IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

(1) REPORTABLE: ***no***
(2) OF INTEREST TO OTHER JUDGES:
(3) REVISED:

Date: 28/11/2024 ***Signature***: [redacted]

Case No. 4477/2021

In the application between:

ADV H KRIEL N.O. curator ad litem to:

ENGELBRECHT: JAN HENDRERIK JACOBUS Applicant

and

THE ROAD ACCIDENT FUND Respondent

JUDGMENT – LEAVE TO APPEAL

MAHOMED AJ

The applicant seeks leave to appeal the whole of the judgment I handed down on 17 July 2024[1].

1. Mr Uys for the applicant submitted that I was wrong when I noted the evidence of the curandus as that of a single witness. His evidence on how

[1] CL 30-16 to 44

the accident occurred was corroborated by Nortje, it was unchallenged it should have been accepted as probable. Furthermore, he submitted that I made no finding on Nortje's evidence or credibility and therefor his evidence should be accepted. Counsel further submitted that Nortje was an independent witness, who part of the group of boys who had gone fishing that night, he watched the car return from the main gate, through the trees.

2. Counsel further contended that I failed to consider Mr Engelbrecht's injured state, the fact that the incidences occurred a long time ago and that his evidence was corroborated. He argued that both Jan Engelbrecht and Nortje gave direct evidence on the first collision, albeit that Nortje did not see the vehicle veer off the road, he heard a loud bang, he went to investigate, and he found that that the vehicle had left the road and knocked into a tree. It was obvious that the first accident occurred and was due to Theo's negligent driving of the vehicle, in which Jan Engelbrecht was a passenger, this must surely be causal negligence. Counsel submitted that the only fact for determination before me was whether the first collision occurred.

3. Mr Uys argued that the curandus is under curatorship and the court should not expect the impossible off him[2], simply because he failed to report the

[2] Van Zyl NO v RAF 2022 (3) SA 45 CC

accident or to lodge a claim, he suffered a mental condition, he could not have known he had a duty to report the accident. Counsel contended that the court ought to have overlooked minor shortcomings in the witnesses' evidence, given that the accident occurred a long time ago. Mr Uys submitted that the driver's parents did not report the accident because they were protecting their child and the rest of the young boys who were celebrating the end of their exams. In terms of the judgment in Van Zyl, a court cannot expect the impossible off the curandus.

4. It was argued that the accident report is proof that the second accident occurred, the report remains unchallenged, it must itself prove causal negligence, which supports the applicant's version. Counsel argued that the court misdirected itself when it made a finding on how the second accident occurred, the court should have simply accepted that the accident occurred, the report remains unchallenged, the respondent has no version in this regard either. Counsel submitted that another court would arrive at a different finding and that leave to appeal to the full bench should be granted with costs.

5. Mr Ngomana for the respondent argued that the curandus volunteered as witness, he cannot now be heard to complain that his evidence must be approached with caution. Counsel contended that at the trial the plaintiff's case was argued on the basis that the curandus and his mother did not know that they had to report the accident, it was not that the curandus was

injured and that the impossible was expected of him, when he failed to report the accident or to lodge his claim. Mr Ngomana further argued that the Nortje's evidence regarding the first accident was hearsay, he did not witness the vehicle collide into the tree, his evidence was that he watched the lights of the vehicle through the trees, it was a dark night, he could not provide evidence in regard to the negligence of the driver. Furthermore, the curandus' mother conceded she could not assist the court on how the accident occurred, she heard of the accident on the next day. He submitted that only the curandus's evidence on how the accident occurred was before this court and he has an interest in the matter.

6. Mr Ngomana contended that Mr Uys argued his client's case differently in this application. At the trial, the evidence was that the driver's parents were not interested in assisting in the trial, the matter happened a long time ago they wanted nothing to do with this trial. Counsel argued that nothing was said about protecting their children and therefore the court must reject the reasons now advanced. Furthermore, Mrs Englebrecht at trial stated that there was "no reason to report the accident to the police." Even after the second accident occurred Mrs Engelbrecht again did not see the need to report the accident, her testimony was not that the carandas was mentally impaired therefore they did not know.

7. Furthermore, Mr Ngomana argued that there is no independent witness who saw how the first accident occurred. The applicant will struggle to

prove his one percent negligence regarding this first accident, he does not even have any medical evidence for a court to draw even a necessary inference. Counsel argued that the court must consider the conspectus of the evidence, on the occurrence of the first accident together with the probabilities regarding the nature and extent of the injuries sustained.

8. In reply Mr Uys stated that the court made no adverse finding on Nortje's evidence, he heard a loud bang the logical conclusion is that an accident occurred. This is the prima facie evidence that was not disturbed. The second collision is supported by an accident report which is objective evidence.

JUDGMENT

9. At the trial of this matter, I understood the plaintiff's submissions were that he and his mother did not know that they were to report the first accident and to report injuries from the two collisions to the defendant to claim for compensation. I agree with Mr Ngomana, that counsel approached this application differently, now placing reliance on the judgment in Van Zyl NO v RAF. I noted Mr Uys submissions at the trial that the veracity of the witness evidence is critical, and he referred the court to the judgment in Stellenbosch Farmer's Winery, see paragraphs 37, 40 to 44, of my judgment on my approach to the evidence as well as my reference to the paucity of evidence before this court as well as before the defendant in regard to the accident and the injuries. It cannot be disputed that the

defendant relies very heavily on an accident report and medical reports, to assess its liability, those are it “critical tools” nothing was before the defendant for several years, see judgment.[3]

10. Whilst the Act is social legislation, and it makes provision for filing of supporting documents within a reasonable time” in my view the legislature could not have contemplated reasonable time would be “decades later.” It would be unreasonable to expect the defendant to gain any useful evidence years later to assist in the determination of its liability, furthermore, it is trite that the defendant bears no onus. I noted that the curator was in possession of relevant document for several years before he lodged supporting documents.

11. Mr Uys’ criticism of my reference to facts and a misdirection, in relation to the main point, the occurrence of the first accident, is noted however, in my view very little evidence was available to the court, apart from the curandus say so, and circumstantial evidence of Nortje, I considered the conspectus of the evidence, the veracity and credibility of the witnesses evidence for reliability to determine the issue before me. In my view a reference to the facts on injuries sustained and manner of observance of

[3] CL 030-17, 030-33 at paras 27 and 28

incidences and the like, constituted the "conspectus of the evidence," which informed my judgment.

12. The test for leave to appeal is as set out in s17 of the Superior Courts Act 10 of 2013, and the threshold to grant leave is raised, an applicant must demonstrate that another court "would" arrive at a different decision. Our courts have held "*there must be substance in argument advanced on behalf of the applicant*, there must be a measure of certainty that another court will differ from my judgment.[4] I am not persuaded that much substance was placed before me in this application, but rather a different approach to the arguments from those at trial, and even this different approach, in my view does not justify the grant of leave. I am not persuaded of any greater degree of certainty. This application fails and the cost must follow the successful party, as accepted in our law.

Accordingly, I make the following order:

1. Leave to appeal is refused.

2. The applicant shall pay the costs of this application.

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[4] ***Mont Chevaux Trust v Goosen*** 2014 JDR 2325 (LCC) para 6

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MAHOMED AJ
Acting Judge of the High Court

This judgment was prepared and authored by Acting Judge Mahomed. It is handed down electronically by circulation to the parties or their legal representatives by email and by uploading it to the electronic file of this matter on Caselines. The date for hand-down is deemed to be 28 November 2024

Date of Hearing: 21 November 2024

Date of Judgement: 28 November 29024

Appearances: As at trial.