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IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

- (1) NOT REPORTABLE
- (2) NOT OF INTEREST TO OTHER JUDGES
- (3) REVISED.

CASE NO:34634/2015

12/3/2018

In the matter between:

ADV M LETZLER N.O. obo

JACOBUS FRANCOIS VAN ZYL

PLAINTIFF

and

THE ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT

RANCHOD J:

- [1] The plaintiff, in her capacity as the duly appointed curator-ad-litem of Mr. Jacobus Francois Van Zyl (Van Zyl), claims damages from the defendant for injuries sustained by Van Zyl in a motor vehicle collision on 9 June 2011 on the Old Johannesburg Road, Wierdabrug, Pretoria between a motor vehicle with registration letter and numbers [...] (as per the particulars of claim but it seems to me that the numeral '5' is in fact a 'G' if

one has regard to the police accident report) driven at the time by one T. Nkosi (the insured driver) and motor vehicle with registration letters and numbers [...] driven at the time by Van Zyl.

- [2] The matter was set down for trial before me on 1 November 2017 in respect of both merits and the quantum.
- [3] At the commencement of the trial I was informed that due to the serious injuries sustained by Van Zyl he was unable to testify regarding the circumstances of the collision. There was no one else on behalf of the plaintiff who could do so. Only the insured driver could shed light on the cause of the collision. However, the insured driver was not present at court although he had apparently told defendant's attorney that he would be.
- [4] Plaintiffs counsel then sought to hand up a signed statement of the insured driver dated 24 October 2017 which was obtained by assessors Malesa & Associates who were appointed by the defendant to investigate the merits of the case. Although it is drafted in the form of an affidavit, it has not been signed before a commissioner of oaths. Counsel said it was the best evidence available in the circumstances as plaintiff cannot provide a version to the court about the collision.
- [5] Defendant's counsel objected to the insured driver's statement being handed up in the circumstances as it is not known why the insured driver was not at court and why he was not answering his phone. The assessor was also not at court.
- [6] The position was that there is neither a version on behalf of the plaintiff nor on behalf of the defendant. The defendant did not consent to the use of the insured driver's statement as evidence. It had no evidentiary value as it was not on affidavit. Counsel also submitted that the defendant has not accepted the assessor's report so it too, is not before court. It is for the plaintiff to prove his case and he had ample opportunity to do so. Plaintiff could have called the insured driver to court as he knew long ago that he was not able to give a version of the collision. Hence, said defendant's counsel, there should be absolution from the instance.
- [7] Rule 38(2) of the Uniform Rules of Court provides -

'The witnesses at the trial of any action shall be examined *viva voce*, but 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: Provided that where it appears to the court that any other party reasonably requires the attendance of a witness for cross-examination, and such witness can be produced, the evidence of such witness shall not be given on affidavit.'

- [8] The first thing to note is that the sub-rule provides that the evidence must be on affidavit. The insured driver's evidence sought to be adduced is merely a statement and not an affidavit. Secondly, it is not clear why the insured driver was not at court. His attendance could yet be secured by either party by, for example, serving him with a subpoena.
- [9] A draft order was ultimately prepared which provided *inter alia* that the trial is postponed *sine die* pending my ruling regarding the admissibility and/or weight of the insured driver's statement and sketch; the plaintiff was to file heads of argument by 20 November 2017, the defendant by 27 November 2017 and the issue of costs to be dealt with when I made the ruling.
- [10] Plaintiff's heads of argument only came to my attention on 8 March 2018. The reason was that they were in between a bundle of authorities consisting of printouts of several decided cases and other documents which were delivered sometime in January or early February 2018 (I assume by plaintiff's correspondent attorneys) without any covering letter to indicate for which matter the bundle was provided. It was therefore not known who delivered the bundle of documents and that it contained the heads of argument. On 8 March I decided I should clear the bundle from my chambers and in doing so I unbundled the documents and purely fortuitously came upon the heads. This, regrettably, has led to an unnecessary delay in giving my ruling. The blame for this must surely be laid squarely at the feet of the attorneys of the plaintiff who delivered the documents in this fashion.
- [11] Be that as it may, I am of the view that the statement of the insured driver cannot be admitted at this stage as the best evidence in the circumstances

of the case. The situation may be different where It is shown that a concerted attempt has been made to secure the attendance of the insured driver at court but a party was unable to do so.

[12] I think costs should be reserved for final determination at the end of the trial when the presiding judge will be in a better position to determine the issue.

[13] I make the following ruling:

13.1 The request by the plaintiff to admit the insured driver's statement as the best evidence is refused.

13.2 The issue of costs is reserved for determination during the trial.

RANCHOD J

JUDGE OF THE HIGH COURT

Appearances:

Counsel on behalf of Plaintiff	: Adv. P.C Eia
Instructed by	: A Batchelor & Associates
Counsel on behalf of Defendant	: Adv. M. De Meyer
Instructed by	: Pule Inc.
Date heard	: 29 November 2017
Date delivered	: 12 March 2018