

SOUTH AFRICA / JUDGMENT

Lewis v Road Accident Fund (17441/2009) [2023] ZAWCHC 120 (18 May 2023)

[2023] ZAWCHC 120

COURT

Western Cape High Court, Cape Town

BEFORE

Le Grange

CASE / FILE NUMBER

17441/2009

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Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA

[WESTERN CAPE DIVISION, CAPE TOWN]

Case No: 17441/2009

In the matter between:

Sarah LewisPlaintiffAndRoad Accident FundDefendant

Sarah LewisPlaintiff

Sarah Lewis

Plaintiff

Road Accident FundDefendant

Road Accident Fund

Defendant

JUDGMENT DELIVERED: 18 MAY 2023

LE GRANGE ADJP:

[1]In terms of Rule 28 (1) of this Court's Rules, the Defendant (RAF) seeks leave to amend its Amended Plea dated 17 May 2022.The Plaintiff's claims emanate from a motor vehicle accident in November 2006 wherein her husband passed away.

In terms of Rule 28 (1) of this Court's Rules, the Defendant (RAF) seeks leave to amend its Amended Plea dated 17 May 2022.

The Plaintiff's claims emanate from a motor vehicle accident in November 2006 wherein her husband passed away.

[2] Regrettably, this matter has a long and convoluted history. Summons was issued on 23 September

2009. The Defendant was initially represented by a firm of attorneys but their mandate was subsequently terminated by RAF. Thereafter, the matter was dealt with by various personnel of RAF, including a Senior Claims Handler. The Plaintiff had appointed a psychiatrist, Dr Keir le Fevre ("Dr le Fevre"), who provided two reports, dated 4 October 2010 and 23 October 2014. RAF also appointed a psychiatrist, Dr Tuviah Zabow ("Dr Zabow"), who provided a report, dated 6 October

2015. The Plaintiff furthermore appointed a clinical psychologist, Ms Mignon Coetzee ("Ms Coetzee") to provide a medico-legal report, dated 21 August 2012 and Defendant's clinical psychologist, Ms Elspeth Burke ("Ms Burke") filed a report dated 15 October 2014.

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2015. The Plaintiff furthermore appointed a clinical psychologist, Ms Mignon Coetzee ("Ms Coetzee") to provide a medico-legal report, dated 21 August 2012 and Defendant's clinical psychologist, Ms Elspeth Burke ("Ms Burke") filed a report dated 15 October 2014.

[3] The mentioned psychiatrists and clinical psychologists prepared joint minutes between them, dated 3 November 2014 and 16 November 2014. All agreed the Plaintiff had suffered a serious psychiatric injury resulting from the deceased's death that is accident related. Dr Lourens, an industrial psychologist was appointed in 2016 as a joint independent expert by the parties to do investigation regarding the quantum of the Plaintiff's claim for loss of support, loss of earnings and or loss of earning capacity. His investigation and reports are all based on the fact that the Plaintiff suffered a serious psychiatric injury that is accident related.

[4] Various pre-trial conferences were also held and the minutes thereof filed. Ultimately, the State Attorney received formal instructions in December 2021. Senior and Junior counsel were appointed a few days prior to the commencement of the trial on 15 March 2022. According to RAF upon receiving the brief, counsel evaluated the entire matter and concluded that further investigation in respect of the loss of income and support

components of the Plaintiff's claim should be done. After a substantive application, a postponement to 30 May 2022 was granted and RAF was ordered to pay the Plaintiff's wasted costs.

[5] The matter was thereafter again postponed for Dr Lourens to provide further investigations regarding the heads of damages still in dispute. A directive was also issued in respect of the further conduct of this matter, including that Dr Lourens provides further recommendation to the parties' respective actuaries in order to compile a joint minute.

[6] Pursuant, to Dr Lourens further investigation and the two reports he subsequently filed on 20 and 21 May 2022, RAF filed a document titled "Defendant's note in respect of issues in dispute relating to Dr Johan Lourens' reports" (the note) on

27 May 2022. In that note RAF set out the issues still in dispute regarding Plaintiff's claims for loss of earnings and loss of support.

[7] Due to the lapse of approximately 9 years since the clinical psychologists and psychiatrists provided their respective reports and joint minutes, RAF requested the Plaintiff to be re-examined by Dr Khan, a psychiatrist in the United States of America ("USA") for the purposes of establishing whether a residual earning capacity remains, given the factual history, to ensure a fair and reasonable settlement.

[8] In its application for the Plaintiff to be examined by Dr Khan, RAF's CEO recorded in the founding affidavit that the purpose of the examination was to obtain "updated information in respect of the plaintiff's current state of mind, vocational functioning and current residual earning capacity, if any..". The CEO further recorded that, "I categorically state that the examination is not sought in order to obtain a tactical advantage over the Plaintiff. It is sought for purposes of establishing whether a residual earning capacity remains, given the recent factual history, in order to ensure a fair and reasonable settlement herein." This was initially opposed by the Plaintiff.

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I categorically state that the examination is not sought in order to obtain a tactical advantage over the Plaintiff. It is sought for purposes of establishing whether a residual earning capacity remains, given the recent factual history, in order to ensure a fair and reasonable settlement herein."

[9] On 16 August 2022, RAF launched a Rule 36(5) application. In correspondence dated 26 August 2022, the Plaintiff conceded to the request to be examined by Dr Khan subject to certain limitations in particular that the evaluation must only deal with Plaintiff's current earning capacity and be limited to 4 hours. RAF objected thereto. In correspondence the Plaintiff noted RAF's objections. The Plaintiff ultimately agreed to be evaluated by Dr Khan which filed two reports. The first was dated 24 October 2022 and the second 20 December 2022.

[10] Dr Khan in her first report recorded, inter alia, that the Plaintiff does not meet the criteria of Post Traumatic Stress Disorder (PTSD) as set out in the DSM-V and no causal connection

exists between the Plaintiff's psychiatric condition and her husband's demise on 18 November 2006, although her current

mental health symptoms show signs and symptoms of chronic depression. Dr Khan also expressed her concern that the psychiatric and

psychological reports of the other experts were inconsistent and contained conflicting information. According to Dr Khan it would have been preferable to view the actual treating psychiatrist or treating mental health provider's records which in her opinion are vital in considering the Plaintiff's psychiatric condition as none of the other expert psychiatric and psychological reports made any reference to it.

inter alia

[11] As a result of Dr Khan's opinion, RAF is now seeking the following amendments:

"By amending paragraph 23 thereof (with heading "AD PARAGRAPHS 16 AND 17 THEREOF") by deleting the entire paragraph and by substituting it with the following:

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"23. The contents hereof are denied and Plaintiff is put to the proof thereof.

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23.1 In amplification of the aforesaid denial, and in accordance with the reports of psychiatrist, Dr Salma Khan, dated 24 October 2022, and 20 December 2022 respectively filed in these proceedings, it is pleaded that:

23.1.1 There is no causal nexus between her current mental health symptoms and her alleged symptoms subsequent to the demise of her husband.

23.2 The death of Plaintiff's husband has caused her no psychological injury or disability;

23.3 The Plaintiff, furthermore, does not meet all the criteria of a diagnosis of Post-Traumatic Stress Disorder ("PTSD"), as listed in the DSM-V."

23.3 The Plaintiff, furthermore, does not meet all the criteria of a diagnosis of Post-Traumatic Stress Disorder ("PTSD"), as listed in the DSM-V.

- [12] By amending paragraph 29 (with heading “AD SUB-PARAGRAPHS 19.8 AND 19.9 THEREOF”), by deleting the entire paragraph and by substituting it with the following:

AD SUB-PARAGRAPHS 19.8 AND 19.9 THEREOF

“29. Whilst it is admitted that the Plaintiff was treated with observation, bedrest, medication and therapy, it is denied that the previously mentioned sequelae had been present from the date of collision to the date hereof. The content of paragraph 23 pleaded hereinabove, is repeated herein as if specifically traversed.”

29. Whilst it is admitted that the Plaintiff was treated with observation, bedrest, medication and therapy, it is denied that the previously mentioned sequelae had been present from the date of collision to the date hereof. The content of paragraph 23 pleaded hereinabove, is repeated herein as if specifically traversed.”
29. Whilst it is admitted that the Plaintiff was treated with observation, bedrest, medication and therapy, it is denied that the previously mentioned sequelae had been present from the date of collision to the date hereof. The content of paragraph 23 pleaded hereinabove, is repeated herein as if specifically traversed.

By the deletion of paragraph 39, and by substituting it with the following:

“39. In the event of the Honourable Court finding that the Plaintiff has suffered serious psychiatric injuries, consisting of PTSD and complicated bereavement and that these symptoms have been present from the date of collision to date hereof, which is denied, it is specifically pleaded that the Plaintiff does retain a residual earning capacity.

39. In the event of the Honourable Court finding that the Plaintiff has suffered serious psychiatric injuries, consisting of PTSD and complicated bereavement and that these symptoms have been present from the date of collision to date hereof, which is denied, it is specifically pleaded that the Plaintiff does retain a residual earning capacity.

[13]It is common cause, RAF in paragraph 5 of its amended plea admitted liability. In paragraph 23 thereof, RAF admitted the Plaintiff suffered a significant psychiatric injury as a result of her husband's death in the motor vehicle accident. Moreover, RAF has settled the Plaintiff's claims for past medical expenses, future medical expense and general damages on the basis that she suffered a psychiatric injury that is accident related. The only outstanding issue is the head of damages relating to past and future loss of earnings and or earning capacity and loss of support. The Plaintiff has also amended her particulars of claim on 22 February 2023. The loss of support component now amounts to \$ 2 195 000.00 and the past and future loss of earnings and or earning capacity component has been amended to an amount of \$ 5 022 400.00. The total claim in respect of those damages amounts to \$ 7 217 400.00. Converted into rand value, it amounts to approximately R 133 377 552.00

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[14] The Plaintiff's main grounds in opposing the proposed amendment are the following: the proposed amendments would be prejudicial to her case; her claim for future loss of earnings were compromised as RAF in various pre-trial minutes conceded liability and that she is entitled to recover 100% of her proven or agreed damages; her claims for general damages and future medical expenses were settled by RAF on the basis of her psychiatric condition. The Plaintiff was further of the view it is not permissible for RAF to repudiate Dr Lourens' opinion in circumstances where he investigated the facts and filed a joint expert report which RAF agreed upon at the pre-trial conference. In support of the latter, reliance was placed the dictum in *Bee v RAF*[1] where the court inter alia held the facts agreed upon by experts enjoy the same status as facts which are common cause on pleadings or agreed in a pre-trial

conference. Furthermore, where experts reach an agreement on a matter of opinion, the litigants are not at liberty to repudiate the agreement unless a litigant does so clearly and, at the very latest at the outset of the trial.

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conference. Furthermore, where experts reach an agreement on a matter of opinion, the litigants are not at liberty to repudiate the agreement unless a litigant does so clearly and, at the very latest at the outset of the trial.

[15] According to RAF, the fact that it admitted liability for 100% of Plaintiff's proven or agreed damages, is a concession in respect of the merits of the collision only and cannot be construed as a concession on the issue of causation and the quantum of damages. According to RAF, the settlement of certain of the Plaintiff's damages was done in good faith with the available information at the time. It was further stated that when Dr Khan's expert opinion became available a new ground of defence came to the knowledge of RAF for the first time after its Amended Plea was filed and the issue of causation must still be considered in determining the Plaintiff's component of damages that is still in dispute. Furthermore, according

to RAF, the reliance by the Plaintiff on Beeis misplaced as fair warning to repudiate Dr Lourens' reports which was given prior to the onset of the trial.

[16] The causal connection between the demise of the Plaintiff's Husband on 18 November 2006 in the motor vehicle accident and her subsequent psychiatric incident is central the Plaintiff's claims in the action, as four of the Plaintiff's claims, namely her claims for past medical expenses, future medical expenses, general damages and loss of earnings and or earning capacity are directly dependent upon the issue of causality, except the claim for loss of support.

[17] It is trite that there can be no question of delictual liability if it cannot be proven that the conduct of the wrongdoer or defendant

caused the damage of the person suffering the harm[2]. In turn, delictual liability requires a factual causal link between wrongful and culpable conduct, on the one hand, and loss suffered on the other. There must also be legal causation meaning whether the harm or loss suffered is not too remote to be recognised in law and the test to apply is a flexible one which factors such as reasonable foreseeability, directness, the absence or presence of novus actus intervenience, legal policy, reasonableness, fairness and justice all play their part[3]. It was also held in *RAF v Sauls*[4] that the so-called flexible approach or test of legal causation does not require a limitation to the Plaintiff's claim, apart from the questions of proof of the quantum of damages.

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[4]that the so-called flexible approach or test of legal causation does not require a limitation to the Plaintiff's claim, apart from the questions of proof of the quantum of damages.

[18] In the present instance the parties' respective psychiatrists and psychologists in their joint minutes accepted that the Plaintiff's psychiatric injury was caused by the death of her husband. Dr Lourens in his investigation and reports relied upon those joint minutes and accepted that the Plaintiff suffered a psychiatric injury.

[19] The question now is whether RAF's concession of admitting liability for 100% of Plaintiff's proven or agreed damages amounted to a compromise on the merits including the issue of causality or was it only limited to negligence of the motor vehicle driver. It is trite, a compromise or settlement has its effect of the prevention, avoidance or termination of litigation. Ultimately, it has the effect of res judicata between the parties irrespective of whether it is embodied in an order of court[5]. Moreover, a compromise must be strictly interpreted and must not be understood to include anything which was not likely to have been contemplated by the parties at the time they reached the compromise[6].

[19] The question now is whether RAF's concession of admitting liability for 100% of Plaintiff's proven or agreed damages amounted to a compromise on the merits including the issue of causality or was it only limited to negligence of the motor vehicle driver. It is trite, a compromise or settlement has its effect of the prevention, avoidance or termination of litigation. Ultimately, it has the effect of

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[20] In answering the latter it is perhaps convenient to relook at the pretrial minutes and the pleadings. The parts of the pretrial minutes can be summarised as follows: On 23 May 2014 in the third pretrial minute the following was recorded: "...Defendant has now conceded the merits" and that "Hence quantum is the only issue in dispute". In the fifth pretrial minute dated 20 November 2014 it was recorded that "Quantum is the only issue in dispute". In the

sixth pretrial minute dated 27 February 2015, it was recorded that “The parties confirm that the Defendant conceded merits”. In the seventh pretrial minute dated 3 August 2015, the parties recorded that “The issue of liability is not in dispute in that the Defendant conceded the merits” This was repeated in the eight pre-trial minute dated 19 October 2015. In the eighteenth pretrial minute dated 6 November 2015, it was again recorded that “the Defendant has conceded liability herein and the Plaintiff is consequently entitled to recover 100% of her proven or agreed damages.” In the pretrial conference held before Judge Savage on 20 September 2018, the matter was declared trial ready. In that trial ready minute it was recorded that “The Defendant has conceded liability herein and that Plaintiff is consequently entitled to recover 100% of her proven or agreed damages” and further “The issue of the quantification of the Plaintiff’s damages remains in dispute.” In a further memorandum of issues dated 6 November 2020 it was recorded that “Liability is no longer an issue inasmuch as the Defendant has accepted liability for 100% of the Plaintiff’s proven damages arising from the collision.” The parties again on 9 March 2022 agreed during a pretrial conference that “The Defendant has conceded that it is liable to pay the Plaintiff’s agreed or proven damages in this action.”

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The issue of liability is not in dispute in that the Defendant conceded the merits”

the Defendant has conceded liability herein and the Plaintiff is consequently entitled to recover 100% of her proven or agreed damages.”

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Liability is no longer an issue inasmuch as the Defendant has accepted liability for 100% of the Plaintiff’s proven damages arising from the collision.

The Defendant has conceded that it is liable to pay the Plaintiff’s agreed or proven damages in this action

[21] In respect of the pleadings RAF in its Amended Plea dated 17 May 2022 admitted in paragraph 5, liability for 100% of the Plaintiff’s proven or agreed damages. In paragraph 23 thereof RAF admitted the injuries suffered by the Plaintiff as formulated in paragraphs 16 and 17 of her Combined Summons. RAF recorded the following “Defendant admits that the Plaintiff suffered a significant psychiatric injury as a result of the deceased passing away in the motor vehicle accident on 18 November 2006.”

Defendant admits that the Plaintiff suffered a significant psychiatric injury as a result of the deceased passing away in the motor vehicle accident on 18 November 2006.”

[22] In interpreting the compromise, the so-called ‘golden rule of interpretation’ is to have regard to the normal grammatical meaning of the relevant words, the context in which they were used, including the nature and purpose of the agreement, and the background circumstances which might explain the purpose of the agreement and the matters properly present to the minds of the parties when they concluded it[7].

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[23] In this instance, RAF is facing a claim for damages brought by the Plaintiff, as a result of her suffering a psychiatric injury that is accident related. Delictual liability can therefore only follow if there was a psychiatric injury[8]. In admitting liability on the merits, RAF in no uncertain terms accepted the Plaintiff’s psychiatric injury without qualification for whatever damages the Plaintiff has suffered, subject of course to proof of those damages that ought to be awarded. The latter is also in accordance with the joint minutes of the parties’ expert witnesses. In my view having regard to the above mentioned, there is no room for the argument by RAF, its acceptance of liability was only limited to the issue of negligence. RAF in my view never intended to deny Plaintiff’s psychiatric injury in order to avoid its liability. Furthermore, RAF never laboured under any erroneous belief, ignorance of fact(s),

misrepresentation or mistake when it entered into the compromise. In fact, the clearest of indication that the concession by RAF went far beyond the question of negligence and embraced the resultant psychiatric injury, is the settlement of Plaintiff’s claims for general damages and future medical costs. The latter is even further fortified by RAF’s own CEO when he stated in the application for the Plaintiff to be examined by Dr Khan that, “I categorically state that the examination is not sought in order to obtain a tactical advantage over the Plaintiff. It is sought for purposes of establishing whether a residual earning capacity remains, given the recent factual history, in order to ensure a fair and reasonable settlement herein.” The issue of causality was accordingly settled. In my view the unqualified concession of liability by RAF renders it both impermissible and opportunistic for it to now attempt to introduce the evidence of Dr Khan to dispute the issue of causality in order to avoid its liability. Having regard to the pretrial conference on 20 September 2018, there can be no doubt that RAF and the Plaintiff entered into a compromise to shorten the litigation. RAF in no uncertain terms intended to concede liability on the merits including Plaintiff’s psychiatric injury.

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the pretrial conference on 20 September 2018, there can be no doubt that RAF and the Plaintiff entered into a compromise to shorten the litigation. RAF in no uncertain terms intended to concede liability on the merits including

Plaintiff's psychiatric injury.

[24] I accordingly conclude that the issue of Plaintiff's psychiatric injury is no longer alive as it has been compromised. There is no longer alisin respect of which the Plaintiff bore the onus of proof, beyond establishing the quantum of her damages.The Plaintiff is consequently entitled to recover 100% of her proven or agreed damages.

[24] I accordingly conclude that the issue of Plaintiff's psychiatric injury is no longer alive as it has been compromised. There is no longer a

in respect of which the Plaintiff bore the onus of proof, beyond establishing the quantum of her damages.

The Plaintiff is consequently entitled to recover 100% of her proven or agreed damages.

[25] It is trite that a compromise may be set aside if it was obtained by fraud or on the grounds of mistake, provided that the error vitiated true consent and did not merely relate to the motive of the parties or to the merits of the dispute, which was the purpose of the parties to compromise[9]. Other contractual defences, such as the impossibility of performance or illegality of the compromise, are also available. In the present instance, on the facts, none of the abovementioned defences are available to RAF.

[26] But even in the absence of a compromise, the withdrawal of admissions is not easily to achieve because firstly, it involves a change of front which requires full explanation to convince the court of the bona fides thereof, and secondly, it is more likely to prejudice the other party, who had by the admission been led to believe that she need not prove the relevant fact and might, for that reason, have omitted to gather the necessary evidence[10].

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[27] In *President Versekeringsmaatskappy Bpk v Moodley*[11], two guiding rules were distilled from the various authorities under discussion in that matter. Firstly, there must have been a bona fide mistake on the part of the party seeking to amend and secondly, the amendment must not cause prejudice to the other side which cannot be cured by an appropriate order as to costs.

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mistake on the part of the party seeking to amend and secondly, the amendment must not cause prejudice to the other side which cannot be cured by an appropriate order as to costs.

[28] In this instance there was clearly no mistake on the part of RAF when it made the admission. The admission in fact, was based on the advice received from the experts it consulted on this issue, namely a psychiatrist, Professor Zabow, and a clinical psychologist, Ms Burke. At the time of making the admission, RAF's experts had also met with the experts consulted by the Plaintiff on this issue, namely Dr le Fèvre, a psychiatrist, and Ms Coetzee, a psychologist. These experts were all in agreement regarding the issue of causality.

mistake

[29] The mere fact that Dr Khan at a later stage expressed an opinion which differs from the other experts on whose advice(s) RAF relied on when it elected to make the admission, cannot in this instance be a good reason to withdraw the admission made. It is not a new ground of defence in the true sense of the word that comes to RAF's knowledge for the first time after it filed its Amended Plea. It is merely a different opinion by another expert on an issue which was already within the knowledge of the parties. When RAF elected to make the admission, it surely must have known a possibility exists that another expert may hold a different opinion. However, it was prepared to accept that risk in the interests of limiting the issues for trial[12].

[30] In my view, the principles of justice and effective case management would be seriously undermined if a party, who has elected to make an admission under such circumstances, were to be allowed to withdraw the admission made, on the basis that another single expert, many years later, has expressed a different opinion to that of the other experts on whose advice(s) the admission was founded. To allow an amendment in these circumstances and at this late stage will in my view undermine the very purpose of a Rule 37 conference which is to shorten the length of trials, to facilitate settlements between parties, narrow the issues and to curb costs[13]. Furthermore, RAF in this instance simply failed to advance any reasonable explanation as to why Dr Khan's opinion is to be preferred on the issue of causality over that of its other experts. There is no indication on record that RAF has even tried to confer with Professor Zabow on this very important issue. The only inference to be drawn is RAF prefers the opinion of Dr Khan, as it could be advantageous to its case.

[31] In my view RAF has simply failed to offer an adequate explanation for its sudden change in stance to belatedly withdraw the material admission it made. Both parties accepted the matter was declared trial ready on 18 December 2020, and proceeded on that basis that the Plaintiff has suffered a psychiatric injury. To allow the amendment sought would be manifestly prejudicial to the Plaintiff's case, and this is not a matter where the prejudice can be cured by an appropriate costs order.

[32] As already pointed out, liability for the Plaintiff's damages could only be admitted if it was accepted that the Plaintiff had sustained a psychiatric injury. The objections raised by the Plaintiff is therefore not without merit and the proposed amendment(s) falls to be dismissed.

- [33] Turning to the issue of repudiation. Dr Lourens report(s) came about as a result of a joint minute previously prepared by the parties' respective industrial psychologists, Mr Martiny and Ms Atkins, dated 27 April 2015. In that joint minute, Martiny and Atkins recorded their difficulty to research the issues in person in the USA. They accordingly proposed that the parties instruct a suitably qualified expert or experts in the USA, to interview the relevant witnesses and to report on their findings, alternatively that they would be available to travel to the USA to consult with the relevant witnesses in order to ratify their findings.
- [34] The parties then decided to jointly appoint Dr Lourens, to consult with the relevant witnesses in the USA in order to ratify their findings and to carry out certain investigations. It needs to be mentioned that RAF proposed the appointment of Dr Lourens who then travelled to the USA on two occasions, during 2017 and 2020, for approximately one week on each occasion, to consult with the various witnesses and to obtain relevant information. He consulted with no less than thirteen witnesses in total. He produced three reports pursuant to those visits, respectively dated 21 August 2017 and 29 January 2020, comprising of 299 pages.
- [35] RAF had no difficulty with the reports of Dr Lourens until May 2022. After the postponement of the trial in March of 2022, Dr Lourens produced a further two reports at the request of RAF, dated 20 and 21 May 2022 respectively. The matter was again set down for trial on Monday, 30 May 2022. RAF however, filed the note in respect of Dr Lourens' report(s) which it still regarded to be in dispute.
- [36] According to RAF the note on 27 May 2022, the subsequent amendment of RAF's plea and its replying affidavit were clearly an indication to the Plaintiff of the issues it wants to distance itself from and wishes to repudiate. RAF indicated it wished to repudiate most, if not all of Dr Lourens' findings and opinions, as contained in the note as well as the actuarial calculations based on his recommendations. RAF also wants to repudiate Dr Lourens' acceptance of a causal connection between the death of the deceased and the Plaintiff's current mental health symptoms, which is based on the joint minutes of the parties' respective psychiatrists (Prof Zarbow and Dr le Fevre) and the psychologists (Ms Burke and Ms Coetzee).
- [37] The Plaintiff aggrieved by RAF's stance relied on the dictum in the Bee judgment to oppose the repudiation. According to Plaintiff, RAF has failed to show any good cause or at least a valid reason for the proposed repudiation of the reports of Dr Lourens.
- [38] Before I turn to the Bee judgment it needs to be said from the outset. RAF is not entitled to repudiate Dr Lourens' acceptance of a causal connection between the death of the deceased and the Plaintiff's current mental health symptoms, which is based on the joint minutes of the parties' respective psychiatrists (Prof Zarbow and Dr le Fevre) and the psychologists (Ms Burke and Ms Coetzee). As stated previously, there is no longer an issue of the merits and causality, which the Plaintiff bore the onus of proof beyond establishing the quantum of her damages. The only issue remaining is whether RAF should be allowed to repudiate the

issues as recorded in the note dated 27 May 2022.

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issue of the merits and causality,

which the Plaintiff bore the onus of proof beyond establishing the quantum of her damages. The only issue remaining is whether RAF should be allowed to repudiate the issues as recorded in the note dated 27 May 2022.

[39] The relevant legal principles regarding pretrial minutes had been fully discussed by the Supreme Court in *Bee* and can be summarised as follows: a fundamental feature of case management, here and abroad, is that litigants are required to reach agreement on as many matters as possible so as to limit the issues to be tried; effective case management would be undermined if there were an unconstrained liberty to depart from agreements reached during the course of pretrial procedures, including those reached by the litigants' respective experts; where the parties engage experts who investigate the facts, and where those experts meet and agree upon those facts, a litigant may not repudiate the agreement unless it does so clearly and timeously; where the experts reach agreement on a matter of opinion, the litigants are likewise not at liberty to repudiate the agreement and the limits on repudiation are matters for the trial court.

[40] The SCA however did not venture to decide in the context of that case whether a litigant needs to have a good cause for repudiating an agreement reached by his or her expert. In the present instance the Plaintiff is of the view that such a decision is warranted in this matter as RAF failed to advance any good cause or legitimate reasons for repudiating Dr Lourens' report apart from relying on the report of Dr Khan.

[41] It has often been stated that repudiation, is a serious matter requiring anxious consideration and is not lightly to be presumed because parties must assume to be predisposed to respect rather than to disregard their contractual commitments.[14] However, when it comes to expert witnesses, Courts are not bound by the views of any expert. Ultimately, it is the Court who must decide on the issues on which an expert provides an opinion[15].

[42] In this instance, given the legal principles, and considering the background of this matter, RAF recorded in the note dated 27 May 2022 that it disagrees and wants to distance itself from the opinions of Dr Lourens in respect of the Plaintiff's claims under the headings loss of earnings and loss of support. In my view the reasons advanced by RAF cannot be regarded as bad taking into account the issues still in dispute. The repudiation was done timeously before the onset of the trial.

[43] It follows RAF has made out a case for the repudiation on the issues recorded in the "Defendant's note in respect of issues in dispute relating to Dr Johan Lourens' reports" dated 27 May 2022.

Defendant's note in respect of issues in dispute relating to Dr Johan Lourens' reports"

[44] In the result the following order is made:

1.The Application to amend is refused.

The Application to amend is refused.

2.Repudiation of only those issues in dispute as recorded in the note termed "Defendant's note in respect of issues in dispute relating to Dr Johan Lourens' reports'dated 27 May 2022 is allowed.

Repudiation of only those issues in dispute as recorded in the note termed "

Defendant's note in respect of issues in dispute relating to Dr Johan Lourens' reports'

dated 27 May 2022 is allowed.

3.Costs to be costs in the cause.

Costs to be costs in the cause.

LE GRANGE, ADJP

[1]2018

(4) SA 366(SCA) at para 65 to 75.

2018

(4) SA 366(SCA) at para 65 to 75.

2018

(4) SA 366

[2]Neethling Potgieter Visser -Law of Delict 5thEdition para 2 ft 7 and the cases referred to therein.

Neethling Potgieter Visser -Law of Delict 5

Edition para 2 ft 7 and the cases referred to therein.

[3]In this regard see RAF v Sauls 2002 (2) 55 SCA at para 12-13 and the cases referred to therein.

In this regard see RAF v Sauls 2002 (2) 55 SCA at para 12-13 and the cases referred to therein.

[4]Ibid.

[5]See Amler's Precedents of Pleadings, 9th Edition by LTC Harmse

See Amler's Precedents of Pleadings, 9

Edition by LTC Harmse

[6]Road Accident Fund v Krawa 2012 (2) SA 346 ECG at 369 D.

Road Accident Fund v Krawa 2012 (2) SA 346 ECG at 369 D.

2012 (2) SA 346

[7]Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 4 SA 593 (SCA).

Natal Joint Municipal Pension Fund v Endumeni Municipality

2012 4 SA 593

(SCA).

[8]Kompape v Minister of Basic Education 2020 (2) SA 347 (SCA) at 364 F.

Kompape v Minister of Basic Education 2020 (2) SA 347 (SCA) at 364 F.

2020 (2) SA 347

[9]Amler's Precedents of Pleadings at 338.

Amler's Precedents of Pleadings at 338.

[10]In President Versekeringsmaatskappy Bpk v Moodley 1964 (4) SA 109 (TPD)

In President Versekeringsmaatskappy Bpk v Moodley 1964 (4) SA 109 (TPD)

[11]Ibid

[12]See Gollach & Gomperts v Universal Mills & Produce Co. 1978

(1) SA 914 (A).

See Gollach & Gomperts v Universal Mills & Produce Co. 1978

(1) SA 914 (A).

[13]See MEC v Kruizenza 2010 (4) SA 122 (SCA) at para 6 and the cases referred to therein.

MEC v Kruizenza 2010 (4) SA 122 (SCA) at para 6 and the cases referred to therein.

2010 (4) SA 122

[14]See Datacolor International (Pty) Ltd. v Intamarket (Pty) Ltd[2000] ZASCA 82;2001

(2) SA 284the SCA, at 294 J. and the cases referred to therein.

See Datacolor International (Pty) Ltd. v Intamarket (Pty) Ltd[2000] ZASCA 82;2001

(2) SA 284the SCA, at 294 J. and the cases referred to therein.

[2000] ZASCA 82

2001

(2) SA 284

[15]Road Accident Fund Appeal Tribunal and Others v Gouws and Another2018 (3) SA 413(SCA) at para 33.

Road Accident Fund Appeal Tribunal and Others v Gouws and Another2018 (3) SA 413(SCA) at para 33.

2018 (3) SA 413

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