
SOUTH AFRICA / JUDGMENT

Witthuhn v Road Accident Fund (A5046/2015) [2017] ZAGPJHC 285 (14 September 2017)

[2017] ZAGPJHC 285

COURT

South Gauteng High Court, Johannesburg

BEFORE

Van der Linde, Ismail, Twala

CASE / FILE NUMBER

A5046/2015

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: A5046/2015

Not reportable

Not of interest to other judges

Revised.

14 September 2017

In the matter between

Witthuhn, Otto Carl Appellant

and

Road Accident Fund Respondent

Judgment

Van der Linde, J:

Introduction

- [1] This is an appeal against an order absolving the respondent from the instance in respect of a portion of the appellant's claim for compensation for personal injuries that he sustained when a collision occurred between his motorcycle and a motor vehicle. The portion of the claim that is concerned is the claim for future loss of earnings.
- [2] The reason why the court a quo granted the order of absolution from the instance was because it held that since the plaintiff was not called, the expert evidence that had been led on the plaintiff's behalf constituted hearsay evidence, at least to the extent that those witnesses testified to what had been relayed to them by the plaintiff. That evidence was, so held the court a quo, inadmissible under the Law of Evidence Amendment Act 45 of 1988 ("the Act"). The appeal is with leave of the Supreme Court of Appeal.
- [3] The issue before the court a quo and now before us is rendered even more circumscribed than this introduction already suggests, by reason of the fact that the impugned evidence, as it happens that of three experts, was led in chief and cross-examined without any objection to its admissibility – to the extent described above
- for being hearsay evidence.
- [4] In the result, the difference between the parties has come down to this: the appellant contends that since there was no objection to the impugned evidence, it went in by agreement under s.3(1)(a) of the Act, whereas the respondent contends that the evidence became inadmissible when the plaintiff was not called to confirm the evidence that his experts had relied upon in forming their opinions.
- [5] The issue may also be framed this way: in a trial where a party leads hearsay evidence to which the other party does not object at the time the evidence is presented, is the inference that the evidence is being admitted by agreement under s.3(1)(a) of the Act; or is the inference that the evidence is being merely provisionally admitted under s.3(3) of the Act?
- [6] I add, still by way of introduction, that no party argued that in principle absolution from the instance was not competent in respect of portion only of the appellant's claim, and this judgment is approached on the basis that it was unobjectionable.

Discussion: appellant's main argument

- [7] The relevant part of the Act provides as follows:

"3 Hearsay evidence

- (1) Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless-
- (a) each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings;

- (b) the person upon whose credibility the probative value of such evidence depends, himself testifies at such proceedings; or
 - (c) the court, having regard to-
 - (i) the nature of the proceedings;
 - (ii) the nature of the evidence;
 - (iii) the purpose for which the evidence is tendered;
 - (iv) the probative value of the evidence;
 - (v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;
 - (vi) any prejudice to a party which the admission of such evidence might entail; and
 - (vii) any other factor which should in the opinion of the court be taken into account,
- is of the opinion that such evidence should be admitted in the interests of justice.

(2) The provisions of subsection

- (1) shall not render admissible any evidence which is inadmissible on any ground other than that such evidence is hearsay evidence.
- (3) Hearsay evidence may be provisionally admitted in terms of subsection (1) (b) if the court is informed that the person upon whose credibility the probative value of such evidence depends, will himself testify in such proceedings: Provided that if such person does not later testify in such proceedings, the hearsay evidence shall be left out of account unless the hearsay evidence is admitted in terms of paragraph (a) of subsection (1) or is admitted by the court in terms of paragraph (c) of that subsection.”

[8] For the appellant the submission might run as follows. One starts with a textual treatment of the section itself. The structure of the section is to proclaim as the default position that all hearsay evidence is inadmissible unless the evidence is exceptionally

admitted under paragraphs (a), (b) or (c) of s.3(1).

[9] The admission of hearsay evidence under the exception in paragraph

- (a) requires the opposite side’s agreement. The admission under the exception in paragraph (b) depends on whether the person on whose credibility the probative value depends, has already testified, or has not yet but may yet testify.

[10] Since admission under paragraph (c) requires court approval, there does not appear to be any chance that hearsay evidence will become admissible without more under paragraph (c) if no objection is raised at the time it is presented: after all, the court has to make a conscious ruling, one that takes into account the factors set out in s.3(1)(c)(i) to (vii). Such a ruling is unlikely to be considered and given without some external manifestation by the party when applying for the admission, and by the court when ruling on it.[1]

[11] So the question really is whether any inferences at all can be drawn from non-objection to hearsay evidence at the time it is presented; and if so, whether the inference is that paragraph (a) applies, or whether paragraph (b) applies.

[12] Starting with paragraph (b): as pointed out earlier, the person on whose credibility the probative value depends may either already have testified when the hearsay evidence is presented, or may not yet have testified. In the case of the former, if no objection is raised when the hearsay evidence is presented, the inference is legitimately drawn that the absence of objection is ascribable to paragraph (b) which renders the evidence admissible.

[13] If the person on whose credibility the probative value depends has not yet testified and there is no objection when the hearsay evidence is presented, the inference is potentially one of two: either that there is agreement under paragraph (a) that the evidence be received, or that the evidence is not objected to, but only provisionally, under s.3(3).

[14] Which of these two is the legitimate inference? In my view an inference that the other side is not objecting to the evidence on a provisional basis only, reserving its right as it were later to contend that the person on whose credibility the probative value depends was not in fact called, is not legitimate, for this reason. Admission of hearsay evidence on a provisional basis only in terms of s.3(3) requires court intervention at the time the hearsay evidence is presented.

[15] The language of the sub-section is plain: the court is required to consider whether or not to admit the hearsay evidence provisionally,

in anticipation of the person yet testifying in the future. By definition the person has not yet testified.

[16] Therefore, since provisional admission where the person has not yet testified under the paragraph (b) scenario requires a court ruling, silence when the hearsay evidence is presented cannot legitimately justify the inference that the non-objecting party is assenting to admission of the evidence on a s.3(3) provisional basis only.

[17] That leaves only paragraph (a); meaning that if hearsay evidence is presented during a trial and there is no objection from the other side, potentially the only legitimate inference that can be drawn is that the other side is assenting to the admission of the evidence under s.3(1)(a).

[18]In the discussion thus far the question as to what inferences might be legitimately drawn has been framed from the perspective of the party presenting the hearsay evidence. That was done bearing in mind the well-known proposition applicable to inferences of assent from silence, articulated as follows in *Smith v Hughes*:

"If, whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon the belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms." [2]

[19]Applied to the present enquiry, this approach could justify that the party presenting the hearsay evidence is justified in viewing the conduct of the non-objecting party objectively, to decide whether that conduct justifies the inference of assent under s.3(1)(a), or whether it justifies mere reserved objection/assent under s.3(1)(b). And this is, in effect, the main argument of the appellant: that the conduct of the non-objecting party justifies the inference, for the reasons given above, of assent under s.3(1)(a).

[20]But have our cases borne out the conclusion that non-objection, even in a civil case, justifies the inference of agreement that inadmissible hearsay evidence may be admitted? One is aware of the general proposition often touted in adversarial trial practice, that unless hearsay evidence is objected to, "it goes in". See, as an example, the remarks by the full court in the Western Cape High Court (emphasis supplied): [3]

"[60] The evidence of Mr Crous and Ms Burke about the circumstances of the appellant's poor performance in the 2006 fall/winter examinations was not only inconsistent, it was also hearsay in nature. The respondent's lead counsel made it clear early in the trial that he objected to the admissibility of the hearsay evidence of the expert witnesses as evidence of the facts. It was evident that counsel who represented the appellants at the trial had initially thought that he would be able to conduct the claimants' cases without adducing their evidence. The objection by the respondent's counsel alerted the appellant's advocate to the perils of his intended course and a postponement of the part-heard trial was obtained to enable the claimants to be called."

[21]Other examples of where courts have underscored this approach include this (emphasis supplied): [4]

"[101] I am also mindful of the plaintiff's attack on the admissibility of the patent application attached to the defendant's papers, which the latter relies upon. The plaintiff has argued that the patent application constitutes inadmissible hearsay. Mr Antonie SC, for the plaintiff, urged me to therefore disregard it. I am not inclined to do so. I am satisfied that, by virtue of s 42, s 43(1) and s 43B of the Patents Act 57 of 1978, the patent application is a public document and therefore at common law constitutes admissible evidence. Apart from this, there was no proper objection thereto by the defendant. Nor was I presented with an application to strike out the hearsay evidence."

[22]But despite this popular notion, the Constitutional Court has made it clear that, even in civil cases, this is not the state of the law. In *President of the Republic of South Africa and Others, v South African Rugby Football Union and Others*[5] the Court wrote (emphasis supplied):

“[105] We are unable to agree with this reasoning which in our view is clearly fallacious. The averment, that the President had made the comment, was based on double hearsay which prima facie was inadmissible in evidence against him. If it was inadmissible, no regard could be had to it whether the President objected to the evidence or not.”

[23]In reaching that conclusion, the court expressly approved the judgment of Caney, J in *Langham and Another NNO v Milne NO and Others*,[6] which contains a lengthy exposition of the topic (emphasis supplied):

“There was never any express consent to its being used as evidence in these proceedings. If it should have been objected to earlier, there nevertheless was an objection by Mr. Shaw before the argument opened.

Writing of trials by a Judge alone, Phipson (8th ed. p. 673) says

'If inadmissible evidence has been received (whether with or without objection), it is the duty of the Judge to reject it when giving judgment; and if he has not done so, it will be rejected on appeal, as it is the duty of Courts to arrive at their decisions on legal evidence only; a party may, however, by his conduct at the trial, be precluded from objecting to such evidence.'

Our Courts have held that where in an appeal it appears that inadmissible evidence has been admitted at the trial without objection, it is the duty of the Appeal Court in a civil case to re-hear the case and determine for itself on the admissible evidence whether the decision of the Court a quo was correct. *Estate Lala v Mahomed*, supra at pp. 329, 330. And see *Kopelowitz v Buchanan*, 1939 NPD 95; *Radus and Mindel v Plaza Outfitters*, 1945 T.P.D. 350.

In my judgment the first respondent is not precluded from objecting to the evidence which I have indicated I consider to be inadmissible and it is my duty to have no regard to it in deciding the case.”

[24]This is not to say that silence can never amount to agreement that otherwise inadmissible hearsay evidence becomes admissible; but whether it does, will depends on the facts. For example, in *Thoroughbred Breeders Association of South Africa v Price Waterhouse*[7] Goldstein, J was able to say (at 1015, emphasis supplied):

“In the result his evidence of Mitchell's early history with the TBA was hearsay. However, no objection was made to the admission of such evidence and it seems clear to me that the parties are in fact agreed that I take cognisance thereof. To some extent, too, the problem of Bladegroen's hearsay evidence about Mitchell is resolved by Allem, who was chairman of the council of the TBA from November 1992 to April 1996 and had been a member of the council 'for some time' prior to that and certainly when the TBA discovered the truth of Mitchell's past.”

[25]Here then the learned judge was able to conclude that “... the parties are in fact agreed that I should take cognisance thereof.” It is obviously desirable that in a trial, sometimes of considerable duration, litigants and their advisors should know at the outset, or if not then certainly as the trial progresses, where they stand on such important issues as to whether or not to object to otherwise inadmissible evidence.

[26]That objective is attained if parties are clear as to the other side’s position when hearsay evidence is presented: whether it is done on the provisional basis envisaged under s.3(3); or whether it is done to procure, by default as it were, ostensible assent to its admission. And it is suggested that the party who deliberately presents hearsay evidence ought to bring this to the attention of the court, so that its admissibility may be dealt with there and then.

[27]It was submitted on behalf of the appellant that although silence may not warrant the inference of agreement to the admission of hearsay evidence that is material to the matter, it does justify such an inference as regards non-material hearsay evidence. I regret that the submission cannot be accepted, if only because the distinction between material and non-material is too vague.

[28]The consequence for this case of these judgments is therefore that the mere non-objecting to the hearsay evidence did not without more render the evidence admissible by agreement under s.3(1)(a) of the Act. It follows that the central point advanced by the appellant must fail, and the plaintiff’s expert witnesses’ references in the witness-box to what they were told by the plaintiff, is not admissible in evidence against the defendant.

Appellant’s alternative argument

[29]Accepting that hearsay evidence cannot be admitted does not mean that all evidence must be excluded. The next enquiry is therefore whether such evidence as was admissible, established the claim for future loss of earning. The appellant submitted in the alternative that even on the expert evidence not rendered inadmissible as being hearsay, the appellant made out a case for damages for future loss of earnings.

[30]Here reliance was placed pertinently on the evidence of Dr Versfeld,[8] and this submission must next be examined. Regrettably, the appellant’s written heads of argument do not assist by providing references to the specific parts of Dr Versfeld’s evidence relied on for this submission.

[31]The evidence of Dr Versfeld is fully summarised in the judgement of the court a quo.[9] His evidence must be seen against the backdrop of other material to which he referred. This material included the following.

[32]First, there is his report itself, confirmed by him in his evidence in chief, containing his opinions and the reasons for those.[10] His conclusion[11] is (emphasis supplied):

“As a result of the accident Mr Witthuhn sustained multiple injuries including: a fracture of his left forearm, a fracture of his left wrist, an injury to his right ring finger, a fracture of his right tibia with damage to his right knee, bruising of his chest and lungs, a head injury with a period of loss of consciousness, a neck injury and a right knee injury, and following the accident he has swelling of his right leg.

His symptoms and disabilities adversely affect his ability to do his normal work and will probably result in him being restricted to sedentary or semi-sedentary type work by approximately 55 years of age and a possible truncation of even sedentary type work by approximately 60 years of age.”

[33]Dr Versfeld’s conclusion thus lists specific injuries and it records his opinion regarding the future: that the plaintiff’s

symptoms and disabilities adversely affect his ability to do his normal work both at the present time and in the future. As it

happens, with the exception of the neck injury, the injuries there listed are common cause between the parties. This appears from the second relevant piece of evidentiary material, being the joint minutes of experts.[12]

[34]There are two joint minutes, handed up at the commencement of the trial,[13]and both are relevant. The first is the joint minutes of the two opposing orthopaedic surgeons, Dr Versfeld and Dr Ramasuvha; and the second is the joint minute of the opposing occupational therapists, Ms Murcott and Mr Mashaba.

[35]Some explanation is necessary concerning the joint minute of the orthopaedic surgeons. The minute included in the appeal record is not signed by the orthopaedic surgeon of the defendant, Dr Ramasuvha.[14] The reason is the following: the viva voce evidence of Dr Versfeld makes it clear that in truth he and his counterpart never actually held a meeting, and Dr Versfeld in anticipation of them meeting in fact drew up a document which could constitute the minute.[15]

[36]Although in the event they did not meet, the viva voce evidence makes it clear that Dr Ramasuvha did sign it later.[16] Moreover, the signed copy was actually proved by the defendant’s counsel in the course of his cross-examination of Dr Versfeld, and handed up by him to the court who received it as D6 and D7.[17] And if any doubt remained, the defendant made its position plain before it closed its case:[18]

MR MOPANE: M’Lord we have decided to close our case. The doctor was here but we just decided, because of the joint minutes, we have not seen any wrong in that so we will consider that the joint minutes are in.”

[37]This joint orthopaedic minute lists various agreements between the two opposing experts in regard to the plaintiff's injuries: the fracture of the left forearm and wrist resulting in a "serious left wrist injury", the fracture of the right ring finger resulting in "flexion contracture", the ingrown fingernail, the fracture of the right tibia and fibula, which is symptomatic, a chest injury with fractured ribs and lung contusion, a significant head injury with sequelae, and a significant right knee injury.

[38]The third relevant piece of evidentiary material is that which was elicited from Dr Versfeld by the cross-examiner. This included

evidence that might otherwise have been regarded as of a hearsay nature.[19] In particular, in response to questions put in cross-examination, Dr Versfeld referred to the radiologist's report by Dr Adroos[20] attached to the report of the defendant's expert orthopaedic surgeon, Dr Ramasuvha.[21] That report also lists and identifies the orthopaedic injuries.

[39]It follows then from these pieces of evidentiary material that when the plaintiff closed his case, the evidence had established he had suffered the injuries concerned. These were at least the injuries listed in the joint orthopaedic minute, identified above. That the plaintiff had suffered these injuries there listed as a result of the collision was therefore common cause between the parties.

[40]Concerning the consequences of those injuries for the plaintiff's future employability, there were two pieces of evidentiary material. The first is the opinion expressed by Dr Versfeld, already quoted above, of restriction to sedentary type work by age 55 and complete cessation by age 60. But more pertinent, there is the joint minute of the opposing occupational therapists.[22]

[41]The agreements that are listed in their joint minute include that the plaintiff experiences left wrist pain as a result of steering and handling a clutch for long periods of time;[23] that he experiences right knee and ankle pain as a result of the repeated actions on and between the brake and accelerated foot pedals;[24] and generally, the circumstances of his pre-accident work are agreed.[25]This included that the strength demands of his work fell mainly in the light and medium work categories.

[42]The minute also records agreement regarding his post-accident working environment.[26] This includes that the physical strength demands of his current work fall mainly in the sedentary to light work categories. The difficulties that the plaintiff currently experiences in that environment are also agreed, and set out in some detail.[27]

[43]The plaintiff's residual abilities are also agreed: "... sedentary/light type of work, which do not place excessive strain on his left forearm and wrist, and right knee and lower leg." [28] Finally, the opposing occupational therapists agree as follows (emphasis supplied):[29]

It is agreed that Mr Witthuhn's future work capacity is subject to the progression of his condition over time. Deterioration in his condition and increasing pain and symptoms will from a functional perspective result in a further reduction in his work efficiencies, productivity and workday tolerance. Deference is given to the relevant specialists with regard to the anticipated progression of his condition.

It is agreed that deterioration in his condition will, from a functional perspective, result in a further decrease in his work capacity, productivity, efficiencies and workday tolerance. He will have to be selective in future to perform work within his residual capacity at any given time.

It is agreed that the industrial psychologists should comment on his employment prospects and earning capacity, taking cognisance of his residual functional capacity."

[44]In short, these experts agree that the plaintiff used to do light/medium work, and now does sedentary/light work; that he currently

experiences difficulties as a result of his injuries; and that his work ability will in the future decrease as a result of his injuries. They defer to the other experts on two issues: the rate of deterioration (the orthopaedic experts); and his employment prospects (the industrial psychologists).

[45]As regards the rate of deterioration, Dr Versfeld opined, as quoted above: "... and will probably result in him being restricted to sedentary or semi-sedentary type work by approximately 55 years of age and a possible truncation of even sedentary work by approximately 60 years of age."

[46]In sum, these agreements between the experts are therefore saying that they are agreed that the plaintiff suffered certain injuries; that these injuries have resulted in him no longer being the man he used to be and less capable physically than he was pre-accident; and that this has affected his present work capacity and will in the future affect his work capacity.

[47]So, on the agreed evidence the plaintiff has suffered a loss of earning capacity in the future. Has the available evidence quantified this? There is the evidence of Dr Versfeld that the plaintiff would be restricted to the level of physical activity in which he is in any event now already occupied ("sedentary or semi-sedentary") by 55, and possibly losing even that level of capacity at age 60. But by what age would the plaintiff in any event have retired from this type of work but for the injuries?

[48]The evidence presented by Ms Donaldson, industrial psychologists for the plaintiff, was that he would have retired at the normal retirement age of 65,[30] but that at the appellant's present employment, the normal retirement age is 60.[31] There is the suggestion that but for the injuries, he might have gone on for another five years beyond age 60, and perhaps even beyond age 65. The witness said that this would have occurred if the plaintiff were offered further contract employment, and if he accepted it.[32]

[49]I regret that to conclude, on the evidence available and without having had the advantage of the plaintiff's own viva voce evidence, a court is ill-suited to draw that inference - that he would likely have worked beyond age 60 - as a matter of probability.

Such an inference involves assessing the plaintiff's temperament and resolve, and his ambition; and that cannot be done without having had the advantage of seeing the plaintiff testify.

[50]It seems to me that at best for the plaintiff, he has shown a future loss of earnings, conceptually represented by the difference between age 55 (having regard to) and age 60 (but for). The expertise of the plaintiff's actuary and his actuarial calculation methodology were not disputed.[33] We accordingly requested that the actuary preform a recalculation on this basis, and the result is a loss of R1 175 753.

Conclusion

[51] It seems clear then from the available evidentiary material that, accepting that the hearsay evidence of what the plaintiff conveyed to his experts is excluded, the evidence that the plaintiff had put up before he closed his case in any event established that he had suffered damages in respect of future loss of earnings.

[52]It follows that the appeal must succeed, and I propose the following order:

- (a) The appeal succeeds, with costs.
- (b) The order of the court a quo, to the extent of the words, "Absolution from the instance is granted in the plaintiff's claim for non-patrimonial (loss of future income)" is set aside, and the following is substituted for it:

"The defendant is ordered to pay to the plaintiff the amount of R1 175 753 in respect of loss of future employability."

WHG van der Linde

Judge, High Court

Johannesburg

I agree, and it is so ordered.

M Ismail

I agree.

M Twala

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Ref: R01541/HC/THM

Date argued: 1 September 2017

Date judgment: 15 September 2017

[1] This appeal is in any event, as it happens, not concerned with admission under paragraph (c). Although it is not impossible that an application for admission under that paragraph could have been done before the trial court, whether before or after the evidence had been led, that was not done, and such an issue is not before us.

[2]

(1871) LR 6 QB 597 at 607, approved in *Sonap Petroleum (SA) (Pty) Ltd v Pappadogianis*, 1992 (3) SA 324 (A) at 239F - 240B.

[3] *Hing and Others v Road Accident Fund*, 2014 (3) SA 350 (WCC).

[4] *Boost Sports Africa (Pty) Ltd v South African Breweries Ltd*, 2014 (4) SA 343 (GP).

[5] 2000 (1) SA 1 (CC).

[6] 1961 (1) SA 811 (N) at 817 A – F.

[7] 1999 (4) SA 968 (W), overruled on appeal on a different issue.

[8] Appellant's heads of argument, para 42.

[9] Vol 7/374/4 – 384/10. His viva voce evidence appears at vol 4/186/1 – 212/12; and vol 5/280/19 – 313/22.

[10] Vol 2/64 – 93; vol 4/187/5 – 20.

[11] Vol 2/91/11 ff.

[12] Vol 3/162 – 166.

- [13] Vol 4/169/24 – 25.
- [14] Vol 3/163.
- [15] Vol 5/280/19 – 25; 281/1 – 6.
- [16] Vol 5/296/25 – 298/1 – 19.
- [17] Ibid.
- [18] Vol 5/315/21 – 25.
- [19] See eg vol 5/292/3 – 21.
- [20] Vol 3/147 – 149.
- [21] Vol 3/135 – 146.
- [22] Vol 3/164 – 166.
- [23] Vol 3/165/4 – 5.
- [24] Vol 3/165/6 – 7.
- [25] Vol 3/165/15 – 22.
- [26] Vol 3/165/23 ff.
- [27] Vol 3/166/1 – 10.
- [28] Vol 3/166/14 – 17.
- [29] Vol 3/166/19 – 28.
- [30] Vol 1/38/10 – 14.
- [31] Vol 4/244/21 – 245/12.
- [32] Vol 1/38/14 – 24.
- [33] Vol 5/314/1 – 19.
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