



IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)

CASE NO: 28572/2013

In the matter between:

WITTHUHN, OTTO CARL

Applicant/Plaintiff

And

ROAD ACCIDENT FUND

Respondent/Defendant

JUDGMENT

FRANCIS J

- 1.. This an application for leave to appeal by the applicant against part of my judgment delivered on 10 November 2014 after I had granted absolution from the instance in the plaintiff's claim for non-patrimonial (loss of income).
 2. The applicant has raised several grounds for leave to appeal which is not necessary to repeat since these are contained in the application for leave to appeal. I have dealt with all the grounds for leave to appeal in my judgment and nothing new has been raised in this application. The application was opposed by the respondent.
 3. It is trite that the traditional test in deciding whether leave to appeal should be granted is whether there is a reasonable prospect that another court may come to a different conclusion to that reached by me in my judgment.
-

2.

4. The issue in this application for leave to appeal is whether I erred in finding that the applicant had failed to prove his claim for future loss of income after he was not called to testify despite the fact that he was in court for the duration of his trial. It was contended by the respondent's counsel at the trial that the applicant's claim for future loss of income had to be dismissed on the grounds that he had failed to discharge the onus that he will suffer loss of income. It was contended that the applicant's experts reports contained hearsay evidence in that they had relied on information that was provided by the applicant who failed to testify.
 5. In the application for leave to appeal, it was contended that it was raised in chambers that the applicant was not going to be called as a witness to save on time since there were deadlines by when this matter was to be finalised. Respondent's counsel had no recollection about this. It was further contended that the respondent had not objected to the leading of hearsay evidence and that by failing to do so, consented to it. It was further contended that the respondent's counsel had elicited hearsay evidence during cross examination of the applicant's experts which is an exception to the hearsay rule.
 6. It is common cause that some parts of the expert reports are based on information that was relayed to the experts by the applicant and or his employer. It would have been necessary to call the applicant and or employer to testify about those facts unless the parties had agreed to admit the reports as they were.
 7. I have dealt with the issue of the hearsay evidence in paragraphs 22 to 30 of my judgment. I had essentially found that the issue of hearsay evidence was raised by the
-

3.

respondent's counsel when he was respondent's counsel when he was cross examining the applicant's experts in particular Barbara Donaldson. This was in relation to the information about the applicant's father, what the source was that she relied on when compiling her report, about the rare skill that the applicant allegedly possesses, the failure to call any person from the applicant's employer to testify about how long the plaintiff would have continued to work for them after he had reached 60 years and about what their policy was in accommodating employees who had suffered from any disabilities and who possessed rare skills. I would have thought that this would have alerted the applicant that he was required to testify to fill those gaps in his reports.

8. The reasons provided for not calling the plaintiff as a witness due to time constraints are rather somewhat opportunistic to say the least. The fact of the matter is that even if this matter was not going to be completed in the allocated period, the matter would simply have become a part heard matter and arrangement would then have been made to set the matter down for a hearing again. Once the respondent's had raised the issue with the experts about who their sources were of their information, the applicant should have been called as a witness.
 9. I have dealt with the issue whether the respondent's counsel had elicited hearsay evidence during cross examination. I had found that he did not since some of the information that was contained in the reports was clearly of a hearsay nature. It is unclear how a person could elicit hearsay evidence when the hearsay evidence has already been led in chief.
-

4.

10. I have reconsidered the matter, and considered the arguments raised for and against leave to appeal and do not believe that there is a reasonable possibility that another court will come to a different conclusion to that reached by me.

11. The application for leave to appeal stands to be dismissed.

12. In the circumstances I make the following order:

11.1 The application for leave to appeal is dismissed with costs.

FRANCIS J

JUDGE OF THE HIGH COURT

FOR APPLICANT : N VAN DER WALT SC INSTRUCTED BY
JOSEPH'S INCORPORATED

FOR RESPONDENT : M MOPANE INSTRUCTED BY MOLOTO
STOFIE INCORPORATED

DATE OF HEARING : 29 APRIL 2015

DATE OF JUDGMENT : 5 MAY 2015
