



REPORTABLE

CASE NO: SCR 1/2018

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

RAINIER ARANGIES

First Applicant

AUTO TECH TRUCK AND COACH CC

Second Applicant

and

UNITRANS NAMIBIA (PTY) LTD

First Respondent

PAULUS SHIIMI

Second Respondent

Coram: SHIVUTE CJ, HOFF JA and FRANK AJA

Heard: 22 June 2018

Delivered: 27 July 2018

Summary: The applicants brought an application under section 16 of the Supreme Court Act 15 of 1990 seeking an order reviewing and setting aside a decision of the High Court made on 5 December 2016. The application stems from an action instituted by the applicants (plaintiffs) against the respondents (defendants) for damages as a result of a motor vehicle collision.

The matter was dealt with in the judicial case management process and after numerous postponements, it proceeded to trial. At the commencement of the trial, the respondents requested an inspection *in loco* of the accident scene which was granted. After the inspection *in loco* the parties produced a report which was by agreement handed in at court. The applicants sought leave to file supplementary witness statements in respect of two witnesses they intended calling at trial. The managing judge granted the request and postponed the matter.

The applicants in addition to filing the said supplementary witness statements filed the statement of an additional witness, a further witness statement of first applicant, a supplementary note relating to video footage and a rule 36 (1) notice relating to the introduction of video material. The respondents objected to the introduction of these additional witness statements and the video material.

When the matter was called for status hearing on 5 December 2016, the managing judge requested the parties to make submissions in respect of the contentious additional witness statements and the rule 36 notice. After hearing argument on behalf the parties, the court held that the additional witness statements, supplementary reports and a notice purporting to introduce a video clip would not be allowed as evidence during the trial.

Dissatisfied with this decision, the applicants requested this court to invoke its review jurisdiction so as to review and set aside the decision of the court *a quo*. In terms of s 16 of the Supreme Court Act, this court has jurisdiction to review lower courts' decisions and those of administrative bodies or tribunals.

The applicants contend that their fundamental right to a just and fair hearing was violated by the court on 5 December 2016. The applicants claim that the managing judge ought not to have proceeded on that date with the hearing on the admissibility of the additional witness statements and the notice purporting to introduce a video clip as they were not given sufficient time to prepare and make submissions in that respect.

The court is satisfied that an irregularity had occurred in those proceedings justifying the exercise of this court's review jurisdiction as contemplated in s 16 of the Supreme Court Act. The court is further satisfied that the decision of the court *a quo* constitutes an irregularity in the proceedings and thus reviewed and set it aside. However, the court after considering that the case had dragged on with one postponement after the other, and as it was in as good a position as the trial court to determine the issues, dealt with the issues relating to the additional witness statements, reports and video clip and refused leave to the applicants to file them.

The court remits the matter to the court *a quo* in order to determine the way forward in finalising the matter. No order as to costs is made in respect to the review application.

REVIEW JUDGMENT

FRANK AJA (SHIVUTE CJ and HOFF JA concurring):

[1] On 5 December 2016 and at a status hearing requested by the respondents, the judge *a quo* indicated that the matter would continue from 12 to 27 January 2017 and also made the following order as it appears from the record of proceedings:

‘ . . . , insofar as Mr Kuhn does not purport to be an expert witness these additional statements filed by Mr Arangies, supplementary report inclusive of the supplementary report of Ms Badenhorst, statement by Mr Andre Kuhn and a notice purporting to introduce a video clip will not be allowed as evidence during the trial.’

[2] Applicants filed a Notice of Appeal against the above order and thus on 12 January 2017 when the trial was set to commence the court *a quo* was informed that because of the pending appeal the parties agreed that the trial would have to be postponed pending the outcome of the appeal. The judge *a quo* questioned this approach as according to him the order he made was an interlocutory one it could only be appealed with leave. However, as a result of the parties agreeing to the postponement and hence not ready to proceed with the trial, the trial was postponed *sine die* ‘with great reservation’.

[3] In pursuit of the appeal, the record was filed late on 20 April 2017 together with an application to condone the late filing of the record and to reinstate the appeal that had lapsed as a consequence of the late filing of the record. This was the position when applicants on 13 December 2017 filed an application in this court seeking a review of the decision of the court *a quo* made on 5 December 2016. The application was made pursuant to s 16 of the Supreme Court Act.¹ Applicants were given leave to institute review proceedings on 25 April 2018 and it was directed that the ‘review shall be heard by the Supreme Court . . . , together

¹ Act 15 of 1990.

with the appeal . . .’ between the parties. However, the appeal was withdrawn on 25 April 2018, shortly prior to the applicants receiving notice that they could proceed with the review. (I point out in passing, although nothing turns on it, that what had to be withdrawn was the reinstatement application).

[4] In the founding affidavit to the review application, the legal representative of the applicants states the reason for also seeking a review when the appeal (reinstatement application) was still alive as follows:

‘Counsel for the applicants and I were initially of the opinion that the appeal could be noted without leave from the High Court. In view and taking heed of recent judgments of this Honourable Court,² the applicants’ legal representatives considered this initial view about the appeal and came to the conclusion, also in view of the fact that a rule 16³ review application appeared to be the far more appropriate remedy with which to address the order of 5 December 2016, the appeal should be withdrawn.’

[5] As pointed out by the judge *a quo*, his ruling in respect of whether the additional evidence sought to be tendered was ‘purely interlocutory’, ie this could be altered or set aside by him at any time prior to final judgment. This flows from the common law and this is why it is termed ‘purely interlocutory’.⁴ Rulings with regards to the admissibility of evidence during the cause of a hearing are regarded as orders and are hence not separately appealable even though such rulings may be raised as grounds of appeal against the final judgment.⁵ If a party is aggrieved by such rulings the proper relief is by way of review as was pointed out as far back

² The reference to the Supreme Court.

³ Assumedly s 16 of the Supreme Court Act is what was intended.

⁴ *S v Mkwanazi* 1966 (1) SA 736 (A) and *S v Basson* 2007 (3) SA 582 (CC) para 105.

⁵ *Dickenson v Fisher’s Executive* 1914 AD 424, *Le Roux v Montgomery* 1918 TPD 384, *Commissioner for Inland Revenue v Niemand* 1965 (4) SA 780 (C) at 781F-H and *Goldberg v Grosvenor Finance and Trust Co and others* 1950 (4) SA 154 (W).

as 1914.⁶ It seems that the legal representatives of the applicants' initial view was fatally flawed even prior to the 'recent decisions' of this court.

[6] A question that arises in the context of the explanation in the founding affidavit is this: if the review of the order 'appeared to be the far more appropriate remedy with which to address the order', why was it not brought from the outset? A review application would have meant that an application to stay the proceedings pending the review would have had to be brought and applicants would have run the risk of it being refused and the trial proceeding despite the intended review. Instead, the appeal simply led to a further delay in finalising the matter which had already been delayed through numerous postponements for much longer than it should have been as I point out below. By withdrawing the appeal so close to its intended hearing and continuing with the review, applicants must have known that the trial would not proceed pending a determination of the review. Here it must be borne in mind that the judge *a quo* was an acting judge who has in the meantime returned to practice and if he is to finalise the trial, it is obvious that reasonable notice must be given to him in this regard. As a result, this appeal of the applicants will have caused a postponement of the hearing of the matter for about two years.

[7] Before I deal with the proceedings of 5 December 2016, it is necessary to briefly put the proceedings in context. During February 2013, the applicants instituted an action against the respondents for damages following a collision between motor vehicles. The usual exchange of pleadings took place and the matter was set down for trial on a number of occasions but instead of the matter proceeding, on those occasions, it was always postponed. The dates of set down

⁶ *Schwartz v Goldschmid* 1914 TPD 122.

were as follows: 19-23 May 2014; 24-28 November 2014; 1-5 January 2015; 26 October to 5 November 2015; 19-23 September 2016 and 12-17 January 2017. I must point out that at the hearing scheduled for 19-23 September 2016 the trial did commence with an inspection *in loco* and a report in respect thereof was handed in at court whereafter the applicants applied for a postponement of the matter which was granted.

[8] It is indicated in the affidavits in this application that according to the respondents they have already spent 'in excess of' N\$1 million on the case and according to the applicants they have already spent N\$600 000 in this litigation and had picked up costs of about N\$200 000 in respect of taxed costs relating to the September 2016 postponement. All these costs in a matter which has not yet progressed past one inspection *in loco* as mentioned. Needless to state that the constant postponements come at a cost to the parties. Each party blames the other for the 'needless' costs incurred up to date. The fact that the respective legal practitioners do not act *vis-a-vis* each other in a spirit of collegiality is also evident from the exchange of correspondence between them which is replete with snide asides. One can only pity the clients who must view the court as not having changed since Charles Dickens⁷ withering comments about the conduct of lawyers in the early 19th century in the Chancery Division: (I have replaced the word 'equity' with the word 'justice' to put the quotation in a Namibian context) '. . . mistily engaged in one of the ten thousand stages of endless cause, tripping one another up on slippery precedents, groping knee-deep in technicalities, running their . . . heads against the walls of words, and making a pretence of justice with serious faces, as player's might.'

⁷ Charles Dickens: Bleak House describing the hearing of *Jandyce v Jandyce*.

Needless to say, such impression cannot but do damage to the administration of justice as it undermines the role of the judiciary in society and discredits it as a state institution designed to administer justice fairly and expeditiously to all and sundry. Delays are 'frustrating and disillusioning' to litigants and 'destroy the public confidence in the judiciary'.⁸

[9] As the order sought to be reviewed was made during a status hearing which was requested by the respondents pursuant to the case management process envisaged in the rules of the High Court it is apposite that some comments are made about this process. The managing judge must see to it that the objectives of case management are attained, ie that a matter is dealt with 'justly and speedily, efficiently and cost effectively as far as practicable'.⁹ To do this it is necessary to determine the real disputes between the parties, limit interlocutory applications to those necessary to achieve a 'fair and timely disposal'¹⁰ of the matter. Parties, and especially legal practitioners, are duty bound to assist the managing judge in this regard.¹¹ The rules are so designed to ensure that when an action is referred to trial all the preliminary preparation has been done and all the preliminary or interlocutory issues have been determined. Thus the pre-trial order will stipulate all the matters relevant to the ensuing trial, such as, facts and disputes, facts not in dispute, issues of law to be decided, the names of the witnesses (and when the witness statements have to be filed) as well as any

⁸ *New Clicks South Africa (Pty) Ltd v Minister of Health and another* 2005 (3) SA 238 (SCA) para 39.

⁹ Rule 1(3) read with rule 17 of the High Court Rules.

¹⁰ Rule 1(3)(b) and (d) of the High Court.

¹¹ Rule 17(2) of the High Court.

expert notice.¹² By this time discovery of documents should also have been done.¹³ The general rule thus is, when the pre-trial order is given, it should be adhered to and that the parties are ready to proceed with the trial on the date indicated. Where issues arise from the pre-trial order, such as problems with witness statements, the party incurring such problems must require a status hearing so that the managing judge can give directions in respect of the issue or issues in question.

[10] The purpose of the case management system is to avoid unnecessary delays in the finalisation of trials. The rationale for this has been stated as follows:¹⁴

‘The law’s delays have been the subject of complaint from litigants for many centuries, and it behoves all courts to make proper efforts to ensure that the quality of justice is not adversely affected by delay in dealing with the cases which are brought before them, whether in bringing them on for hearing or in issuing decisions when they have been heard.’

[11] It is advisable that in all cases where a party cannot comply with a pre-trial order that the opposing party(ies) be approached first to seek consent for the indulgence that will be sought at the status hearing. If all the parties consent to the envisaged action this is a relevant factor for the managing judge to consider. I wish to emphasise that it is a factor and not the only factor. Furthermore, the case management process is a step away from the previous practise where the parties could by agreement determine the process and where a party would be entitled to delay (postpone) the process by tendering wasted costs, provided there would be

¹² Rule 26 of the High Court.

¹³ Rules 28 read with 29 and 26 of the High Court.

¹⁴ *New Clicks* case above at 262B.

no prejudice on the merits of the case to the other party or parties involved caused by such postponement. It is exactly these never-ending pending cases where no real emphasis was placed on the matter reaching finality which allowed legal practitioners to be slack in the preparation of cases as they could fix issues intermittently as they cropped up, provided they could tender costs. The reality of such approach was to favour those litigants with deep pockets and those with meritless cases as cost awards seldom cover all the costs of litigants.

[12] If a client appoints a legal practitioner who is lax when it comes to preparation he will now run the risk that he will not be granted a postponement or indulgence to bolster his or her case if he or she did not prepare properly. The proof of such laxity will be the legal practitioner's inability to adhere to the case management process and/or the pre-trial order. This does not mean that the pre-trial orders cannot be altered. It simply means that there must be an acceptable explanation for the non-compliance. The nature of trials is such that unexpected evidence may arise, (although this aspect has been mitigated by the necessity of filing witness statements) new evidence may become available as a result of the publication of the case or issues arising from cross-examination may need to be addressed. The point is that unless a case is made out (other than the unpreparedness by design or omission or because of a lackadaisical attitude in general) for an alteration to a pre-trial order, this will not be granted. To do otherwise would be to assist in discrediting the administration of justice and in the destruction of the court's integrity in the eyes of the public. This would also undermine the rules of the High Court which are designed to stop this erosion of trust in the judiciary which occurred under the previous rules where cases could simply carry on without end. One simply cannot allow litigants (and their legal

practitioners) to play the system so that the High Court gets the reputation that Charles Dickens ascribed to the Court of Chancery in Bleak House: ‘. . . ; which gives to the monied might, the means abundantly of wearing out the right; which so exhausts finances, patience, courage, hope; so overthrows the brain and breaks the heart; that there is not an honourable man among its practitioners who do not give – who do not often give – the warning. ‘Suffer any wrong that can be done to you rather than come here!’

[13] As stated above, the trial was set down in September 2016. The respondents indicated that they would apply for an inspection *in loco*. There was no objection by applicants to this course of action. However, at the scene, when the respondents wanted to introduce vehicles to simulate their version, counsel for applicants objected as this would ‘have taken place in the absence of the heavy-duty vehicles that obscured the views of the first applicant’. According to the affidavit of Mr Horn (not the counsel for applicants who was present at the inspection and raised the objection) the approach by the respondents in this regard ‘evidences a misconception about the nature of an inspection’ as it is customary that no evidence through oral submissions is presented on such occasions. The objection by counsel for applicants referred to was apparently conceded to although the reason for this is not stated. It is in fact a misconception to state that the parties cannot point out where, on their witnesses’ version, certain incidents occurred at the scene. This is precisely why it is sometimes desirable to hold inspections after a witness had testified and the parties’ positions appear from the record. Where this is done prior to testimony and the report of the inspection *in loco* is placed on record, no issue can arise save where a witness under oath deviates from the report. The purpose of an inspection *in loco* is to enable the

court to follow and apply the evidence¹⁵ and how the placing of vehicles on the scene, to demonstrate the respective parties' versions would not have assisted the court *a quo* is incomprehensible.

[14] The observations done at the inspection, where the expert on behalf of the applicants (Ms Badenhorst) was also present, was recorded and handed in by agreement when the trial resumed subsequent to the inspection. What is not explained is why the applicants did not have the trucks available to demonstrate their position at the inspection. If the request for the inspection *in loco* was premature, as is now suggested by the applicants, this was certainly not conveyed to the court nor was there any suggestion that arrangements had been made by them for trucks to be available later in that week and after some evidence had been led so that it would be better if the inspection *in loco* did take place later. The applicants state that they did not intend to call for an inspection *in loco* and when the respondents did, they agreed, apparently reluctantly, to such inspection. The inference is inescapable that they went along and at the scene realised that the inspection could pose challenges in the presentation of their case. It seems that the scene was not visited prior to the trial nor was an inspection contemplated hence the objection to the course of action involving vehicles proposed by the respondents.

[15] As will become apparent below, the whole purpose of the application that forms the subject matter of the review was to place evidence before the court amounting to a simulation of what the traffic was like on applicants' version at the time when the collision occurred. The question that arises is whether a proper

¹⁵ *Rex v Sewpaal* 1999 All SA 597 (N).

preparation for the trial and a visit to the scene prior to the trial would not have indicated that a simulation of applicants' version would have been advisable and that an inspection *in loco* should have included a demonstration with vehicles on the version of the applicants.

[16] When the trial resumed subsequent to the inspection *in loco* the report pertaining thereto was compiled and handed in by agreement between the parties. The facts contained in that report thus become common cause between the parties. The trial was postponed due to the late filing of an additional witness statement of a witness that the applicants intended calling, Mr Koch. At this hearing, counsel for the applicants sought leave to file supplementary witness statements in respect of two witnesses it had indicated it would call, namely a Mr van der Kolff and the expert Ms Badenhorst. These supplementary witness statements the court *a quo* directed to be filed by 21 October 2016, which deadline was extended by agreement with the respondents to 26 October 2016. On this latter day, applicants filed not only the two witness statements indicated but the statement of an additional witness (Mr Kuhn), a further witness statement of first applicant, a supplementary note by Ms Badenhorst relating to video footage and a rule 36(1) notice in terms of the rules of the High Court relating to the introduction of video material.

[17] Per letter dated 8 November 2016 respondents' legal practitioners objected to the rule 36 notice and the witness statements filed other than those for Mr van der Kolff and Ms Badenhorst indicating that they would ignore those statements and would call a status hearing to brief the court on the progress of the matter. In a letter dated 16 November 2016, Mr Mueller, the legal practitioner of the applicants

at all material times hereto up to the filing of the appeal, took issue with the status hearing, apparently contemplated for 17 November 2016 as both he and instructed counsel for applicants would be unavailable on that date and because the issues to be addressed at such status hearing were not stipulated. Respondents' response was to indicate that they wanted the issues raised with regard to the additional witness statements and rule 36 notice resolved by the end of November 2016 and would request a status hearing if the applicants did not consent to such hearing. According to Mr Muller, he received a notice on 28 November 2016 of a status hearing scheduled for 29 November 2016. The legal practitioner for the respondents (Mr Erasmus) maintains this notice was delivered on 24 November 2016 at the office of the Law Society which legal practitioners use for this purpose by agreement. Be that as it may, Mr Mueller on the same date forwarded a further letter of protest in respect of the short notice indicating that as a result neither he nor instructed counsel was available and indicated that the issues that respondents intended raising were 'pivotal and material' and that it should not be determined at the status hearing but be raised as a 'fully substantive issue during the trial' or as a 'a fully-fledged interlocutory application' with affidavits (if necessary) and after the exchange of affidavits. He also indicated that: 'We will attempt to procure the availability of our counsel, who is involved in Cape Town in a trial and opposed application this week, to make submissions upon the manner in which the status hearing was called for, and the relief sought therein, on Monday, 5 December 2016.'

[18] On 29 November 2016 the managing judge, in the absence of the representatives of applicants made the following order:

'The parties are to approach the managing judge in chambers on a date suitable and agreed between the parties.'

[19] Per letter dated 1 December 2016, Mr Erasmus noted the availability of counsel for applicants for 5 December 2016 and informed Mr Mueller that the managing judge was also available on that date and that the issues to be addressed would remain as per his previous correspondence. This letter of 1 December 2016 wrongly attributes to Mr Mueller a statement he did not make. Mr Mueller clearly indicated that he would attempt to instruct counsel for 5 December 2016, but that this was dependent on counsel's availability seeing that he was involved in other matters in South Africa. As it turned out, counsel was not available on 5 December 2016 and Mr Mueller informed Mr Erasmus of this fact on 2 December 2016 proposing the dates of 14 or 15 December 2016 as alternative dates for the proposed status hearing. Mr Erasmus reverted on the same day indicating that respondents would be available on 14 December 2016 and that they were awaiting a response from the managing judge with regard to this date. Mr Mueller accordingly informed applicants' counsel that nothing would happen prior to 14 December 2016 as far as the status hearing was concerned and confirmed the availability of counsel for that date.

[20] On 5 December 2016 while looking at the court roll for the day Mr Mueller noted that the matter was enrolled. He decided that as a matter of courtesy, seeing that the matter was enrolled, to go to court simply to formally remove the matter from the roll or postpone it to 14 December 2016. As this was his purpose, he attended court without even taking the file of the case along with him. At court no one appeared at the time indicated and Mr Mueller, who was under the

impression that this was as a result of the agreement between him and Mr Erasmus that the matter will proceed on 14 December 2016 (subject to the availability of the managing judge) approached the clerk of the managing judge to enquire whether the hearing would indeed take place on 14 December 2016. He in the meantime also spoke to the secretary of Mr Erasmus who confirmed that the managing judge was informed that the parties were available on 14 December 2016 for the status hearing to proceed. The clerk, however informed him that the legal practitioner for the respondents was on his way. This turned out to be Mr Erasmus and the two of them went to see the managing judge in chambers. The judge indicated that he would proceed to court where parties would have to address him on the issues raised as he wanted to finalise these issues. Mr Mueller indicated to the judge that he was not prepared to properly address the issues since there was an agreement to postpone the matter and deal with the issues on 14 December 2016 should the judge be available on that date. The judge however indicated that he should be addressed on the matter in court as he wanted to adjudicate on it.

[21] According to the record of proceedings of 5 December 2016 the judge *a quo* indicated that he was aware of correspondence between the parties indicating that they were not ready to proceed but that he would not postpone the matter, as he intended to make orders 'on the further conduct of the matter so that it is ready for trial' on 12 January 2017. Mr Mueller raised no objection to the approach and stated that as the respondents raised issues, Mr Erasmus must address the court first. Mr Erasmus addressed the court, in essence pointing out that the court did not allow the applicants to file the witness statements objected to and the rule 36 notice when it adjourned after the inspection *in loco*. He informed the court that the

additional witness statements and video recording contained a reconstruction of the collision. The court enquired whether the reconstruction appears to have been done subsequent to the inspection *in loco* and this was confirmed by Mr Erasmus. He then enquired whether the statements filed on behalf of the new witness, Mr Kuhn, indicated that he was an expert witness. Once this was confirmed by Mr Mueller, he enquired whether an expert notice was filed which was not done. The judge *a quo* then indicated that, subject to Mr Mueller's submissions, he would not allow the statement of Mr Kuhn if he was not a witness to the collision and he is not an expert witness. I pause here and mention that it was common cause that Mr Kuhn was not a witness to the collision. The judge *a quo* indicated that he would allow Mr Mueller to suggest amendments to the pre-trial order and that he was 'very flexible about that' as long as the trial could proceed on 12 January 2017.

[22] When it was Mr Mueller's turn to address the court, he was asked whether Mr Kuhn purported to be an expert witness and when this was confirmed the judge enquired whether the necessary notice in this regard had been filed, which was replied to in the negative. Thereafter some discussion followed revolving around the fact that the inspection *in loco* had already been held and the court put the position to Mr Mueller as follows:

'Your difficulty is the fact that the pre-trial order is already issued, inspection *in loco* was already done, there is a report that was made after that inspection *in loco* and your person who purportedly did the reconstruction is not an expert.'

Mr Muller's response was: 'I cannot argue with that, my Lord, that is correct.' Before the judge made an order it was confirmed that the additional witness statements objected to, were based on the video recording and Mr Mueller

conceded 'if the video footage is not allowed then automatically' those statements will have to share the same fate. The judge then made the order quoted in the introduction of this judgment.

[23] The managing judge made it clear that he would not consider the new evidence tendered and did not want to be addressed on it. This is in line with the indications that he wanted to make orders relating to the further conduct of the matter so as to ensure that the trial proceeded in January 2017. He was informed by the legal practitioners that the basis of the tendered evidence was an opinion expressed by Mr Kuhn and in respect of whom no expert notice was given. In other words, what was tendered was inadmissible evidence. The purpose of tendering expert evidence is to call witnesses who are, 'by reason of their special knowledge and skill, . . . are better qualified to draw inferences than the judicial officer'.¹⁶ The other party must also be forewarned about this via an expert notice. As is evident from the exchanges between the managing judge and the legal practitioners, applicants did not adhere to these requirements. This being so, the evidence that was intended to be tendered was inadmissible and it is clear that this was appreciated by the managing judge if regard is had to his order. It needs to be pointed out that the managing judge at all times sought to act in terms of the overall objective of the case management system namely, to finalise the matter and avoid further delays.

[24] The gravamen of the applicants' complaint is that the date of 5 December 2016 was not agreed upon by the parties as contemplated in the order of 29 November 2016 and hence their legal practitioner was not ready for and prepared

¹⁶ Zeffert et al, *The South African Law of Evidence* (2003) at 299.

to deal with the matter on that date and that the managing judge should not have insisted, in the face of these facts, to proceed with the status hearing and to make the orders he did and to have done so without even considering the evidence sought to be tendered.

[25] What is implicit in the complaint is that counsel for applicants who would have been prepared to deal with the issues raised, had he been given the opportunity, would potentially have been able to persuade the judge to come to a different conclusion. This must be seen in the context of the case namely that this was the umpteenth postponement of the trial and the new evidence tendered could even lead to yet a further postponement. Further, that the new evidence objected to was not authorised by the order given in September 2016 when leave was granted at the request of the applicants to file two further supplementary witness statements.

[26] It is necessary to state that the conduct of both legal practitioners at the status hearing contributed to the order of 5 December 2016. It is clear the managing judge did not intend dealing with the contents of the statements or video recording (indeed this is now labelled as an 'egregious irregularity' by applicants) but simply wanted to make arrangements so that the issues could be resolved prior to the trial starting in January 2017. As the status hearing was held on 5 December 2016 and the trial was about to start on 12 January 2017, there was little time for this to be done if cognisance was taken of the December court recess. Mr Mueller did not object to this approach and after Mr Erasmus took the opportunity to deal with the merits to point out that the tendered evidence objected to was not in accordance with the order made in September 2016 and that a

reconstruction of the collision was subsequent to the inspection *in loco* the managing judge assumed that the witness Kuhn would be an expert in the reconstruction process. When the judge took this up with Mr Mueller, the latter conceded that Mr Kuhn was an expert and that no expert notice had been filed and that the other witness statements and notices in respect of the video was all based on the evidence of Mr Kuhn. In other words, what was conceded was that all the evidence sought to be tendered (as no expert notice was filed) amounted to inadmissible opinion evidence. It is against this background that the managing judge gave the order he did.

[27] From the record it appears the concession that Kuhn would give expert evidence was wrong. So was the concession that the evidence tendered amounted to a reconstruction of the collision. That these two considerations were material to the managing judge is evident from the record. It cannot be excluded that these concessions were (wrongly) made because Mr Mueller was not prepared to deal with the issues raised by the judge which was further exacerbated by the fact that he could not have regard to his documentation as he did not have the case file with him.

[28] The applicants in this review application have disclosed their reasons for filing the additional documentation objected to. This court is thus in as good a position as the trial judge to consider whether they should be granted leave to file the additional witness statements and rule 36 notice. This is also the stance taken on behalf of the applicants. The respondents abide the decision of this court. In my view, this court should determine the issue as a referral back to the trial judge

could lead to further delay and potential further appeal or review and it is necessary in the interest of justice that this matter be finalised.

[29] At the September 2016 hearing counsel for applicants indicated that supplementary statements would be filed in respect of two identified witnesses, namely Mr van der Kolf and Ms Badenhorst. This they did, but in addition a further witness statement in respect of the first applicant was filed, a witness statement in respect of a new witness not previously mentioned, Mr Kuhn, was filed as well as a rule 36 notice in respect of a video recording. As pointed out, the witness statement of Ms Badenhorst consists wholly of commentary on the video footage of which notice was given in the rule 36 notice and which relates to the witness statement of Mr Kuhn and supplementary witness statement of the first applicant.

[30] Counsel for applicants submits that the leave granted to file further witness statements by the expert Ms Badenhorst implicitly contain leave to file further witness statements to establish the factual basis for her further expert opinion and hence that he complied with the September 2016 order. In the words of counsel in his heads of argument, the leave granted 'encompassed and permitted the production of whatever non-expert evidence that was required for purposes of establishing a foundation for the expert opinion'. This submission is so meritless that it borders on the absurd. If normal factual evidence needs to be led this must be done in the ordinary course and by non-expert witnesses whose identities in terms of the case management system need to be disclosed and this is especially so where special leave to call witnesses is necessary because they were not indicated in the pre-trial order. Further, where leave is sought to call further witnesses at a late stage of the proceedings it may make a material difference

whether leave is sought to call a single witness or 5 witnesses, ie 4 to give factual evidence for the 5th (expert) to formulate his or her opinion. It would simply be absurd if a party can indicate he has one witness, an expert, and then call the plaintiff and say 5 witnesses because they must establish the facts on which the expert must base his or her opinions on. This submission is clearly an afterthought by counsel to attempt to justify his abuse of the indulgence granted to him to file further or supplementary witness statements.

[31] In the founding affidavit the video footage sought to be introduced by the rule 36 notice in conjunction with the new evidence of first applicant and Mr Kuhn is explained. It is stated that it is not an attempt to reconstruct the collision but that it is simply footage demonstrating how other trucks on the scene on the day of the collision obstructed the views of the driver of the truck. This apparently is necessary to dispel the 'misleading' picture presented by the respondents at the inspection *in loco*. It needs to be pointed out in this context that the first applicant in his witness statement refers to trucks obscuring his view prior to the collision and that the applicants' expert Ms Badenhorst also incorporates this factual statement into her witness statements in rendering her opinion.

[32] Counsel for the applicants was present at the inspection *in loco* and objected to any trucks being introduced at this inspection. I have dealt with the inspection *in loco* above and pointed out that this was the natural occasion for this kind of evidence to be produced. Counsel, probably at the inspection or shortly thereafter, realised this kind of evidence would be helpful to his case and hence the attempt to now introduce it. The inference is inescapable that a thorough preparation for the trial did not include a consideration of this aspect and that when

the trial commenced the applicants' legal practitioner was satisfied to proceed with the evidence of his witnesses in respect of whom witness statements were filed in this regard without having to demonstrate this visibility point by reference to a simulation. The issue of the obstruction, as mentioned, appears in the witness statements. Applicants clearly intended to prove their version by way of oral evidence only, which they can still do.¹⁷ The sudden change of heart is now based on attempts to ascribe this to the misleading picture painted by the respondents at the inspection *in loco* which he attended. This allegation is also wholly without merit. He objected to trucks being placed on the scene so it is obvious that the scene would be presented without obstacles. How this can be attributed to the respondents placing misleading evidence before court is incomprehensible. Applicants can, in any event, during evidence point out the alleged misleading nature of the evidence.

[33] As indicated earlier in this judgment, the days that legal representatives prepare as they go along in a case and solely in reaction to the conduct of the other party(ies) are gone. Counsel is appointed to act and within the limits of his or her brief, is the person who makes the decisions relating to the conduct of a case and where he or she exercises his or her discretion in this regard the client is bound by his or her judgment.¹⁸ Legal practitioners must prepare timeously as the reputation of the administration of justice and the integrity of the courts are more important than the convenience of legal representatives. Thus, when counsel decides not to utilise an inspection *in loco* properly or not to obtain evidence timeously the client is bound hereby. In the present matter, which as pointed out above had been postponed on a number of occasions, and where it became

¹⁷ *Sewpaul* case, above, at 979.

¹⁸ *S v Louw* 1990 (3) SA 116 (A) at 124A-125E.

imperative that the matter be finalised it was simply unacceptable for applicants to, contrary to an order and with total disregard for the case management process, shortly before the resumption of the trial file witness statements in respect of a matter which, had there been proper preparation, should have been filed at the outset of the case.

[34] In the result, although the managing judge committed an irregularity, this was of no moment because had he granted the applicants' legal practitioners a full hearing he should still have had to come to the same conclusion not to admit it filing of the statements and the video clip objected to.

[35] As the irregularity involved a breach of the *audi alteram* principle the order of 5 December 2016 is bound to be set aside. The review application is thus successful to this extent. As both parties' legal representatives were not blameless in respect of how this order came about no order of costs will be made in favour of either party in effect meaning that each party should bear their own costs in respect of the setting aside of the order of the court *a quo* of 5 December 2016.

[36] As far as the decision of this court is concerned in relation to whether applicants were entitled to file the witness statements and Rule 36 notice objected to, the position as far as costs are concerned is the same. The applicants were not successful but the respondents did not oppose the review application but abided the decision of this court. Hence, it would be appropriate that no costs order is issued.

[37] In the answering affidavit of the legal representative for the respondents he stated that as far as the costs order *a quo* is concerned he did not ask for costs but submitted that costs should be costs in the cause. According to his affidavit he initially asked the costs but 'at the end of the status hearing I actually relented and conceded that costs should be costs in the cause'. He also refers to the record of proceedings in support of this stance. It however turned out that the record incorrectly reflects the position if regard is had to the actual recording of the hearing and that the legal representative indeed asked for costs. In a further affidavit he apologises for this and seeks to explain how this error came about as he did not intend to mislead the court.

[38] Whereas lay litigants may have some excuse for signing affidavits drafted by their legal practitioners that contain factual inaccuracies or where such inaccuracies are obscured to such deponents by the use of the surrounding legalese or by the use of fancy turn of phrases, a legal representative has no such excuse. Legal representatives know the full impact of deposing to a document under oath and if they sign affidavits drafted by instructed counsel without properly reading or scrutinising such affidavits, they must not complain if what they signed under oath is held against them, be it a factual incorrectness, unwarranted personal attacks or unwarranted allegations of impropriety.

[39] Finally, there is a consideration that needs to be addressed and that revolves around the judge *a quo*. As pointed out in the judgment, the judge *a quo* was an acting judge, whose term has come to an end. If he accepts an acting appointment so as to finalise the matter, no problems will arise as he will simply resume the matter where he left off and finalise it without reference to the rule 36

Notice and witness statements excluded in the order of this court. If however the trial must start *de novo* in front of a different judge, the position is different. An inspection *in loco* may be helpful to assist the court in following and applying the evidence in which case it should be allowed. If this happens the parties will obviously be entitled to make use, to the full, of such inspection for its intended purpose. In short, a trial *de novo* will not hamper the judge in managing the trial in his or her discretion to conclusion.

[40] In the result I make the following order:

- (a) The order of the court *a quo* (inclusive of the costs order) given on 5 December 2016 which forms the subject matter of this review application is reviewed and set aside;
- (b) Leave is refused to the applicants to file the additional witness statements of Mr Arangies, Mr Kuhn and Ms M S Badenhorst as well as the rule 36 notice in respect of the video recording which they presented to the court *a quo* on 26 October 2016 and to which respondent objected to at the status hearing on 5 December 2016;
- (c) There shall be no costs order in respect of this review;
- (d) The matter is referred back to the High Court for case management and finalisation.

FRANK AJA

SHIVUTE CJ

HOFF JA

APPEARANCES

APPLICANTS:

T A Barnard

Instructed by De Klerk Horn and
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FIRST AND SECOND

RESPONDENTS:

J Marais SC (with him D Obbes)

Instructed by Francois Erasmus &
Partners