

SOUTH AFRICA / JUDGMENT

Nonyane v Road Accident Fund (3126/2016) [2017] ZAGPPHC 706 (10 November 2017)

[2017] ZAGPPHC 706**COURT**

North Gauteng High Court, Pretoria

BEFORE

M F Legodi

CASE / FILE NUMBER

3126/2016

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Policy**IN**

THE HIGH COURT OF SOUTH AFRICA, GAUTENG DIVISION, PRETORIA
[FUNCTIONING
AS MPUMALANGA CIRCUIT COURT, MBOMBELA]

REPORTABLE:

YES

OF

INTEREST TO OTHER JUDGES: YES

DATE:

10/11/2017

CASE

NUMBER 3126/2016

CISNECIA

NONYANE

PLAINTIFF

And

ROAD

ACCIDENT

FUND

DEFENDANT

JUDGMENT

LEGODI J,

- [1] A young lady aged [...] residing at K. Village next to Kgotso Tuckshop, Casteel in Bushbuckridge, Mpumalanga Province was on 25 May 2015 a passenger in a motor vehicle when the driver of the motor vehicle aforesaid lost control and the vehicle overturned.
- [2] As a result of the plaintiff sustained injuries which are described in Dr Bila's report as 'left elbow abrasions, right shoulder and wrist injuries and displayed scars on her right elbow and crepitus of the right wrist'.
- [3] On 13 October 2016 she instituted the present proceedings against the Road Accident Fund (the Fund). At start of the trial on 18 September 2017 the court was informed that the only issues to be determined relate to general damages and loss of earning capacity if any resulting from injuries sustained in the collision.
- [4] For this purpose, the plaintiff in addition to her evidence relied on the evidence and or reports compiled by Dr Bila (orthopaedic

surgeon,) Dr Kgosana (Industrial Psychologist) and Occupational Therapist, Mrs Miyelani Molemi. An intelligent evaluation of facts is often difficult or impossible without the application of some scientific technical or other specialised knowledge. The most common source of this knowledge is the expert witness, although there are other techniques for supplying it.

- [5] It is common place for experts to be utilised by the plaintiffs and defendants to bolster their respective cases and give guidance to the courts and this role has been welcomed by our courts. But over time the experts have glaringly overstepped their mark by attempting to usurp the powers of a court in arriving to a decision. This contentious issue should be used as a caution to the courts not to allow its authority and evaluation of evidence to be eroded, bearing in mind what the true duties of experts in our courts are.

- [6] The duties of an expert testifying in court are characterised as follows[1] :

6.1 Expert evidence presented to court should be, and should be seen to be an independent product of the expert uninfluenced as to form or content by the exigencies of litigation.

6.2 An expert witness should provide independent assistance to the court by way of objective and unbiased opinion in relation to a matter within his expertise. An expert witness should never assume the role of an advocate.

6.3 An expert witness should state the facts or assumptions upon which his opinion is based. He should not omit to consider material facts which could detract from his concluded opinion.

6.4 An expert witness should make it clear when a particular question or issue falls outside his expertise.

6.5 If an expert opinion is not properly researched because he or she considers insufficient time is available, then this must be stated with an indication that the opinion is no more than provisional one. In the case where the expert witness who has prepared a report could not assert that the report contained the truth, the whole truth and nothing but the truth without some qualification, that qualification should be stated in the report.

[7] 'A number of expert witness called on behalf of the plaintiffs in general overstepped the mark by attempting to usurp the function of the court and to express opinions based on certain facts as to the future employability of the plaintiff and to express views on probabilities. That is the function of the court to base its inferences

and conclusions on all the facts placed before it'.[2].

[8] An expert is not entitled anymore more than any other witness, to give hearsay as to any fact and all

facts

on which the expert witness relies must ordinarily be established during trial, except those facts which the expert draws as a conclusion by reason of his or her expertise from other facts which have been admitted by the other party or established by admissible evidence[3].

[9] The prime function of an expert seems to be to guide the court to a correct decision on questions found within specialised field. His or her own decision should

not, however, displace that of the court or tribunal which has to determine the issue to be tried.

[10] In short, an expert comes to court to give the court the benefit of his or her expertise. Agreed, an expert is called by a particular party, presumably because the conclusions of the expert, using his or her expertise, are in favour of the line of argument of the particular party. But that does not absolve the expert from providing the court with an objective and unbiased an opinion based on his or her expertise, as far as possible. An expert should not be a hired gun who dispenses his or her expertise for the purpose of a particular case. An expert does not assume the role of an advocate, nor gives evidence which goes beyond the logic which is dictated by the scientific knowledge which that expert claims to possess[4].

[11] In *RAF v Zulu*[5] the court dealt with the approach to expert's evidence that has to be adopted by the courts. Briefly, the facts were as follows: The respondent (plaintiff in the court a quo), was married to a certain Professor (hereinafter referred to as the deceased). The respondent instituted a claim against the Road Accident Fund for loss of support. The matter went on appeal to decide whether the deceased could have opted for career in the corporate field as opposed to academic but for the accident. It was common cause that the deceased was a distinguished Professor in the scientific field. The court a quo adopted the evidence of Dr Holwes, the respondent's industrial Psychologist and Dr Ngubane, a personal friend of the deceased that the deceased but for the accident, would have left academic career and pursued a career in the corporate field as Chief Executive Officer.

[12] The court a quo in addressing the issue reaffirmed the principles set out in *Michael v Linksfield Clinic (Pty) Ltd*[6] that what is required in the evaluation of such evidence is to determine whether and to what extent their opinions advanced are

founded on logical reasoning. Mhlantla JA (as she then was) in adopting the principle enunciated above came to the

conclusion

that Dr Holmes, as an expert, had a limited role in the proceedings. His duty was to advise the court on the availability of employment possibility. He is not qualified to predict and state as a fact that the deceased, whom he had never met, would with certainty have moved to the corporate world. His expert notice did not provide for this conclusion. It is the court's duty to assess the evidence and decide on the probabilities. It will be wrong to decide a case by simple preference where there conflicting views on either side both are capable of logical support. Only where expert opinion cannot logically be supported at all will it fail to provide the bench mark by reference to which a party's conduct falls to be assessed.

[13] Mhlantla JA went further and stated: " it has to be borne in mind that the deceased was academically inclined. He was a research scientist and served on boards linked with education. He was committed to the upliftment of communities and children in the field of science. He undertook initiations to promote and provide scientist and laboratory services. He clearly was not an avaricious person motivated by wealth. In my view, it cannot be said with certainty that the deceased would have been appointed as a senior executive or CEO in a corporate sector. A chance exists that the deceased, due to his academic background could have remained at the university. There was no evidence which would have raised the probability of employment in the corporate sector to the level of certainty'

[14] To this it became evident from the evidence of Dr Holms and Dr Ngubane in the Zulu case that they totally ignored the true facts and postulated their opinions on a scenario which was favourable to the respondent at the detriment of the appellant, the Road Accident Fund. Experts are readily amenable to overstep their mark by pronouncing their opinions without logical foundations and thereof attempt to abuse the powers of the court

[15] It is therefore important that courts should stick to the approach and legal principles that govern the role and value of expert

evidence. It is evident from the authorities above, that it is necessary to be consistent and guard jealously to protect its

role and power of the courts. It is therefore important for the experts to understand their role and function and leave the courts to be the ultimate arbiters in any court proceedings.

[16] The present case brings to bear the warning above. The tendency to think that our courts capitulate to every evidence or report of an expert is wrong and has to be dispelled and discouraged. Each case has to be determined on its merits. That responsibility for evaluation of the reliability of facts and or evidence lies in the domain of the courts contrary to belief of those participating in the court proceedings. It was therefore necessary to lay open the authorities referred to in the preceding paragraphs.

[17] Coming back to the facts of the present case, the plaintiff was injured whilst doing grade 12. She stayed at home before she went back to school during July of 2015. She completed grade 12 with high certificate. She intends to upgrade her matric results so that she can further her studies as she wants to be a Social Worker, so she testified. She did not upgrade her matric earlier allegedly because of the pains resulting from the injuries sustained in the collision. She uses pain killers for her pains which make the pains to subside. She got employment as a packer at a supermarket during February 2017 and left her employment in March 2017 because she was expected to work faster and sometimes she would ask for a day off and the employer would then refuse. It is her shoulder which presents her with pains from time to time, but not all the times.

[18] Both the industrial psychologist and occupation therapist their opinions is based mainly on the report of the orthopaedic surgeon

compiled on 13 March 2017 after consultation with the plaintiff on 11 March 2017 for the purpose of determining the issue at hand regarding general damages and loss of earning capacity based on the injuries sustained in the collision.

[19] The role of occupational therapist is to help patients improve or maintain skills for their day-to-day activities and well-being.

Occupational therapists work in partnership with their patients to identify important and valued activities that are difficult to do because of their arthritis. The activities may be related to self-care, paid

or unpaid work or leisure and fun. Together they are expected to find ways to use the patient's strength and resources to lead productive and satisfying lives.

[20] The occupational therapist will work or interact with patients to determine how their arthritis or conditions is affecting their day-to-day activities due to pains, joint stiffness, fatigue or stress, how mental health e.g memory, thinking, reasoning, social and environment factors e.g anxiety, family support, use affecting their homes, school work, and community lives, how home, school, work place and community physical environment, are helping or posing barriers to doing their valued activities.

[21] Having considered the Orthopaedic Surgeon report and other documentation, Ms Miyelane Molemi, occupational therapist and dealing

with work ability of the plaintiff inter alia, stated:

"Taking into consideration the assessment findings as well as the pathology of her right upper limb, she remains suited for her premorbid work as a Packer however will benefit from adaptations with occupation performance. This includes taking rest breaks whenever she experiences pain. She will need to use correct posture of the upper limb with correct ergonomically arrangement of work station and avoiding over use the limb without breaks in between to manage pain. Time off work would also need to be allowed to attend recommended treatment. These may render her an unequal competitor when compared to her peers in the open labour market.

As demonstrated during the evaluation, she remains best suited for sedentary light and occasional medium work. Experienced chronic pain to the right arm would negatively affect performance of full spectrum medium work, heavy and very heavy work thus would be advised to refrain from this. This will thus have a negative effect on future occupation choices should she for whatever reason lose her current job. This can be attributed to the accident under review."

- [22] It appears from the report by the occupational therapist that the limitations that are attributed to the injuries sustained, are pains related. In her report Ms Molemi for example, states: "she reported no limitations with performance of work associated tasks as a result of accident related injuries."
- [23] Complaints of pain should be seen in context. Firstly, she is suited for her premorbid work as a packer. Secondly, for the pains, she is advised to use correct posture of the upper limb with correct ergonomically arrangement of work station and avoid over using the limbs without breaks in between to manage the pains. Lastly, and most importantly, according to Dr Bila, the orthopaedic surgeon, the nature of the pains in relation to the injuries can sufficiently be dealt by means of taking pain killers whenever a need arises.
- [24] All of the above, became vital in the way the plaintiff's limitations can be treated with success. I however agree with the occupational therapist that "time off work would also need to be allowed to attend recommended treatments and that these may render her an unequal competitor when compared to her peers in the open labour market. However that appears to be on a very limited curtailment of her working capacity and i do not think that the capacity to work in the open labour market is significantly affected or limited. This becomes a necessary consideration when dealing with the percentage by which her working capacity has been diminished.
- [25] The plaintiff expressed her wish to become a social work some other time. But for her to accomplish her dream, she has other hurdles to deal with first. One, it was not part of her evidence that her poor performance in matric is attributed to the fact that she was absent from school for months due to the injuries sustained in the collision. Two, and whilst talking about her absence from school, during her

evidence in court she stated that she has been absent from school for about three months. The three months period is in contrast to what she had conveyed to the experts called to testify on behalf of the plaintiff. In their reports they indicated that the plaintiff conveyed to them that she was absent from school for five months due to the injuries. If that is so, then the period of absence from school remains unproven. This, considering the fact that she was never admitted at the hospital, as Dr Bila puts it in his report, 'she was dressed on her right elbow wounds. She was discharged on the same day'.

[26] There are other challenges for the plaintiff insofar as she wish to be a social worker. She conveyed to the expert she is a mother of a child who at the time of the collision was 4 years old. In her evidence she did not allude to how she intends to further her studies to become a social worker with caring for the child on the other side.

[27] Dr Kgosana, an industrial psychologist also took the witness stand on behalf of the plaintiff. The role of the occupation therapist and that of an industrial psychologist seems to be overlapping and sometimes it presents confusing roles posed to legal practitioners,

parties and sometimes the experts themselves. In the present case, Dr Kgosana during the course of cross-examination

conceded that some of his evidence and or an opinion was something beyond his expertise. For example, the effect of lack of centration

by the plaintiff if any, due to the pains occasioned by the injuries sustained in the collision.

[28] Articulation of the role of an industrial psychologist might be necessary to have a better assessment of the evidence of Dr Kgosana. The role is to identify how activities and behaviours can be improved in the workplace, to ensure that workplace morale remain high during periods of change, to observe the efficiency of training prospects and assisting in developing employees at a workplace, to work in direct relation to the well-being of individual in the workplace or how employees fit into particular roles in the work environment, to oversee the well-being of individuals in the workplace, to match employees to certain tasks depending on their personal characterisict . A typical industrial psychologist will focus how societal norms influence the wellbeing of employees, as well as managerial approaches affect morale. If an industrial psychologist finds that the workers or one worker is likely to be affected negatively by the operational side of their workplace due to the circumstance of their limitations, he or she may make recommendation for change that is reflecting scientific based evidence.

[29] It is therefore clear from all these roles of industrial psychologist that the main role is how to advise on the proper treatment of a particular individual employee to cope at a workplace with his or her limitations, not much about what other field of work can be resorted to due to limitations confronting a particular employee at a workplace.

[30] Dr Kgosana moved inter alia from this premise: 'the report (referring to his report) will highlight the loss of future income if any and highlight the career trajectory which is achievable by a reasonable person in claimant's conditions and position'. This comment worries me as it presupposes that it is not much about how to deal with the wellbeing of the plaintiff having regard to her personal conditions or limitations bearing in mind that the report was concluded on the basis that she was employed as a packer. This is not quite clear what 'the loss of future income, if any' he is referring to.

[31] In his report dealing with "scenario", Dr Kgosana took the view that considering the plaintiff's background, education level, skill repertoire, she could have continued searching for a job. The search could have lasted for at least 24 months after which, she could have entered the labour market, earning in line with her qualifications. She could have started earning at Paterson level A3 with gradual progression to Paterson B4 towards age

45. From the age of 46, her earnings would have stabilised and she would have earned only additional inflationary increases until retirement age she would have possibly worked until the age of 65, pending on the policy of the employer and her health.

[32] Having postulated what is stated above and having indicated that the plaintiff is employed, he then came to conclude as follows:

"The writer took notes of expert report. The writer concludes that the accident has compromised the claimant's ability to perform optimally in the open labour market. The claimant added that she still experiences pains and struggles to carry heavy objects. The writer concludes that her work performance has been negatively affected by the accident. She is continuing with her duties, albeit with some difficulties. Her current profile does not allow performance in any kind of jobs. However, due to the financial responsibilities, the claimant is compelled to continue as such. The pains experienced by the claimant will interfere with the claimant's ability to be effective as her occupation requires frequent use of the body as she moves around. In sum, the accident did have a deleterious effect on the claimant's ability to work. She is rendered vulnerable and uncompetitive. When the time comes for downsizing, the claimant will lose her job. When that happens, she will remain unemployed, possibly until retirement age." (My emphasis).

[33] I should be worried that Dr Kgosana elected to take this stance. He clearly does not allude in his report what can be done for the plaintiff to assist her in employment environment considering what he referred to as the claimant's inability to perform optimally in the open labour market, or considering the plaintiff's limitations.

[34] The statement, 'her current profile does not allow performance in any kind of roles' seems to be a contraction to the statement that the accident has compromised the claimant's ability to perform optimally in the open labour market. In addition, the statement is not supported by other experts, that is, Dr Bila and Ms Molemi. One doubts whether his comment as a whole quoted in paragraph

[32] above falls within the ambit of his expertise. It does not look like it is for him to express the view that the pains will interfere with her ability to be effective as her occupation requires frequent

use of the body as she moves around. One would have expected that he will defer this to occupational therapist's opinion as Mr Molemi alluded to in her report.

[35] Limited consideration will be given to Dr Kgosana's evidence and report. In any event, the injuries sustained by the plaintiff and the effect thereof as described by Dr Bila (Orthopaedic surgeon) and Occupational therapist do not purport to convey significant limitations occasioned by the injuries. In addition the pain insofar as it might impede on the plaintiff to work and compete with his peers in the open labour market on the same level had it not have been for the accident, seems to be capable of being minimised by the taking of pain killers. The reduction of her capacity to work and compete in an open labour market should therefore be seen in context.

[36] Insofar as the plaintiff might have wanted to suggest that due to the pains resulting from the injuries she was fired or resigned as a packer where she was employed and that her future loss of earnings should be calculated on the basis of her un-employability, the difficulty is that no one confirmed her version. I find it particularly unsatisfactory that she went for interviews with all the three experts on 11 March 2017 and suddenly thereafter she is no longer employed. More importantly, none of the expert had the opportunity to speak to the employer, neither did the plaintiff provide any proof that she is presently unemployed. To mention that she is unemployed whilst in the witness box made it not possible to verify the veracity of the evidence in this regard.

[37] Just to conclude on Dr Kgosana's evidence, his suggestion in dealing with future loss of income that he is of the opinion that accident has affected the plaintiff's ability to complete in an open labour market and that with her reported pains, it will also be difficult to be effective as a student has to be seen in context. His further statement that "pains are known to affect concentrating level and attention span" is clearly not the field of his expertise and he has conceded to this.

[38] Messer Munro Actuaries in their report relied entirely on the report of Dr Kgosana. In paragraph 3.1 of their report, having referred in part to Dr Kgosana's report alluded to earlier in paragraphs [30] to

[34] of this judgment, they wrote as follows:

"As it not certain whether the claimant will lose her job or when this would occur,

future contingencies should be applied to deal with the uncertainty thereof Contingencies may be applied as usual guide the Raf Act cap does not have an impact on this scenario".

[39] Then in paragraph 4.5 of the report calculations are projected as follows:

Past R 52 700 R 11 700 R 41 000 Future R 4 484 400 R 680 200 R 3 804 200

TOTAL LOSS OF INCOME R

3 845 200

[40] So if the plaintiff capacity to work uninjured based on Paterson A3 for past loss and on Paterson A4 for future loss as indicated in paragraph [39] above, the amount must be reduced by 75% which I find to be the plaintiff's level of capacity to

work post the accident. Put differently 25% to be the extent to which the plaintiff capacity to work has been reduced. The total loss for past loss should therefore be calculated as follows:

$R52\,700 \times 25\% = R13\,175$

And for future loss:

$R4\,484\,400 \times 25\% = R1\,121\,100$

Total loss based on 25% of reduction of working capacity= R1 134 275.

[41] I now turn to deal with the issue of general damages. Dr Bila sought to deal with this issue by identifying specific headings relevant to the determination of general damages amount and under the heading "ACUTE PAIN", he states:

"There was acute pain immediately after the impact which gradually subsided. The writer is of the opinion that the uses of analgesics and splints have reduced this pain significantly". This is an aspect for serious consideration. Dealing with "Chronic Pain" Dr Bila concludes by stating that the plaintiff "has never been pain free since the accident". This is an aspect mentioned by all experts in their reports. However according to Dr Bila, the pain can adequately be subsided by using analgesics and splints (pain killers).

[42] Dealing with the loss of amenities of life, it is reported by Dr Bila that the plaintiff was a netball player. During the plaintiff's evidence, she did not confirm this, neither was there any evidence as to how the injuries affected her ability to continue to play netball. Mr Molemi, Occupational therapist in dealing with loss of amenities of life alluded to the fact that her efficiency to perform self-care and home management tasks has been negatively affected. However it is stated that she can benefit from use of recommended assistance devices and assistance to facilitate joint hygiene. She is also impaired in carrying heavy objects.

[43] Considering all of the above, I am of the view that an amount of R200 000.00 for general damages would be appropriate. Consequently

judgment is hereby granted as follows:

43.1 The defendant to pay an amount of R1 134 275.00 occasioned by the loss of 25% earning capacity calculated as in paragraph [39] above.

43.2 The defendant to pay an amount of R200 000.00 for general damages.

TOTAL: R1 542 275 00

45.3 Interest on the amount of R1 542 275.00 from date hereof to date of payment at the appropriate rate.

45.4 Costs of the action on party and party scale including the preparation and reservation fees of the following experts:

45.4.1 Dr Bila

45.4.2 Dr Kgosana

45.2.3 Ms Molemi.

M F LEGODI

JUDGE OF THE HIGH COURT

DATE OF HEARING:

18 SEPTEMBER 2017

DATE OF JUDGMENT:

10 NOVEMBER 2017

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- [1] National Justice Compania Naviera SA v Prudential Assurance Co.Ltd 1993(2) Lloyd's Report 68-81
- [2] Nicholson v Road Accident Fund (11453/ 2007) 2012 SGHC(unreported)
- [3] Mathebula v Raf (05967/ 05(2006] ZAGPHC.
- [4] Schneider No & Others VAA and another 2010 (5) 203 wee para 211-2128
- [5]
- [2011] ZASCA 223
- [6] 2001(3) SA 188 SCA
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