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**HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, JOHANNESBURG)**

- (1) REPORTABLE: Yes.
(2) OF INTEREST TO OTHER JUDGES: Yes.
(3) REVISED.

.....
Date Judge P.A. Meyer

Case no: A5051/2019

In the matter between:

M N

Appellant

and

MINISTER
Respondent

OF

POLICE

Case Summary: Delict – Damages – Bodily injuries – Future medical expenses.

Evidence – Expert evidence – Joint minutes - Whether requirements laid down in *Glen Mark Bee v Road Accident Fund* 2018 (4) SA 366 (SCA) that when a court itself is for any reason dissatisfied with the matters agreed to by experts or is minded to reject their opinion, litigants should be alerted to the court's dissatisfaction or of a possible rejection of the agreed opinion timeously so that they can consider adducing further evidence on the agreed material.

JUDGMENT

MEYER J (LAMONT J and HARRISON AJ concurring)

[1] This is an appeal against part of the judgment and order made by the High Court, Gauteng Division, Johannesburg (Sutherland J) on 22 August 2019 in a delictual action instituted by the appellant, Mr M N, against the respondent, the Minister of Police, for damages arising from an unlawful shooting which shattered the appellant's right arm with debilitating consequences. Liability had been determined in a preliminary hearing and the respondent was held to be liable in such sum of damages as shall be proven. The trial court was then seized with the computation of those damages.

[2] The heads of damages which the trial court was required to determine were the appellant's general damages for pain, suffering and loss of amenities of life, future medical expenses, and future loss of earning capacity. To facilitate the determination of each of these heads of damages, the parties agreed not to lead any oral evidence. Factual evidence had been obtained from the medical experts who submitted reports on the condition of the appellant. The medical experts had, where appropriate, given joint minutes setting out their agreements, and the parties agreed to use the respondent's actuarial computations. Having been addressed by counsel for both parties the trial court reserved its judgment. In a fully reasoned judgment that was subsequently handed down the trial court awarded a total amount of R4 309 000 in damages to the appellant, which amount was made up as follows: R1 559 000 in respect of his future medical expenses; R750 000 in respect of his general damages; and R2 000 000 in respect of his loss of earning capacity.

[3] In determining the appellant's future medical expenses in the total amount of R1 559 000, the trial court rejected most of the recommendations of the occupational therapists. In this regard Sutherland J said the following:

'[18] The only remaining controversy is whether all the recommendations of the occupational therapists ought to be accepted as necessary. Some comments on the list provided and the thought that went into compiling the list are warranted. The impression made on me in reading the list is that every conceivable aid has been recommended, without regard to lifestyle of the plaintiff or a genuine investigation into whether he has, in the period that has elapsed since sustaining the injury, coped without these aids. In the absence of concrete evidence to substantiate a material disadvantage if these aids are not supplied, the opinion dictating the recommendations is unconvincing. Many items are ordinary household devices which would be acquired in any event. In my view the list is nothing more than a blatant attempt to inflate the quantum of damages, conduct in which both occupational

therapists are culpable. It is an abuse of the role that medical practitioners are expected to play in litigation.

[19] I accept that the recommendation for occupational therapy is appropriate (item no 34) R18 284.00, but for the balance, the items are wholly unsubstantiated or unconvincingly alluded to in the reports. On the premise that the plaintiff is likely to acquire some devices for strictly personal use to ameliorate the clumsiness he must experience, I shall make a lump sum allowance of R50 000.00. That sum added to the sum recommended for therapy *per se*, I shall round up the gross figure for occupational therapy to R70 000.00.'

[4] The appellant applied for leave to appeal against the court *a quo*'s allowance of only an amount of R70 000.00 for future medical treatment in respect of occupational therapy and assisted devices, *inter alia* contending that the court *a quo* 'erred in fact and/or law . . . [i]n not warning the legal representatives of the parties, prior to judgment, that the Court does not accept the joint opinion of the experts and in not allowing the parties the opportunity to lead oral evidence in this regard.' In support of his contention the appellant relied on the judgment of the Supreme Court of Appeal in *Glen Mark Bee v Road Accident Fund* (093/2017) [2018] ZASCA 52 (29 March 2018) (2018 (4) SA 366 (SCA)).

[5] In *Bee* the question as to the effect of an agreement recorded by experts in a joint minute was considered. Rogers AJA *inter alia* said this in the majority judgment:

'[71] I would add that even where the agreed matter is one of opinion, fair play will, as I have said, generally require that a possible rejection of the agreed opinion be timeously raised. This is for the reason that litigants will quite properly not spend their resources on establishing matters of expert opinion which are not in dispute. Indeed, they would rightly be upbraided for wasting court time by doing so. If a court is minded to reject the opinion on the available evidence, the litigants should be alerted to this so that they can consider adducing further evidence.

. . .

[73] My colleague has cited a number of local and foreign cases dealing with the assessment of contested expert testimony. I agree that in such cases a court must determine whether the factual basis of a particular opinion, if in dispute, has been proved and must have regard to the cogency of the expert's process of reasoning. Matters are quite different, in my respectful opinion, where experts in the same field reach agreement. In such a case, as I have said, a litigant cannot be expected to adduce evidence on the agreed matters. Unless the trial court itself were for any reason dissatisfied with the agreement and

alerted the parties to the need to adduce evidence on the agreed material, the trial court would, I think, be bound, and certainly entitled, to accept the matters agreed by the experts. In the present case the trial court did not require the parties to lead further evidence on the matters on which the experts agreed. The trial court was perfectly entitled to act as it did. In *Coopers (South Africa) (Pty) Ltd v Deutsche Gesellschaft für Schälingsbekämpfung mbH* 1976 (3) SA 352 (A) Wessels JA foreshadowed that an expert's bald opinion, if uncontroverted, might carry weight (371G). All the more so, where experts for the opposing parties share the same opinion.

[6] In his judgment granting leave to appeal to this full court, Sutherland J *inter alia* said the following:

'It has been argued by Mr Pieterse that, in the first place, no alert was given by me that I was not going to accept the opinion of the occupational therapists. There is a nuance to this submission. It would obviously be inappropriate in the course of a hearing to commit oneself to a view one takes before having heard all of the evidence and the argument.

And so it is perfectly correct that I have at no time announced unequivocally that I had rejected the opinion of the occupational therapists.

So much for that. As to whether or not the parties had proper notice that they were at risk of me not accepting the opinions, I have a clear recollection of a vigorous debate taking place in respect of these very issues.

In the first place Ms Makopo, on behalf of the defendant, sought to repudiate the agreement recorded in the joint minutes, because, as she argued, the recommendations which were generous by any measure, were unjustified. I expressed my scepticism about the recommendations and expressed my scepticism about whether any expertise by the experts was evident in their conclusions that the recommendations for these amenities are necessary.

It does not appear, as I understand the argument presented now, that any dispute exists that such exchanges took place. What is suggested is that what is required in terms of the *Glen Mark Bee* case is that there be an unequivocal alert by the Court to a party that the opinions are unconvincing and that evidence should be led. The question arises whether or not that threshold was met or not. That is the first ground upon which leave to appeal is sought.

If indeed the proper threshold is that some degree of formality is required to announce or indeed pronounce that a particular expert agreement is being rejected in advance of the conclusion of the case, then clearly that was not what I announced.

In my view, at the relevant time, it was sufficient to alert the parties to the fact that, as I was entitled to do, as the trier of fact, to express my dissatisfaction with the opinion and were it

the intention or desire of any party, in respect of that exchange and the debate, to adduce further evidence that was open to that party, and it could have been done at the time.'

[7] Sutherland J concluded in saying this:

'In my view the question of how a Court should conduct itself in these circumstances warrants clarification. It may well be that some degree of formality rather than simply a substantive alert is an appropriate procedure to impose upon a Court.

On that point I am inclined to grant leave to appeal to the Full Court for that question to be explored and, if necessary, a clear indication be given of the threshold which is contemplated in paragraphs [73] and [74] of the *Glen Mark Bee* case.'

[8] The crisp question on appeal before us is whether the trial court met the threshold contemplated in *Bee* in its rejection of the agreement of the occupational therapists. If the question is decided in favour of the appellant, the trial court's award of the amount of R70 000 in respect of occupational therapy and assisted devices as a component of the award for future medical treatment should be set aside and the matter referred back to the trial court to alert them of its dissatisfaction with the agreement of the occupational therapists or that it is minded to reject their opinion on the available evidence so that they can consider adducing further evidence on the occupational therapists' agreed material. Should the question be decided against the appellant, then *cadit quaestio* (the dispute is at an end).

[9] A reading of the record of the proceedings clearly shows that the trial court in no uncertain terms expressed its dissatisfaction not only with the agreement reached by the occupational therapists but also by the agreement reached by the industrial psychologists and that it was prepared for the parties to lead evidence on the agreed material. The trial court was of the *prima facie* view that their agreed opinions were not founded on facts relevant to the appellant in this case. A few examples of the interactions between the trial judge and counsel for the appellant relating to the agreement of the occupational therapist during his argument suffice:

COURT: Is a proper case made out that he cannot manage without these services?

MR PIETERSE: Yes.

COURT: I mean this looks pretty extravagant to me.

MR PIETERSE: It is agreed in the joint minutes Your Lordship will see that . . .
[intervenes]

. . .

COURT: Well they would agree, but it is unconvincing.

MR PIETERSE: M'Lord, that is the evidence before Your Lordship.

COURT: Well I do not have to accept it.

...

COURT: If OT's come together and they say you should have home based care services. I mean what is the factual foundation for that.

MR PIETERSE: They say so ... [intervenes]

COURT: They just suck it out of their thumbs, do they not?

MR PIETERSE: No M'Lord.

COURT: Take me to the OT's report and show me what the factual foundation for that is.

MR PIETERSE: Your Lordship will find the joint minute on pages 3 to 10.

...

COURT: It is pretty waffle, is it not; and this is cut and paste stuff. I mean where do they address the actual circumstances of this person, the home environment, the cultural practices and so forth, to provide R1.5 million of daily care. He is not an invalid.

...

COURT: No. I accept that that it is what it will cost, but where is the basis for suggesting that it is an actual need?

MR PIETERSE: M'Lord, after any operation that he will undergo, he will not be able to dress himself, he will not be able to feed himself, he will not be able, he will be immobile.

COURT: No that must be an exaggeration, he has one good hand, he can feed himself with that.

MR PIETERSE: How do you dress, how do you bath, how do you shower, he will need care and assistance and that is what they allowed, but ... [intervenes]

COURT: But, but, but just think about the foundation for the opinion. The fact that you got one limb out of commission, does not mean to say you cannot dress yourself . . . I have had personal experience in having my right arm out of commission for six weeks. I did not have to have somebody else to dress me. I just dressed myself with difficulty. You know the assumptions about total incapacity are exaggerated.

MR PIETERSE: M'Lord, if your Lordship is in disagreement with the common cause facts which are agreed between the parties, then this is something ... [intervenes]

COURT: But there are no facts, that is the problem, sorry to interrupt you. The problem with these reports as is often the case, is there are no facts. It is a thumb sucked opinion, so the two OT's agree on an opinion neither of which is founded in fact. And then I am expected just to swallow that.

...

MR PIETERSE: Yes. M'Lord, may I on this aspect during the adjournment I will take an instruction, because both the occupational therapists and the plaintiff are available to take instructions and I will take instructions on the facts as they were and as they are.

COURT: Well, why are the facts not in the report. The facts are now going to be produced ex post facto. If they did not inquire into the facts in order for them to form their opinions, what facts are there now to be gained?

MR PIETERSE: I will . . . [intervenes]

COURT: Unless you want to have this matter to go to evidence?

MR PIETERSE: No, M'Lord, I will simply make an inquiry as to whether there was a home visit and whether any of this that Your Lordship queried was taken into account when the experts were employed by the parties.

COURT: But, but surely it would have been put in the report. I mean you are welcome to do that in the adjournment.'

[10] Later on during counsel for the appellant's address on the question of the appellant's loss of earning capacity the trial court in no uncertain terms expressed its dissatisfaction with the agreement reached by the industrial psychologists as was the case with its dissatisfaction with the agreement reached by the occupational therapists and that it was prepared for the parties to lead evidence on the agreed material. For example:

'COURT: But you see you have the same problem as with the OTs, the IPs frankly let down the litigants. I would have expected if you were going to give an expert opinion on the career trajectory of a man who between 21 and 25 was a rigger, you would have some research on what the age profile are of riggers over time, whether as a matter of course there are any still doing rigging by the time they get to 40. What sort of other roles do they evolve into, instead of which you get this generalised nonsense? Now it is no rebuke of the legal representatives, you are reliant on these experts, but in fact there is no factual substratum to their findings.

. . .

MR PIETERSE: Now, in a case such as this whether there is agreement between the industrial psychologists that he would have ceilinged at Paterson C2, but for the incident, then there is no need to present those facts in court, because it is uncontested and how satisfactory or not satisfactory they are, those are the facts placed before Your Lordship by agreement. And I submit Your Lordship should accept those facts.

COURT: But is there not, is there not a danger in that, is there not a danger in that. I am not bound by any of these expert reports, even when you agree. The fact that they share an opinion and I cannot find a factual foundation in either of them for their

opinion, I am talking generically now, does not mean to say that I am somehow obliged to defer to the litigants' agreement about their opinion. I am at large to reject it.

MR PIETERSE: But if it is envisaged that a court will always disregard an agreement between experts, then a plaintiff will not approach a matter on this basis . . . So I hear Your Lordship's difficulty in general, but in a matter such as this, I submit that if for instance it was contested and if for instance Your Lordship at the beginning of the trial stated that although the parties accept the agreement reached between the experts and the joint minute, the court does not accept them, then we will tender evidence and bring those facts to enable Your Lordship to weigh up the opinion of the experts having regard to the facts. But now, none of that has happened, so therefore ... [intervenes]

COURT: Well it is happening now. I am pointing out deficiencies in the reports that you are relying on.

...

MR PIETERSE: My submission to Your Lordship is twofold, one, because of the agreement reached between the experts and because of the agreement reached between the parties, Your Lordship should be bound by that agreement and accept that agreement and if Your Lordship indicates to the parties that Your Lordship, because of a lack of facts in the reports themselves, are not willing to accept the basis as agreed between the industrial psychologists, then I submit Your Lordship should inform the parties. Because then I will take instructions, but then the plaintiff would want the opportunity to call the employer and the people at the employer and the people that work with the plaintiff on a daily basis, pre- and post- accident to indicate to Your Lordship the possibilities of where his career path could and would in all probability have ended.

COURT: That is perfectly sensible, and I have raised my difficulties in accepting these views for want of substantiation. So is that what you would like to do?

MR PIETERSE: If Your Lordship indicates to the parties that Your Lordship is not going to accept the agreement between the industrial psychologists who agree but for having regard to career path, then I submit that is what the plaintiff would have to do.

COURT: Well, my prima facie view is that the opinions are based on an unsubstantiated factual strata. And therefore the opinions are compromised. So what would you like to do in the light of that observation?

MR PIETERSE: M'Lord, then we would like to place the facts before Your Lordship regarding ... [intervenes]

COURT: So you would like to call evidence? You are perfectly entitled to ask for that opportunity.

MR PIETERSE: Well, M'Lord, I would like to ask for a 5 minute adjournment to discuss it with my learned friend and take instructions . . .

...

MR PIETERSE: I am indebted to Your Lordship for the short adjournment. M'Lord, we discussed the issue. The parties accept the agreement reached between the industrial psychologists and by agreement between the parties. . . . '

[11] The rule laid down in *Bee* is that the trial court is generally bound, and entitled, to accept the matters agreed to by the experts, unless the trial court itself is for any reason dissatisfied with the agreement or minded to reject the opinion. The litigants should be alerted to the trial court's dissatisfaction or of a possible rejection of the agreed opinion timeously so that they can consider adducing further evidence on the agreed material. I respectfully agree with Sutherland J that it would obviously be inappropriate in the course of a hearing for a judge to commit to a view before having heard all the evidence and the argument. That certainly is also not what the rule in *Bee* requires, nor does it require some degree of formality for the trial judge 'to announce or indeed pronounce that a particular expert agreement is being rejected in advance of the conclusion of the case'.

[12] Furthermore, the requirements laid down in *Bee* in cases where the trial court is dissatisfied with the agreement of experts or minded to reject their opinion are clear and unambiguous. It was, with respect, not necessary for the Supreme Court of Appeal to give any further indication 'of the threshold which is contemplated' in its judgment. The litigants should be alerted to the trial court's dissatisfaction or of a possible rejection of the agreed opinion timeously so that they can consider adducing further evidence. Whether those requirements were met, and whether they were timeously complied with, will depend upon the particular circumstances of each case.

[13] In this instance the trial judge alerted the parties to his dissatisfaction with the agreed matter of the occupational therapists, that he is not bound by their agreement, and, as he correctly stated in his judgment when he granted leave to appeal, 'were it the intention or desire of any party, in respect of that exchange and the debate, to adduce further evidence that was open to the party, and it could have been done at the time'. In my view the trial judge clearly met the requirements laid down in *Bee*.

[14] In many, if not most cases in this division, the trial judge does not get the opportunity to read the expert reports and expert joint minutes prior to the commencement of the hearing, and is confronted with the material during the course of the hearing and closing argument. In such instances the trial judge may become dissatisfied with the agreement or agreements of experts or minded to reject their opinion or opinions during the course of the trial, or closing argument, or even when the judge considers the matter in depth and writes the judgment. Whenever that occurs, (and obviously before delivering judgment) is the moment that the trial judge must alert the parties to the need to adduce evidence on the agreed material.

[15] In the result the following order is made:
The appeal is dismissed with costs.

P.A. MEYER
JUDGE OF THE HIGH COURT

Judgment:	05 November 2020
Heard:	19 October 2020
Appellant's counsel:	Adv JC Pieterse
Instructed by:	Logan Naidoo Attorney, Houghton, Johannesburg
Respondent's Counsel:	Adv N Makopo
Instructed by:	State Attorney, Johannesburg