

**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH**

Case No.: **2295/2013**

In the matter between:

NOMAWETHU KESA

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

JUDGMENT

NTSEPE AJ:

1. This is an action wherein the Plaintiff sues in her personal and representative capacity for damages which arose from the death of her husband (the deceased) on 19 August 2010, allegedly, from injuries that he sustained in a collision between him and a motor vehicle on 8 November 2009 (the collision).
2. The defendant is defending the action and denies that the deceased died as a result of the injuries sustained by him in the collision.

3. By agreement between the parties the only issue before me is causation. The separation of causation from the remaining issues was duly ordered as envisaged by Rule 33 (4).
4. The Plaintiff had the duty to begin; she testified in support of her claims and also called Professor Ian Bruce Copley, a neurosurgeon, on her behalf.
5. The Plaintiff's evidence was mostly formal in nature and can be summarised as follows:
 - 5.1 she married the deceased in January 2000 and lived with him;
 - 5.2 he was involved in the collision on 8 November 2009, had sustained injuries, was hospitalised as a result of the injuries he sustained in the collision and he spent two weeks in intensive care and a month in hospital thereafter;
 - 5.3 prior the collision the deceased was a sportsman who played soccer for his 'work' team and enjoyed exercising. However, this changed after the collision as he could no longer exercise. In fact, he had attempted gym once after the collision but returned home with chest pains;
 - 5.4 his temper had changed after the accident; he was easily angered, stubborn and frustrated by his circumstances;

- 5.5 on 19 August 2010, the Plaintiff was at home with the deceased and the deceased had taken the refuse bin out, returned feeling weak, laid in bed complaining of chest pains, struggled to breath and died. She had not expected him to die on that day.
6. The second witness, Professor Copley testified that the deceased died as a result of an “*acute myocardial infraction*” due to a combination of altered metabolism and chronic stress following the injuries sustained in the collision.
7. At the close of the Plaintiff’s case, the Defendant sought absolution from the instance. The test for absolution is simply whether the Plaintiff has placed evidence before me upon which this court, applying its mind reasonably to such evidence, could or might find in her favour. (See: *Gascoyne v Paul and Hunter* 1917 TPD 170 at 173 and *Gordon Lloyd Page and Associates v Rivera* 2001 (1) SA 88 (SCA) at 92 H-J).
8. The functions of an expert witness have been set out in *Glenn Marc Bee v The Road Accident Fund* (093/2017) [2018] ZASCA 52 (29 March 2018) at paragraph 22 as follows:
- “22. *Expert witnesses are required to lay a factual basis for their conclusions and explain their reasoning to the court. The court must satisfy itself as to the correctness of the expert’s reasoning.*

23. *The facts on which the expert witness expresses an opinion must be capable of being reconciled with all other evidence in the case. For an opinion to be underpinned by proper reasoning, it must be based on correct facts. Incorrect facts militate against proper reasoning and the correct analysis of the facts is paramount for proper reasoning, failing which the court will not be able to properly assess the cogency of that opinion. An expert opinion which lacks proper reasoning is not helpful to the court. (See also Jacobs v Transnet Ltd t/a Metrorail [2014] ZASCA 113; 2015 (1) SA 139 (SCA) paras 15 and 16; see also Coopers (South Africa) (Pty) Ltd v Deutsche Gesellschaft Für Schädlingsbekämpfung mbH 1976 (3) SA 352 (A) at 371F”.*

9. The import of expert testimony was also succinctly set out in the *Gentiruco AG vs Firestone SA (Pty) Ltd* 1972 (1) SA 589 (A) 616 H as follows:

“The true and practical test of the admissibility of the opinion of a skilled witness is whether or not the court can receive ‘appreciable help’ from that witness on the particular issue”.

10. Regrettably this Court received no help, appreciable or otherwise, from Professor Copley neither in the form of his reports nor in his viva voce evidence. He was a poor and unreliable witness who appeared uncertain of the content of the medical records to which he was referred by Counsel for the Plaintiff. He hesitated to give commentary on aspects of the medical records

which he was called upon to give expert commentary on and simply appeared unsure when giving the said commentary and/or of his role before this Court.

11. He conceded that his reports lack various facts or information upon which he expressed his opinion; in particular, he testified that some of the information upon which he based his opinion was obtained from the report of a Dr Kellerman. However, he was unable to state which facts or information he had borrowed from Dr Kellerman's report.
12. His report and his *viva voce* evidence are in generalised terms and do not in any way assist this court in the determination of the issues.
13. Significantly there are simply no clearly established facts informing, a clear and correct reasoning, leading to a cogent opinion. Professor Copley could not illustrate what facts were before him at the time he formulated his opinion as set out in his report, nor could he set out the source of those facts with any clarity. Seemingly he sought, as an afterthought, to rely on the Plaintiff's *viva voce* evidence which is impermissible; an expert witness must, at the time of formulating his expert opinion, have knowledge of the facts and factors informing his opinion and those facts must be reflected in his reasoning.
14. Not only did Prof Copley concede that his report was factually incorrect with regard to the deceased being "*wheelchair bound*", and that a cardiologist was better suited to assist the court on the cause/s of the heart attack that claimed the deceased's life; his opinion was furthermore devoid of any verifiable

reasoning and as such was incapable of being tested. Professor Copley's testimony can be compared to shifting goal posts and was characterised by his standard response that the causes were "multifactorial". His evidence/opinion cannot be said to be cogent, it is thus unreliable and is inadmissible.

15. Plaintiff's Counsel argued that the facts forming the basis of Professor Copley's evidence are on record in the medical records before this court. This submission ignores the very purpose for which expert reports, summaries and evidence are required. It is not sufficient to simply have facts or medical records; such facts and/or medical records must be considered by a person holding certain expertise and such person must give a reasoned opinion thereon which is not the case herein.
16. What then remains is the evidence of the Plaintiff which does not and cannot assist in establishing a *prima facie* case on causation. I do not deem it necessary to set out the legal requirements or elements of causation as set out in the literature and in the decided law in these circumstances; suffice to state same have not been, *prima facie*, established by Plaintiff. In the circumstances, this court could not find in the Plaintiff's favour on the remaining evidence.
17. In the premises I make the following order.

- (a) The Defendant is granted absolution from the instance, on the issue before me, with costs.

N NTSEPE
Acting Judge of the High of South Africa

Appearances:

Counsel for the Plaintiff: Adv L Schubart (SC), instructed by Goldberg & De Villiers Inc

Counsel for the Defendant: Adv P Jooste, instructed by Friedman Scheckter

Date heard: 3 December 2019

Judgment delivered: 4 December 2019