either at their own offices or at the offices of the plaintiff's

attorneys in Durban. The proposal notes that adequate steps will be taken to ensure that the venue where the witnesses will be testifying will be well lit and free from unwarranted interference or background noise. In the event of a break in internet connectivity, the proceedings will be paused until such time as connectivity is re-established. In the event of this not being possible, the

proceedings would be adjourned until such time as the break in connectivity can be restored.

[9] To the extent that the defendants would avail themselves of the invitation to make use of the plaintiff's attorney's offices in Durban in order to access the internet, the plaintiff's attorneys have undertaken to ensure that social distancing and the wearing of masks and other health protocols associated with the pandemic will be obligatory in the offices. They have further extended an invitation to the defendants to send representatives either to Johannesburg or Cape Town, to be present at the venue from where witnesses would testify. The plaintiff's counsel have proposed that they will conduct the trial from their chambers, with the same opportunity afforded to those acting on behalf of the defendants. As indicated earlier, to the extent that the attorneys representing the defendants would prefer to utilise the internet facilities available at the plaintiff's attorneys Durban office, that offer remains extant.

[10] In so far as the exchange of bundles of documents is concerned, which I understand will be voluminous, the plaintiff has undertaken to make these documents available in both digital and hard copy to the defendants and the court. Furthermore, the plaintiff's attorneys have pointed out that the proceedings on Microsoft Teams will be automatically recorded and at the end of each day a digital link to the recording will be circulated to all parties. In so far as the conduct of the participants (counsel and attorneys) and the witnesses, the plaintiff's attorneys in their letter to the Judge President proposed that the following measures be introduced during the trial:

‘23.1 When not speaking all participants will be required to mute their devices (so as to prohibit background noise);

23.2 When a participant is introduced or wishes to interrupt a speaker, he/she shall raise his/her hand;

23.3 Headsets should not be allowed;

23.4 The presiding Judge, the witness giving evidence and lead counsel for both parties shall remain visible on video at all times;

23.5 Each witness, at the outset of their testimony, will be asked to identify anyone who is in the room with them and to give a display on their device of the room from where they are testifying to verify that fact;

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

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

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

[11] In response to the letter of the plaintiff's attorneys, the first defendant's attorney opposed the application to have the trial conducted via an electronic platform and seeks the right to challenge the plaintiff's evidence and witnesses in an open court and to present the evidence of its client in the same forum. In their letter dated 11 June 2020, Amod Attorneys rightly point out that the notion of a trial being conducted via electronic platforms is not the practice in our courts. They place a premium on the right to cross-examine witnesses, with the 'benefit of being stooped [steeped] in the atmosphere (of the court) and having the right to make valid and informed credibility findings'. It is further contended by them that the presiding judge would have difficulty in assessing an individual's reactions to contradictions, inconsistencies, challenges or omissions in evidence. In that regard they submit that the holding of a trial remotely via an electronic platform would infringe on the audi alteram partem principle, and the right of the defendants to challenge the plaintiff's witnesses. It is also contended that an electronic trial would have the potential to unfairly advantage a potentially evasive witness.

[12] The first defendant also points out that the forthcoming trial will not be the first nor the last to suffer the casualty of an adjournment in light of the pandemic. On that basis, there are no plausible grounds to favour the plaintiff's wish to proceed by way of an electronic, remote hearing in respect of the present trial and relegate other litigants, perhaps not armed to the same extent as the plaintiff and its attorneys of having access to unlimited and stable internet connectivity. In some ways, this argument postulates two set of rules under this pandemic, one for those who have access to limitless resources and the other for those less advantaged. The first defendant's attorneys further raise logistical problems associated with a remote hearing, including the fact that the plaintiff intends calling at least 10 witnesses, and the concern that the matter may not be completed within the allocated time. The aspect of a trial not finishing in the allotted time is not a new problem and frequently arises. In so far as the bundle of almost 1200 pages of discovered documents which the plaintiff intends referring to in the trial, the defendant's attorneys suggest that this would be problematic in

the context of a trial via an electronic platform.

[13] As at 8 June 2020, the plaintiff's attorneys were of the view that the sixth defendant, Mr Sahib, the sole member and director of the fourth and fifth defendants, had no intention of defending the plaintiff's claim as his attorney withdrew about two years ago and to date he had not appointed new attorneys. However, after receiving the correspondence from the plaintiff's attorney as well as the replying submissions from those acting on behalf of the first defendant, the sixth defendant joined issue with the first defendant in opposing a virtual trial starting on 24 August 2020. His reasons are marginally different, including that he is presently unrepresented, currently unemployed and without income due to the pandemic. Added to this, his bank accounts have been frozen as a result of the police seizures. The plaintiff disputes his alleged financial distress, pointing out that based on the volume of counterfeit goods confiscated, an amount of over R17 million passed through the accounts of the fourth and fifth

defendants (of which Mr Sahib was the sole director) which included over R12 million paid directly from the account of the second

defendant. The fifth defendant also received an amount of R3,2 million from a company called Titan Marketing Enterprises. The plaintiff points out that Mr Sahib's complaints of lack of resources are a sham to delay the commencement of the trial. They

further allege that Mr Sahib was the 'mastermind' behind the counterfeit operation, and allege that vast sums of money were dissipated from his accounts prior to them being frozen. Sahib also contends not to have received documentation which the plaintiff intends using at the trial. The high watermark of the sixth defendant's objection to a virtual trial is his lack of ability to represent himself and not knowing how to cross-examine witnesses. At a glance, and in light of the plaintiff's responses, these explanations proffered by Mr Sahib would appear nothing more than a delaying tactic and would be bound to fail had they been offered in support of an adjournment of proceedings held in open court.

[14] Faced with this opposition, the plaintiff proceeded to bring a formal application. It is necessary to point out that the delay in rendering a ruling sooner in respect of this application has been due in most part to the delay in receiving responses from the defendants. In fairness, the delay on the part of the first defendant's attorneys was due to their offices having been closed for almost two weeks due to a member of their staff testing positive for the Covid-19 virus. In any event, the delay has not been prejudicial to any party. The starting point in assessing the merits of the application are the provisions of section 34 of the

Constitution that 'everyone has the right to have any dispute . . . resolved . . . in a fair public hearing before a court'. (Emphasis provided.) The Covid-19 pandemic has obviously changed the way in which our courts have operated since the declaration of a national state of disaster in terms of section 27(1) of the Disaster Management Act 57 of 2002. Initially regulations were issued on 18 March 2020 (GN 318, GG 43107, 18 March 2020), in terms of which the Minister of

Justice, in conjunction with the Chief Justice, was permitted to issue directions to take steps to combat the spread of Covid-19 in all courts. These have been since repealed by GN R480, GG 43258, of 29 April 2020. The regulation 4(2)(b) now provides as follows:

‘(b) where appropriate, issue directions to address, prevent and combat the spread of COVID19 in all courts and court precincts in the Republic of South Africa;’

[15] The Chief Justice also issued a directive on 19 March 2020 (GN 187, GG 43117, 20 March 2020) restricting access to court precincts for a period of 60 days, as from 20 March

2020. Paragraph 5(a) of the directions issued by the Minister of Justice on 30 March 2020 (GN R440, GG 43191, 31 March 2020) provided that court cases which ‘are not identified as urgent and essential services may not be placed on the roll for the duration of the period of lockdown’. However, it further provided that:

‘Heads of courts retain the discretion to authorise the hearing of matters through teleconference or videoconference or any other electronic mode, which dispenses with the necessity to be physically present in a courtroom.’

[16] In KwaZulu-Natal, the Judge President on 1 May 2020 issued a directive, which still remains in operation, that:

‘1. All civil trials set down for hearing during the lockdown period may be removed from the trial roll with the consent of the parties.

2. Any party who deems it urgent that their trial must proceed shall communicate such fact to the Judge President . . . who at his . . . discretion, will direct the further conduct of the matter.’ (Underlining is my emphasis.)

In addition, on 2 June 2020, the Minister of Justice issued further regulations (GN 623, GG 43383, 2 June 2020) dealing with the functioning of courts under level 3 lockdown. Paragraph B.3 of the Annexure allows only urgent civil trials. It follows that apart from the provisions of section 34 of the Constitution and the regulations issued by the Minister of Justice, the merits of this application must be adjudicated also against the backdrop of the directive issued by the Judge President that only urgent trials are allowed to proceed during the period of the lockdown. There is nothing in the language of the directive that makes the requirement of urgency only applicable to hearings sought to be held in open court.

[17] The plaintiff contends that the conduct of a trial by way of an online platform is permitted in terms of section 8(3) of the Superior Courts Act 10 of 2013, read with the directions issued by the Minister of Justice, which allow judicial officers a discretion to authorise the hearing of matters on the court roll, including through telephone conference or videoconference or other electronic means, which dispenses with the necessity of being physically present in a courtroom. The intention of the directives was clearly to ensure that notwithstanding the pandemic, access to the courts in accordance with the provisions of the Constitution, would not be suspended. However, access would be permitted in the most urgent of cases where,

rather than having parties being physically present in court, adjudication could still be achieved through electronic means such as telephone conferences or videoconference. As will be considered below, this procedure is more favoured to appeals, applications and opposed motions rather than to trials and especially where there is opposition from one party.

- [18] It is necessary to point out that the plaintiff in its founding affidavit alludes to the potential problem of the lack of internet connectivity at the Durban High Court, and has suggested that the presiding judge allocated to the trial (being myself) could do so from his home, alternatively that the plaintiff would supply the judge with a temporary Wi-Fi hotspot, and the necessary allocation of data. While I do not doubt that this gesture was made in good faith, and in an attempt to assist those judicial officers who do not have their own individual access to a Wi-Fi network, or for whatever reason, no access to adequate data, such gestures have the potential to muddy the waters. It might suggest, as the defendants do, that where judicial officers accept offers of such assistance, it may be construed by a litigant as compromising the impartiality of the judge. In my view, where a decision is made by a judge to proceed with a matter by way of videoconference through the internet, this must always be done independently of any assistance by the litigants in the form of either hardware, such as computers or routers, or in the form of data for the purpose of accessing the internet. This would not be affected by directions for the conduct of the trial which require, for example, that the plaintiff as dominus litis and the party proposing that the proceedings take place by electronic means, take the necessary steps of issuing the electronic invitations to the hearing or to record the on-going proceedings. These are part and parcel of the standard requirements for holding of on-line hearings. Much of what is stated in the plaintiff's application is a reiteration of what was conveyed to the Judge President in its letter, and it is not necessary to repeat any of those submissions.
- [19] In so far as the first defendant's objection that a holding of a trial by electronic hearing would deprive the defendant of having a hearing in the peculiar 'atmosphere' of a court, I am uncertain whether this is intended to operate as an advantage or disadvantage to the first defendant, or if he construes the imposing edifice of the court building or its period architecture from 1911 as somehow responsible for eliciting a version from a witness which would otherwise not emerge under cross-examination in a virtual trial. I am also not persuaded by this contention or that it would not be possible to assess the demeanour of the witness through a trial conducted by electronic means. I am also not persuaded by any suggestion that a trial by electronic means infringes on the right of a litigant to confront a witness, or put forward the version of the defendant.
- [20] Insofar as the delay which would be occasioned should the matter not be able to proceed by electronic means, the plaintiff contends that the delay would be significant in that it would have to wait several months or years to be allocated another trial date, particularly one for a duration of 10 days. The plaintiff points out that the present allocation of a trial date was made in November 2018.

[21] With regard to the contention that the plaintiff would be given an unfair advantage over other litigants who are also awaiting the hearing of their trials and who also suffer the same predicament of having their matters removed from the roll, the plaintiff submits that trials are being conducted in the midst of this pandemic in other parts of the world, by electronic means, and indeed in other divisions of the High Court. However, I am unaware of any High Court in the Republic where, absent any overriding consideration of urgency or public interest, a trial by videoconference has been ordered in the discretion of a judicial officer, in the face of opposition by the opposing litigant. The plaintiff is being overly simplistic in my view by regarding a civil trial as being akin to ‘simply a particular form of meeting’, and that emphasis should be placed rather on the content of information exchanged, than the format in which it is exchanged.

[22] If the trial were to be adjourned, the plaintiff contends that it would suffer severe prejudice. It is trite from the particulars of claim that apart from the interdictory relief, where the goods have already been seized and confiscated by the South African Police Service and have been left in storage, no further harm can arise from the defendants pending the final resolution of this matter. Moreover, the remainder of the plaintiff’s claim is in respect of lost royalties flowing from the defendants’

infringement of its copyright. Even if the matter were to be adjudicated in a year or two, the plaintiff will not be prejudiced as it would still be entitled to claim interest in respect of any damages that it sustains.

[23] The plaintiff’s counsel placed reliance on a decision of the Supreme Court in *Western Australia in JKC Australia LNG (Pty) Ltd v CH2M Hill Companies Ltd* [2020] WASCA 38 which concerned an application to adjourn an appeal hearing because of the onset of the Covid-19 pandemic. The court refused to adjourn the appeal, and noted at para 6 that:

‘The Court of Appeal has now heard a number of appeals and other applications by telephone. The experience of the court has been that the conduct of appeal hearings by telephone has been satisfactory’

[24] The position regarding appeals as set out above would be no different from the provisions of section 19 of the Superior Courts Act which provides that the Supreme Court of Appeal or a division of the High Court exercising appeal jurisdiction may dispose of an appeal without hearing oral evidence. More recently, and as a result of the pandemic, appeals and applications have been considered by the courts employing electronic platforms such as Microsoft Teams. It has also come to my attention that some divisions, particularly in Gauteng, have used electronic audio visual platforms to conduct civil trials, primarily concerning claims where the Road Accident Fund is the defendant. I am unaware, despite my enquiries, of any instance where this has been done in the face of opposition by one of the parties.

- [25] The point that must be stressed is that the dynamics involved in an appeal hearing are significantly different from that of a civil trial. I do not venture to suggest that the presence of the pandemic should cause the halting of all civil trials. This would be inconsistent with the practice directive of the Judge President of 1 May 2020 which states where a trial is considered urgent, the Judge President (or a Judge to whom the matter is assigned) may in his or her discretion direct that the matter proceed. As to whether this would take place in open court or by electronic means would be a matter for the judge and the parties to work out. The determination therefor would rest on the exercise of the Judge's discretion, and be based on the particular facts of the case, the availability of counsel and availability to travel to the particular region where the matter is to be heard.
- [26] I am in agreement with the plaintiff that in the present circumstances of the pandemic, a party is not entitled to demand a normal hearing in open court. As the court in JKC Australia para 7 stated 'procedural fairness requires that a party be provided with an adequate opportunity to properly present its case'. The court found that in its experience '... the conduct of an appeal hearing by telephone provides for comprehensive and considered dialogue and debate between bar and bench as to the issues raised by the appeal'. The use of such technology in allowing for remote or virtual hearings as opposed to hearings in open court were aptly described in JKC Australia para 8 as a 'proportionate alteration to the normal practice and procedure of the court consistent with the due administration of justice'. In the South African context, courts have equally embraced internet technology to discharge their constitutional obligation of ensuring that justice is dispensed, despite the proviso that only the most urgent and pressing of trials would be allowed to proceed. This would, in my view, be permissible as a reasonable limitation of the rights in section 34 of the Constitution.
- [27] The defendants to not proffer valid opposition to the logistics and mechanism proposed by the plaintiff. I am not persuaded by their concerns over 'patchy internet connectivity', the spectre of load shedding or the loss of opportunity to physically observe the demeanour of the witnesses. As the Australian courts have already stated, a judge may have a better opportunity of making these observations of a witness when they are captured on camera. (Australian Securities and Investments Commission v GetSwift Limited [2020] FCA 504 para 33).
- [28] In any event, as I understand the submissions of the plaintiff, criminal proceedings have already been instituted against the first defendant in terms of the Counterfeit Goods Act and he has already pleaded guilty. It is difficult to understand why the demeanour of the witnesses would be critical in determining the outcome of a civil trial involving copyright and trade mark infringement, where goods found on the premises have already been seized and criminal prosecutions are at an advanced stage. The first defendant importantly questions the urgency of the trial and suggests that an offer of making available facilities for internet connectivity and other ancillary measures like the provision of data to an opponent, does not overcome the threshold of urgency.

[29] Much has been written on the impact of Covid-19 on the functioning of court systems throughout the world. In some jurisdictions where technology has been used to lessen the impact, the results have not necessarily been positive for the users. For example, the Civil Justice Council and the Legal Education Foundation in the United Kingdom recently released a report entitled 'The impact of COVID-19 measures on the civil justice system' (<https://www.judiciary.uk/wp-content/uploads/2020/06/CJC-Rapid-Review-Final-Report-f.pdf>, accessed 5 August 2020) and noted the following observations by respondents at 52:

'Respondents were asked a series of questions comparing their experience of remote hearings under COVID-19 to physical hearings. In spite of the broadly positive experiences of remote hearings reported above, the majority of respondents reported that hearings in person were better and more effective than video or audio hearings. In addition, many respondents reported that audio and video hearings were more tiring than physical hearings. The impact of remote hearings on the expense associated with participating in hearings were less emphatic than might be expected: only 35.8% of respondents felt that remote hearings were less expensive than physical hearings.'

[30] In Canada, videoconferencing technology has been used to receive witness testimony in civil trials for over a decade (Amy Salyzyn 'A New lens: Reframing the Conversation about the Use of Video Conferencing in Civil Trials in Ontario'

(2012) 50(2) Osgoode Hall Law Journal

431) and their rules have been amended to allow for such remote testimony where the parties consent thereto. Where there is no consent, the court may issue such a directive, either upon an application or of its own initiative. Other countries have embraced online dispute resolution (ODR), particularly in labour matters. It has been suggested that under ordinary circumstances, a court would be very unlikely to impose an unsatisfactory mode of trial on the parties against their will. At the same time, it has been held that:

'... these are not ordinary circumstances and we have entered a period in which much that is around us is and is going to continue to be unsatisfactory. I think we must try our best to make this trial work. If it becomes unworkable then it can be adjourned, but we must at least try'.

(Capic v Ford Motor Company of Australia Limited [2020] FCA 486 para 25.)

[31] The plaintiff contends that the defendants are largely using the pandemic as a ruse to delay the inevitable consequence of the action brought against them. This is denied by the defendants, who have raised concerns about their availability to adapt to the use of technology in conducting a trial. I am not convinced that the obstacles which the defendants complain of cannot be overcome, and I also recognise that not all practitioners would be comfortable using a different medium through which to conduct litigation. My concern however is in respect of a court ordering a litigant to conduct its legal 'warfare' in a manner that is a departure from the rules as they know it. While the plaintiff may be comfortable with the use of electronic media in carrying out its litigation, the court must be satisfied that

both parties are placed on an equal footing in respect of the matter before it. It would appear to be that the guarantee of equality would be severely strained by an order in terms of which the plaintiff seeks to impose a virtual trial on the defendants, who have voiced their opposition thereto. It would be unfair to label any of the defendants as being opportunistic for refusing to submit to a trial by electronic means. The situation would have been entirely different if both parties consented to a virtual trial and if the court was satisfied that the matter was sufficiently urgent to warrant it being heard.

[32] In the final analysis, I am swayed not so much by the defendants' protestations against a virtual trial due to issues of internet connectivity or the difficulty in assessing a witness's demeanour on a video screen. The critical issue which the plaintiff cannot get past is to demonstrate why it's trial, and the outcome thereof, is of such urgency that the practice directive of the Judge President of 1 May 2020 should recognise it as sufficiently urgent to warrant it forging ahead, albeit by electronic

means. I do not suggest for a moment that it is inconceivable for civil trials to take place in the midst of the pandemic. It is

entirely dependent on the nature of the action and the potential prejudice that would be suffered if the matter had to wait for the allocation of a new date, several months or years ahead. Urgency will be the determining factor in all cases. In the result, the application must fail.

[33] In light of the novel issues raised in the application and the grounds on which it was brought, I deem it fair that each party bear their own costs. The first defendant was legally represented and significant indulgences were granted to enable the first defendant to place his version before the court. The plaintiff had legitimate grounds for bringing the application and it cannot be considered frivolous.

[34] In the result, I make the following order:

1. The application is dismissed.
2. Each party is to pay its own costs.

CHETTY J

Appearances

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Application date:

Date of Judgment :

7 August 2020

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