Fact Finding and Judgement Writing in High Court Civil Cases: Namibian Perspective[1]

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Abstract

The art of judgment writing stems from a thorough process of fact finding to enabling a smooth application of the relevant law to the facts found established in the case. Before preparing a judgment, it is fundamental of the writing judge to have a sound grasp of how to go about establishing the facts of the case which will form the foundation of the judgment. This article discusses the inter-related issues involved in the process of fact finding and judgment writing.

Introduction

To the judge, judgement writing is like parenting. It is probably the most important task facing her but for which she receives no formal training. Parenting is no different. It is the most important responsibility we must undertake on this earth to assure the survival of our species, yet we are not taught how to go about it. It is assumed that the prospective parent would have learnt from their own upbringing - and having watched the parents and other relatives in action - to work out how to raise their own children. In the same way that it is assumed that our upbringing as students of the law and lawyers reading the law reports and observing the judges at work, we would have learnt the craft of judgment writing.

Happily, especially for the new recruits to the High Court Bench, things have begun to change. In most jurisdictions deliberate efforts are being made to mentor new judges in the art of judgment writing. That is to be welcomed!

[1] This article is based on a presentation I made at the Aspirant Judges Training Program organised by the Namibian Judiciary in 2015 and 2017.

Namibia's own *Aspirant Judges Training Programme*[2] devotes substantial amount of time and effort to judgement writing.

Before one actually sits down to write a judgment there is an important preliminary issue that is often overlooked: fact finding. The court's judgment is based on the facts it has found established in the case. It is therefore not helpful to engage in a discourse on judgment writing without discussing that crucial process which precedes the actual writing of the judgment.

The conclusions of law; be it a finding that a person is liable in delict, is liable for breach of contract, has violated a provision of the constitution, can only be made on concrete facts and not in the vacuum. It is important, therefore, for the judge to have a sound grasp of how to go about establishing the facts of the case which is the foundation for the judgment that she is to prepare. Therefore, this article discusses the inter-related issues of fact finding and judgement writing.

Judge's role in civil proceedings

Under the post-independence Rules of the High Court of Namibia[3] (hereafter 'the rules'), the judges have assumed control over the pace of litigation.[4] It is the judge's primary responsibility to manage the case efficiently until finalisation.[5] The parties and their legal representatives are obligated by the rules to cooperate with the managing judge[6] to achieve the overriding objective[7] and to curtail proceedings.[8] The judge is expected by the overriding objective to steer

[2] Started in 2015 under the auspices of the High Court of Namibia.
[3] Which came into force on 16 April 2014 and published in GN 4 of 2014.
[4] Rule 17(2) states: 'Under the rules the control and management of cases filed at the court is the primary responsibility of the court and the parties and their legal representatives must cooperate with the court to achieve the overriding objective'.
[5] Rule 17(2).
[6] Rule 19(a).
[7] Which in terms of rule 1(3) is 'to facilitate the resolution of the real issues in dispute justly and speedily, efficiently and cost effectively as far as practicable' by reference to six listed factors in paras (a)-(f) of that sub-rule.
[8] Rule 19(b).

the parties towards identifying the real dispute(s) in the case and to have that determined in the most economical way.[9]

That said, once the parties have chosen what the issue is, that is what the court must decide. The judge must not go on a frolic of her own. That is reinforced by rule 26(10) which states that:

> Issues and disputes not set out in the pre-trial order will not be available to the parties at the trial, except with leave of the managing judge or court granted on good cause shown.

Both the litigants and the court are bound by the issues as defined by the pleadings and their agreement on what is in dispute.

This principle is worth emphasising because I often see on appeal with much frustration how some trial judges veer off from the parties' pleaded cases and decide matters not ventilated by the litigants. It is important not to fall in that trap and to resist the invitation by a party who during oral argument seeks to augment a case that was not pleaded. Parties engaged in litigation are bound by the agreements they enter into limiting or defining the scope of the issues to be decided by the tribunal before which they appear, to the extent that what they have agreed is clear or reasonably ascertainable. If one of them wants to resile from such agreement it would require the acquiescence of the other side, or the approval of the court.[10]

The point was made as follows by Shivute CJ in *JT v AE*[11]:

> [W]hen at some stage of the proceedings, parties are limited to particular issues either by agreement or a ruling of the court, as a general principle, the court

[9] See also rule 18(1) which enjoins the judge to actively manage a case in order to achieve the overriding objective.
[10] *Stuurman v Mutual & Federal Company of Namibia Ltd* 2009 (1) NR 331 (SC) at 337E-F, para 21, citing with approval: *Filta – Matix (Pty) Ltd v Freudenberg and Others* 1998 (1) SA 606 at 614B-D and *F & I Advisors (EDMS) PBK v Eerste Nasionale Bank van SA BPK* 1999 (1) SA 515 at 524F-H.
[11] 2013 (1) NR 1 (SC) at 9D-E.

cannot unilaterally alter the position without affording the parties an opportunity to make submissions on the proposed new tack in the course of the proceedings.

Deciding constitutional issues

If a case can be decided without deciding a constitutional issue, that is the course that the court must follow. Constitutional issues ought to be developed cautiously and pragmatically if they are to stand the test of time.[12] Shivute CJ emphasised the principle in *Namib Plains Farming and Tourism v Valencia Uranium*[13] and added that the court should decide no more than was absolutely necessary for the decision of the case.

Fact finding

It is convenient to deal with the subject of fact finding by distinguishing between *action*[14] and application (also referred to as *motion*) [15] proceedings.

Application proceedings

In application proceedings the evidence is contained in the affidavits filed in the case by the parties in support of their respective cases. Therefore, after the hearing, the judge, as judgment writer, is sitting with the affidavits and need not worry about what the factual witnesses said both in chief and under cross-examination[16]. But that is easier said than done. The question remains, what is the judgment writer to make of the contents of the affidavits?

[12] *Kauesa v Minister of Home Affairs and Others* 1995 NR 175 (SC).
[13] 2011 (2) NR 469 (SC) at 483C–D, para 38; Road Fund Administration v Scorpion Mining (Pty) Ltd 2018 (3) NR 829 (SC), para 45.
[14] Instituted under Part 2, rules 7 and 14 and Part 5, rules 45- 49.
[15] Part 8, rules 65-69, often referred to as 'motion' proceedings because they are brought on notice of motion supported by affidavit.
[16] Except in the rare case where, because the issue cannot be decided on the affidavits alone, it had been referred to oral evidence in terms of rule 66.

In other words, what is the fact finding process in motion proceedings? The applicant would have made certain allegations in the founding affidavit[17], and the respondent would have answered[18] and the applicant replied.[19] In an application, that is the basis for the judge's case as trier of fact.

The first statement of principle, the Holy Grail if you will of motion proceedings, is that in motion proceedings you 'stand or fall by your papers'. In other words, the affidavits are both the pleadings and the evidence and the parties must make out their respective cases on affidavit.[20]

The *dominis litis* party makes an election to go by way of application and must only do so if it does not foresee genuine disputes of fact arising on the affidavits. Where disputes of fact are foreseen, the safer course is to proceed by way of action so that the parties' versions can be tested under cross-examination. That explains the statement that application proceedings are designed for the resolution of common cause facts.[21]

The process of fact finding in motion proceedings has been explained in the following terms in *Bahlsen v Nederlof and Another*[22]:

> Should disputes of fact arise on the papers the court may still grant a final order if the facts deposed to by the applicant and admitted by the respondent, and the facts alleged by the respondent, justify such an order. Even if the facts are not formally admitted, but it is clear that they cannot be denied, the court must regard them as admitted. In certain circumstances denial of a fact may not be such as to raise a real dispute, genuine or bona fide dispute of fact. Should a genuine dispute of fact exist on the papers, and it was not referred to oral

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[17] In terms of rule 65(1).
[18] In terms of rule 66(1) (b).
[19] In terms of rule 66(2).
[20] *Mbanderu Traditional Authority and Another v Kahuure and Others* 2008 (1) NR 55 (SC); *Nelumbu and Others v Hikumwah and Others* 2017 (2) NR 433 (SC).
[21] *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 at 290 para 26.
[22] 2006 (2) NR 416 at 424E-G, para 31. See also, *Republican Party v Electoral Commission of Namibia* 2010 (1) NR 73 (HC) at 108C.

> evidence, the court must accept the version of the respondent unless it is so far-fetched that it can be rejected simply on the papers.[23]

Without a working knowledge of the test enunciated above the judge will find it hard to write a judgment in a contested application. In its simplest form the test can be stated as follows: The applicant's averments which are not disputed by the respondent must be accepted. The second leg of the test is that the respondent's version prevails unless it is farfetched or it can be rejected simply on the papers. Every material allegation that the respondent has not denied stands as undisputed fact; but if the respondent in a serious way denies the applicant's allegations, the version of the respondent is to be accepted on the disputed facts.

The obvious implication of the test is that in application proceedings the respondent has an advantage over the applicant - to the extent that if she seriously denies anything that the applicant has said, the court must accept that version. In that event, the trier of fact has no discretion. It is matter of law. But if the version of the respondent is so untenable, is so unreasonable, that it can be rejected simply on the papers, the version of the applicant must prevail.

In *Permanent Secretary of Finance v Selfco Fifty-one (Pty) Ltd*[24], Strydom AJA applied the test in an easy-to-follow manner. In that case the applicant made certain allegations. The respondent filed a very short affidavit and chose not to answer to those allegations in a meaningful way. In those circumstances, the court had to accept the applicant's version on the material issues. This is how the learned judge put it at para 24:

> The [respondent] filed a short answering affidavit which consisted of eight paragraphs and which did not deal with the allegations of the [applicant] *ad*

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[23] Relying on the following leading cases: *Stellenbosch Farmers' Winery Ltd v Stellenvale Winery(Pty) Ltd* 1957 (4) SA 234(C) at 235E-G; *Plascon-Evans Paints Ltd v Van Riebeeck paints (Pty) Ltd* 1984 (3) SA 623(A) at 634; *Ngumba en n Ander v Staatspresident en n Ander; Damons NO en n Andere v Staatspresident en Andere; Jooste v Staatspresident en Andere* 1988 (4) SA 224 (A) at 259C-263D; *Mostert v Minister of Justice* 2003 NR 11 (SC) at 21G-I.

[24] 2007 (2) NR 774.

> *seriatim*. As a result it followed that most, if not all, of the [applicant's] factual allegations were not disputed and should consequently be accepted.

In *Mostert v Minister of Justice*[25]*,* Strydom AJA demonstrates the converse position. There, the applicant had put up a certain version on the disputed issues and the respondent had denied each and every one of those allegations and did so in a serious and logical way. The court could therefore not reject the respondent's version. According to Strydom AJA at 21G-I:

> These allegations are denied by the Permanent Secretary and she explained in detail how it came about that the [applicant] was transferred from Gobabis to Oshakati. In my opinion a genuine dispute of fact was raised by the denial of the permanent Secretary and, as the dispute was not referred to evidence…the Court is bound to accept the version of the respondent and facts admitted by the respondent. . .

If disputes arise on the facts, the judge's duty is to see whether the opponent does it in a way that is genuine and serious. Not every denial must be taken seriously. It must be a denial that really damages the case of the applicant. If the denial does not damage the case of the applicant, the applicant's version should prevail: *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd.*[26]

Where genuine disputes arise and the court is not in a position to decide the case on the papers, the parties (especially the applicant) may in an appropriate case request the court in terms of rule 67 to refer the matter to oral evidence.[27] In that event, the judge will not decide the case solely on the affidavits. Where that arises, the affidavits will serve as the pleadings and the court will hear oral evidence on which the parties will be cross-examined in order to determine which version of the parties is to be accepted.

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[25] 2003 NR 11 (SC) at 21G-I.
[26] 1949 (3) SA 1155(T) at 1165.
[27] Ibid at 1162, 1168.

Again, that demonstrates the importance of the statement that motion proceedings are not intended for the resolution of disputed facts. So that, if there are genuine disputes on the facts and the court takes the view that it cannot resolve the issue without hearing oral evidence, it must be referred to oral evidence so that the parties can be cross-examined. The Supreme Court has held that where the dispute of fact is serious, the court ought to refer the matter to oral evidence.[28]

By way of summary, in motion proceedings affidavits are both the pleadings and the evidence. A party must make out its case in the affidavits. If the applicant has not made out his case in the founding papers he cannot remedy the position in the replying affidavit.[29] Only three set of affidavits are allowed. A fourth set of affidavits is only possible with the leave of the court and must be argued from the bar before the court may allow it.[30] The court has a discretion in the matter.[31]

Where there are genuine disputes of fact, the applicant has a problem: The first problem is that he should not have proceeded by way of motion and should have proceeded by action.[32] As the party bearing the risk of non-persuasion the applicant should have anticipated the genuine dispute of fact and should have proceeded by way of action. But if he did regardless and fails to ask the court to refer the matter to oral evidence, the judge may be compelled to dismiss the application.

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[28] See *Mbanderu Traditional Authority and Another v Kahuure and Others* 2008 (1) NR 55 (SC).

[29] Often, however, the replying affidavit is the longest and most unhelpful. See the criticism of that practice by Schutz JA in *Minister of Environmental Affairs & Tourism v Phambili Fisheries* 2003 (6) SA 407 at para 80.

[30] *Piechaczek v Piechacheck* 1921 SWA 51.

[31] Rule 66(2).

[32] It bears mention that in certain circumstances it is a requirement of the law that the applicant must proceed by way of application. For example, in review applications brought under rule 76. In those circumstances, the judge should not fault the applicant for having proceeded by way of notice of motion even if disputes are anticipated on the facts. Rather, the approach should be that if the applicant anticipated genuine disputes of fact which the court will be unable to resolve without referral to oral evidence but fails to ask the court to refer them to oral evidence, the judge has the discretion to dismiss the application. It has been stated in *Federal Convention of Namibia v Speaker of the National Assembly* 1991 NR 69 (HC) that where there are serious disputes of fact, the applicant must proceed on summons.

Action proceedings

These are proceedings initiated by way of combined summons in terms of rule 7 whereafter the defendant is allowed to file a notice to defend[33] and to plead to the claim[34] and where the matter proceeded to trial for the hearing of oral evidence. What remains is for the judge to decide which party's version she should accept.

In action proceedings, the fact finder must always be guided by two things: the burden of proof[35] and the pleadings. The burden of proof is the guiding light in deciding in whose favour the decision goes if the probabilities are evenly balanced. If the judge is clear in her mind about who bears the burden of proof, she is guided next by the parties' pleadings. The issues in dispute should be defined by reference to the pleadings. Nothing else! As I already cautioned, the judge should not go on a frolic of her own.

What the judge is going to decide in the case will be determined by the pleadings and how the issues have been defined by the pleadings. Subject to limited exceptions[36], it is the court's duty to hold the parties to their pleadings. And as I have already pointed out, the pre-trial order tells the judge what issues are going to be adjudicated at the trial. The evidence to be led and the manner in which the trial judge is going to guide proceedings should be guided by that. But, again, that is easier said than done.

Next I will discuss how the judge should go about resolving which version to accept where there are mutually destructive versions. The starting point is the

[33] In terms of rule 14.
[34] In terms of rule 46.
[35] He who alleges must prove. The burden (or onus) may shift during a trial depending on what is in issue, but generally the plaintiff bears the burden of proof on a balance of probabilities in a civil case.
[36] If the parties during the trial had fully canvassed the evidence on matters not necessarily pleaded, the court may come to a conclusion on that evidence although not strictly in accordance with the pleadings: *Hill v Milner* 1937 AD 101 at 105.

test enunciated in *Govan v Skidmore.*[37] The case lays down the applicable rule in the following terms:

> [I]n finding facts or making inferences in a civil case, it seems to me that one may, as Wigmore conveys in his work on Evidence, 3rd ed., para 32, by balancing probabilities select a conclusion which seems to be the more natural, or plausible, conclusion from amongst several conceivable, even though that conclusion be not the only reasonable one.

A civil case is therefore decided on a preponderance of probabilities: Is the conclusion to be drawn more probable than not? If the judge is satisfied that the plaintiff's version is more probable than not; in other words, if the plaintiff's version is more probable than that of the defendant the judge must decide in favour of the plaintiff. But if the defendant was successful in puncturing the case of the plaintiff; in other words, that plaintiff's version is less probable than that of the defendant, the judge must dismiss the plaintiff's case.

The following dictum by Eksteen AJP in *National Employers General Insurance Co. Ltd v Jagers*[38] represents the law in Namibia:

> [W]here the *onus* rests on the plaintiff . . . and where there are mutually destructive stories, he can only succeed if he satisfied the Court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version advanced by the defendant is therefore false or mistaken and falls to be rejected. In deciding whether that evidence is true or not the Court will weigh up and test the plaintiff's allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of

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[37] 1952 (1) SA 732 (N) at 734. See also, *Ocean Accident and Guarantee Corp. Ltd v Koch* 1963 (4) SA AD at 159. This test is to be distinguished from the one in the criminal case as set out in *R v Blom* 1939 AD 188 at 202-203 where Watermeyer JA stated it as follows: The inference sought to be drawn must be consistent with all the proved facts. If it is not, the inference cannot be drawn. The proved facts should be such as to exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude other reasonable inference, then there must be a doubt whether the inference sought to drawn is correct.'

[38] 1984 (4) SA 437 (E) at 440D-G. It was cited with approval by the Supreme Court *in Burgers Equipment and Spares Okahandja CC v Aloisius Nepolo T/A Double Power Technical Services* Case NO.: SA 9/2015 (unreported) delivered on 17 October 2018, at para 112.

the case and, if the balance of probabilities favours the plaintiff, then the Court will accept his version as being probably true. If however the probabilities are evenly balanced in the sense that they do not favour the plaintiff's case any more than they do the defendant's, the plaintiff can only succeed if the Court nevertheless believes him and is satisfied that his evidence is true and that the defendant's version is false.

That leads me to a discussion of how to deal with the protagonists' irreconcilable versions in action proceedings. The *locus classicus* is *Stellenbosch v Farmers' Winery Group Ltd and another v Martell et Cie and another*[39] where Nienaber JA explained the applicable test as follows*:*

The technique generally employed by courts in resolving factual disputes [is the following]. To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness' candour and demeanour in the witness-box, (ii) his bias latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extra-curial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness' reliability will depend, apart from the factors mentioned under (a) (ii) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs

[39] 2003 (1) SA 11 (SCA) at para 5. Approved in Namibia in, for example, *U v Minister of Education and another* 2006 (1) NR 168 at 184A-J and 185A-B and *Josea v Ahrens* 2015 (4) NR 1200 at b1203, para 10.

when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail.

Illustrating probabilities

Probabilities are guided in no small measure by common sense and an appreciation of human nature. I will give a crude example to illustrate how to go about determining probabilities in a civil case. Assume plaintiff A seeks to enforce a loan debt of N$ 1m against defendant B who is not related to him and is only an acquaintance. The evidence shows that the alleged debt was incurred some three years earlier and during that period A made no demand for the money or made no effort to institute legal proceedings. It also emerges from the evidence that A only instituted legal proceedings when B sued him for a debt of N$100 000 allegedly owed by A.

If we go by common sense and human nature, what is the likelihood that someone who advanced a huge sum of money to another does not claim it back for a considerable period of time but does so only in circumstances where the other person institutes a claim against him? In other words, what are the probabilities that a person would advance a large sum of money to another as a loan and not enforce it for a period of three years? It is possible, of course, but is it probable? So, you must logically work through in your mind how to deal with probabilities when you have two versions that you are dealing with.

To develop further on our crude example. The chances that I will lend money to my brother or my son are very good because there is a family relationship. But the chances that I will make a gift of a substantial amount of money to a stranger are not very good.

So, if I come to court and say that I lent my brother N$1 000-00 and that he had agreed to pay me back and I now want it back and his version is that it was not

a loan but some financial assistance because he was in need, the chances that that could have been a gift are greater than if the two of us were strangers to each other.

But go a step further. The chances that I will gift N$1000 to my sibling without the expectation of repayment are very good. But what are the chances (or probabilities) that I will gift him N$50 000-00 without an expectation of repayment? The family relationship strengthens the chances in favour of my brother. But in my favour is the consideration that a smaller amount of money such as N$1 000-00 is more likely a gift than an amount of N$50 000-00. So, as trier of fact, the judge should have regard to all the surrounding circumstances which strengthen the probabilities either way, and in particular the factors relative to credibility and reliability listed by Nienaber JA in *Stellenbosch Farmers' Winery*.

Where the direct evidence overwhelmingly establishes a fact one way or the other, there is no room for speculating about the probabilities.[40] As Mtambanengwe AJA stated:

> It goes without saying that once the evidence proves or disproves something one does not seek to establish that fact on probabilities as the necessity of resorting to probabilities is to establish the truth when there is no direct evidence to achieve the same result.[41]

Caution about over-reliance on demeanour

I must caution that demeanour is a very unsafe guide to deciding a case. There are circumstances in which clearly it can assist the trier of fact; but as we all know as lawyers, the most honest witness can on the fateful day turn out to be the poorest witness because of fear or other factor. So, in the fact finding process the trier of fact should be careful about basing their conclusions on factual disputes entirely on demeanour and a witness' poor performance in the

[40] *Shikale v Universal Distributors of Nevada* 2015 (4) NR 1065 (SC), para 44.
[41] Ibid.

witness box. It has been held that 'an assessment of evidence on the basis of demeanour . . . without regard to the probabilities, constitutes a misdirection'.[42]

Some hints to assist with fact finding

(i) Accept admitted facts as proven

If a party has admitted a fact in terms of rule 26 (6) (c)[43], it is not necessary for that fact to be proved at the trial and the judgement writer must accept it as established fact. Similarly, facts and documents may be admitted in terms of rules 94 and 95[44] and when that has happened, the court must accept them as proven.

(ii) Facts peculiarly within the knowledge of one party

A party to litigation cannot be expected to prove or disprove a fact that is peculiarly within the knowledge of the opponent.[45] The opponent must establish such facts. Therefore, it has been held that it is contrary to principle to cast an onus on a defendant in relation to facts peculiarly within the knowledge of the plaintiff.[46] In similar vein, where a person who is sued moneys alleges that it had paid, the onus is cast on it to prove that it paid.

(iii) Failure to cross-examine

The judge is entitled to draw an adverse inference from a party's failure to cross examine the opposing witnesses on a material issue. Cross-examination is both

[42] *Medscheme Holdings (Pty) Ltd and Another v Bhamjee* 2005 (5) SA 339 (SCA) at para 14. In *President of the RSA v SA Rugby Football Union and Others* 2000 (1) SA 1 (CC) at para 78 the SA Constitutional Court stated that the 'truthfulness or untruthfulness of a witness can rarely be determined by demeanour alone without regard to other factors including, especially, the probabilities'.
[43] The subrule requires that the parties' proposed pretrial order must, amongst others, set out 'all relevant facts not in dispute in the form of a statement of agreed facts.'
[44] Rule 94(1) states: 'A party may serve notice on another party on Part A of Form 21 requiring that other party to admit a fact or part of the case of the serving party specified in the notice. . .' An in terms of rule 95 (2) 'Where the other party makes an admission in response . . . the admission may be used against him or her . . . '
[45] Compare: *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277, para 27.
[46] *Yusaf v Bailey & Others* 1964 (4) 117 at 119D-H.

a right and an obligation. The principle was stated by the Supreme Court as follows in *Ugab Terrace Lodge CC v Damaraland Builders CC*[47]:

> It is an established principle of evidence that if a party is testifying to a matter of fact on which his opponent has a different version, the opponent has a duty, when that party is under cross-examination, to put to him such different version so that that party has a chance to concede or disagree. In other words, there is a duty to cross-examine a witness on any aspects on which there is a dispute. The rationale of the principle is that if its intended to argue that the evidence of the witness on that aspect should be rejected, he should be cross-examined so as to afford him the opportunity of answering to points supposedly unfavourable to him.[48]

(iv) Failure to call an available witness

The judge can in an appropriate case draw an unfavourable inference from a litigant's failure to call a person who is potentially available to come and corroborate his version.[49] It has been held *in Brandt v Minister of Justice and Another*[50] that a party on whom the *onus* rests has no greater obligation to call a witness, but might find that a failure to call a witness creates the risk of the *onus* proving decisive. But an adverse inference in any case does not operate to destroy a case otherwise proved.[51]

(v) Accident cases: Rule in Galante v Dickson[52]

In accident cases there is an important rule stated in *Galante* as follows:

> Where the defendant was himself the driver of the vehicle the driving of which the plaintiff alleges was negligent and caused the accident, the court is entitled,

[47] Case NO.: (SA 51/2011) [2014] NASC 11 (15 July 2014) para 22.
[48] The approach is the same in South Africa: *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC); *S v Boesak* 2001 (1) SACR 1 (CC).
[49] *Raliphaswa v Mungivhi and Others* 2008 (4) SA 154 (SCA).
[50] 1959 (4) SA 712(A) at 715F-716F.
[51] Ibid.
[52] 1950 (2) SA 460 (A) at 465, para 20.

in the absence of evidence from the defendant, to select out of two alternative explanations of the cause of the accident which are more or less equally open on the evidence, that one which favours the Plaintiff as opposed to the defendant.

The rule applies only in accident cases.

(vi) Serious allegations require strong evidence

If a litigant makes a serious allegation against an opponent, it is expected of them to produce the evidence to sustain the allegation. For example, if you allege fraud against another, not only must you plead it properly[53] but you must also produce strong enough evidence for it.[54]

(vii) All material and relevant evidence must be placed in the scale

It is trite that in coming to a decision one way or the other, the trier of fact must take into account all materially relevant evidence and not disregard some evidence in preference for the other without explaining why she did so. Although said in the criminal context, the following dictum by Nugent J applies with equal force in civil cases:

> 'What must be borne in mind, however, is that the conclusion which is reached …must account for all the evidence. Some of the evidence might be found to be false; some of it might be found to be unreliable; and some of it might be found to be only possibly false or unreliable; but none of it may simply be ignored.'[55]

(viii) Only relevant and admissible evidence must be considered

[53] *Courtney-Clarke v Bassingthwaite* 1990 NR 89 (HC) at 94G-I.
[54] *Rally for Democracy and Progress v Electoral Commission of Namibia and others* 2013 (2) NR 390 (HC) at 436A-B para 264; *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) at para 27; *Gates v Gates* 1939 AD 150 at 155. The approach is also followed in England: *R (N) v Mental Health Review Tribunal (Northern Region)* [2006] QB 468 para 62.
[55] 1999 (2) SA 79 (W) 82E; approved in *S v Van Aswegen* 2001 (2) SACR 97 at 101, para 8.

Even if the judge inadvertently or erroneously admitted inadmissible or irrelevant evidence during the trial, she must disregard that in arriving at her decision on the merits of the case. That is so because only relevant and admissible evidence may form the basis for the judicial decision. Admissibility of evidence is a matter of law and not of discretion.

The admissibility of evidence is governed either by statute or the common law. Therefore, the court does not choose itself what evidence to admit.[56] So if, for example, the judge received inadmissible hearsay, opinion[57], parol[58] or other evidence barred by the exclusionary rules of evidence, it should be ignored in coming to a decision.[59]

Having discussed the fact-finding process, it remains to consider briefly how to structure the judgment to record the findings made and the conclusions arrived at by the judgement writer.

Structuring the judgment

The judgement writer has an audience

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[56] *Rally for Democracy and Progress v Electoral Commission of Namibia supra* at 428, para 243.

[57] The rule against opinion evidence states that 'A witness must testify only about facts and is not allowed to give his opinion unless he is permitted to do so under an exception to the general rule, for instance, the one relating to the testimony of an expert': DT Zeffert and A Paizes, *Essential Evidence, LexisNexis (2010) at p 99.* Therefore, if such opinion found its way in the record without objection by an opponent, it is the court's duty to disregard it. If reliance is placed on it, it will be a reversible misdirection.

[58] Parol evidence is very common in contractual disputes where parties will try to either interpret a contract or lead evidence that is in contradiction to the written terms of the contract. Two principles are at play here. The first is that interpretation of a contract is a matter for the court and not witnesses: . . . The second principle is the rule against parol evidence: The parol evidence rule operates to 'prevent a party from altering, by the production of extrinsic evidence, the recorded terms of an integrated contract in order to rely upon the contract as altered': Johnston v Leal 1980 (3) SA 927 (A) at 927B; *Von Wieds v Gousard and Another* 2016 (1) NR 169 at 172 paras 3-4 and *Mudge v Ulrich NO and Others* 2006 (2) NR 616 (HC) at 621Cand 622A-B. The rule applies 'to a contract which has been integrated into a single and complete written memorial . . .': Ibid. It follows that the parol evidence rule does not apply where the evidence does not add to, vary or contradict the written instrument: *Wiseman v Nutman* 1940 NPD 349 at 356-357. Again, as stated in *n* 54, if such evidence found its way into the record, the court must disregard it.

[59] The judge must acquaint herself continuously with the rules of evidence from a leading textbook on the law of evidence available in her jurisdiction.

When writing a judgment always remember that you have an audience. The most important being the parties to the litigation who are directly affected by your decision. As former Chief Justice of the Supreme Court of South Africa, the Hon MM Corbett observes, especially the party who has lost wants to and is entitled know why they lost[60]; not so much that they should agree with your reasons, but to understand why they lost. Apart from the litigants there is a much wider audience out there of students and lawyers who would take an interest in the judgment. The judge therefore has to communicate in a way that those who had no direct part in the case can read and understand what the facts and issues were and the basis for the conclusions and decisions to which the judge has come.

A worst judgment is one which merely announces the result without even the most modicum of reasons. For example: 'I have listened to the evidence. I do not agree with the defendant and therefore I find for the plaintiff'. The importance of reasons has been reiterated by the Supreme Court.[61]

I am a firm believer in the idea that in your professional life you should be inspired by one or other leader in your profession. Also true with judgment writing: Draw inspiration from someone whose style of judgment writing you admire and try to follow their example but do not ape them. Try to be original as best you can. In the initial phase of your career on the bench, adopt a simple style of judgment writing and improve on it as you mature in your role.

What should the judgment contain?

I regret that at this point I must impose on the reader my own style of conceptualising and structuring a judgment. After all, judgment writing is, as it must be, a matter of individuality.

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[60] *Writing A Judgement: Address at the First Orientation Course for New Judges,* SALJ Vol. 115 (1998) at 117-118.
[6161] *Buhrman & Partners Consulting Engineers v Garbade* 2016 (1) NR (SC) and *Hartzenberg v Standard Bank* 2016 (2) NR 307 (SC).

In framing a judgment, I try to answer the following questions:

(a) Who is before me?
(b) How did they come before me?
(c) What are they in dispute over?
(d) What have they said to me?
(e) What issue falls for decision?
(f) What is my decision on the issue(s) to be decided?

Those questions cover everything that a judgment should contain. I propose that in answering the above questions the judgment writer must be guided by the wise counsel of Professor James C Raymond.[62] According to Professor Raymond, every dispute which requires a judgment to be written on falls into a certain legal logic.[63] He argues that every legal dispute falls into either one or a combination of the following permutations: (a) The litigants may be in dispute concerning factual allegations or they may claim that the opponent's reliance on a particular law is misplaced; (b) they may argue that although the other side has cited the right law, they have misinterpreted it, (c) or they can agree about the facts and the law, but disagree about how one applies to the other.

When you set about preparing the actual draft of the judgement I will propose that you give heed to the following guidelines, again by Professor Raymond. He writes that a clearly structured judgment must: (a) convey logical reasoning; (b) contain context before detail; (c) clearly partition issues and (d) set out arguments succinctly.

In short, before you set about writing the judgment, you should know exactly what you are going to say and the sequence in which you are going to say it. And that is only possible with pre-planning and organisation. You must exclude from the draft that which is not necessary to support your reasoning and conclusion. Providing headings for the various segments of the judgment can

[62] *The Architecture of Argument*: The Judicial Review (2004) 7 TJR 40-56.
[63] Ibid at 40.

go a long way in the logical sequencing of the information that makes up the judgment. Create a road map for your judgment under the headings in the proposed template below.

Avoid the temptation to think that, without first resolving in your mind what the result should be and why, you can start writing the judgment and by divine intervention the result will reveal itself. That is the wrong approach to judgment writing. Right or wrong, it is the trial judge's duty to decide a case and move on. She does so based on her understanding of the law as informed by the submissions made by the parties. If she makes a mistake, the appellate process is there to cure it. That is how the system works.

Framing the order

You should spend a great deal of time thinking about your order in a civil case. The order must be self-explanatory, be all-embracing and stand by itself. It must not be understood by reference to something you have said in the body of the judgment. The order must not create doubt in the minds of the parties about who has won and who has lost - without stating the why as *that* will emerge from the body of the judgment. The content of the order must relate to the issues placed before you by the parties. The reader must not go to your judgment to understand what rights and obligations arise under the order because the appeal court may decide that your reasoning was wrong but still agree with the order any way, for different reasons.[64]

In the particulars of claim the plaintiff would have told you what is the relief that he seeks. The defendant would have told you what relief he seeks in opposition to the plaintiff's claim. If it is an application the relief sough and the opposition thereto would have been set out in the notice of motion and the opposing affidavit respectively. As a general rule, the order must be framed around the case as pleaded by the parties. It is a misdirection to grant relief not sought by a

[64] An appeal lies against the order of the court and not against the reasons: *De Beers Marine Namibia (Pty) Ltd v Loubser* 2017 (1) NR 20 (SC).

party.[65] Remember always to deal with costs, clearly spelling out how you are apportioning the costs in the matter.

A final word about the order. A judge of the High Court may hear an appeal from the Magistrate's Court. In that case remember that the order the judge makes on appeal is different in form from an order at first instance, especially if the High Court reverses the order of the court below. Where the High Court reverses the decision of a court below, the order it makes is what the court below should have made. Therefore, it is unhelpful when reversing the court below to simply state: 'The appeal succeeds and the order of the magistrate's court set aside.' You should then proceed to make the appropriate order which the court below should have made in the first place.

Follow precedent

Judgments of the Supreme Court are binding on all courts below it.[66] And judgments of the High Court are binding on the High Court and the courts below it. The judge should try to follow precedent as faithfully as possible and should follow judgments of both the High Court and the Supreme Court unless satisfied it is distinguishable either on the facts or on the law.

A decision of the High Court can only be departed from if the judge is satisfied that it is clearly wrong. That is the principle of *stare decisis*[67]: we are bound by previous decisions. We do not want a chaotic state of the law where each judge decides as they please.

Suggested template for the judgment in a civil case

Based on what I have discussed in the body of the article, I propose the template below for structuring the judgment:

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[65] *Meroro v Minister of Lands, Resettlement and Rehabilitation and Others* 2015 (2) NR 526 (SC) at 545-6, paras 37-39.
[66] Article 78 of the Constitution.
[67] *S v Katamba* 1999 NR 348 at 351 (SC).

Template[68]

Introduction

(a) How the case is before court

(b) The parties, the relief sought and defence

(c) The issue to be decided

The evidence

(a) Summarise only that which is material to the case and the issue(s) to be decided. Make clear what are common cause facts and which facts are in dispute.

(b) Apply the fact finding process to the disputed facts

The controlling law

(a) What law governs the case? It could be the constitution, a statute, regulation, common law, rule of court or regulation or a combination of either of those;

(b) Set out the applicable law and each party's contentions (i.e. the arguments) on the conclusion each urges the court to reach.

Analysis

In this segment apply the law to the facts and in the process make specific findings on the disputed factual and legal issues. This is where the reasoning of the judge must be apparent.

Disposal

Under this heading give a summary of the conclusion which the court has reached on the issues it was called upon to determine, as a precursor to the order to follow.

[68] Compare Corbett, *Writing a Judgement*, supra, at 122-126.

The order

This is the most important part of the judgment. It determines the rights and obligations of the parties. It must be very precise and all-embracing. It should be clear who has won. Deal with costs and, if the judgment is on an interlocutory matter, make clear what should happen next in the case management process.

Delivery of reserved judgment

Rule 133 states that unless a judgment is delivered immediately after the trial or hearing, the judge must announce or inform the parties of the intended time and date of delivery of judgment and postpone the matter to such date and time.