

**THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION, MBOMBELA MAIN SEAT**

CASE NO: A104 / 2019

REPORTABLE: NO
OF INTEREST TO OTHER JUDGES: NO
REVISED.

10 March 2022

In the matter between:

Z[....] N[....] N[....]

APPELLANT

and

ROAD ACCODENT FUND

RESPONDENT

Coram: RATSHIBVUMO J (MASHILE J AND ROELOFSE AJ CONCURRING)

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email. The date and time for hand-down is deemed to be 10H00 on 10 March 2022.

J U D G M E N T

RATSHIBVUMO J:

[1] Background.

This is an appeal against the judgment of Ndlokovane AJ (*court a quo*) of this Division in which she awarded damages for future loss of earning capacity to the Appellant, in favour of the minor child who was involved in a motor vehicle collision, in the amount of R1 677 121.00 plus interest at 10.5%. Costs were also awarded in the Appellant's favour. At the heart of the appeal is the contention that the court *a quo* erred in making reference to expert report authored by an Educational Psychologist (Dr. Pitsoane) who was not called as a witness. Had the court *a quo* excluded this evidence as it should have done, so goes the argument, it would have awarded the damages in line with the scale recommended by the Appellant's experts which was higher than what the Respondent's experts had recommended. For reason that Dr. Pitsoane did not give oral evidence, the Appellant argues that her evidence should have been ruled inadmissible for being hearsay.

[2] It is apposite therefore to unpack how the said evidence or report was dealt with during the trial. Mr. Shai represented the Respondent while Mr. Moeti appeared for the Appellant. The following appears from the record of proceedings after a brief adjournment:¹

Mr. Shai: My Lady I have conferred with my briefing attorney on the issue of the Educational Psychologist and the brief that I received from them is to make an application for the calling of Dr. Pitsoane, and Dr. Pitsoane My Lady is not available up until 12th of July. Then if it is permissible, we will actually move for a postponement for us to call Dr. Pitsoane. And then alternatively My Lady, the report by Dr. Pitsoane is in and we will make an application for us to be allowed to use the contents of that report My Lady in our argument if the postponement is going to be refused My Lady.

Court: Mr. Moeti.

Mr. Moeti: As the court pleases My Lady. I think my learned friend has just made two submissions to the court and on the very same breath I think he has retracted on the first proposition the one of postponement which means that

¹ See p.270-272 of the transcribed record.

the only proposal that stands is the later that he referred to as going to argue on the said educational psychologist report My Lady. And as such My Lady and if that is the stance my learned friend want to take, I am happy to take it as well so that they can argue on the particular report.

*Court: You do not have any objection to him...
(intervenes)*

Mr. Moeti: No objection if My Lady we may proceed.

Court: You do confirm that that report was not (indistinct) in court, it came you are aware of it, you have been given a proper notice?

Mr. Moeti: That much I can confirm My Lady. However, My Lady, that does not on its own mean that (inaudible). It is there before court however it does not necessarily mean that the Plaintiff accede to the said (inaudible). [My emphasis].

[3] The acceptance of reports without their authors giving oral evidence in court is not unheard of in civil trials. In fact, the Appellant's counsel alerted us in his heads of argument that a number of expert reports were to be admitted on record as evidence without their authors testifying, with the exception of a few.² This agreement may have been reached just before the commencement of the trial as it appears nowhere in the pleadings or in the transcribed record. In fact, what appears in the pre-trial minutes held some three months prior to the trial date paints a different picture where under paragraph 6, the following is recorded:³

"6. Which experts witness does the Defendant require the Plaintiff to subpoena for the trial on 25 March 2019?

Whichever experts the Plaintiff deems fit to prove her case. [This points to the fact that he experts referred to above would be called to testify]

[4] The source for the practice whereby parties dispense with the need to call witnesses to give oral evidence could be rooted in Rule 38(2) of the Uniform Rules which provides,

"2. The witnesses at the trial of any action shall be orally examined, but a court may at any time, for sufficient reason, order that all or any of the

² See para 1.2 of the Appellant's heads of argument.

³ See p.336 of the paginated bundle.

evidence to be adduced at any trial be given on affidavit or that the affidavit of any witness be read at the hearing, on such terms and conditions as to it may seem meet: Provided that where it appears to the court that any other party reasonably requires the attendance of a witness for cross-examination, and such witness can be produced, the evidence of such witness shall not be given on affidavit." [My emphasis].

[5] Dr. Pitsoane's report does not meet the requirements in Rule 38(2) above and as such, the Appellant could have challenged its admissibility just on this rule alone. For reasons that will be uncovered hereinafter, the Appellant chose not to do so. First, like all other reports handed in as evidence in this trial, it is not an affidavit as it was not made under oath. For the Appellant to turn a blind eye on this reasoning either during trial or now on appeal is comprehensible as this would have similar impact on its own reports too. That would mean that all those reports for which the authors did not give oral evidence should be excluded, and this was not viable for the Appellant.

[6] Secondly, the Appellant could have opted to exercise its right to cross examine the witness. Once a party in a litigation makes it clear that it wants to cross examine the witness, the court is obliged not to accept the affidavit (and in *casu*, the report) made by him/her. There was an application for a postponement by the Respondent in order to secure the presence of Dr. Pitsoane, alternatively for her report to be admitted and counsel for the Appellant was given an opportunity to respond. In response, counsel for the Appellant indicated that he had no objection to the admission of that report, choosing rather to present an argument on the content thereof. The Appellant did not argue against the admission of the report or advance the hearsay theories before the court *a quo*. These were only argued for the first time now on appeal.

[7] It was for that reason that the court *a quo* concluded in its judgment that "the report in question [by Dr. Pitsoane] forms part of the Defendant's bundle before [it] and it was not objected to by the Plaintiff, and that the only objection only related to the witness who attended court [Mr. Makahane]." ⁴ Had the Appellant raised the objections it raises now on appeal or indicated the desire to cross examine the witness before the

⁴ See para 10 of the court *a quo*'s judgment.

court *a quo*, chances are that the matter would have been postponed to allow the witness to be present in court. Failure to raise these at an opportune time is unfair to the Respondent who would now miss the opportunity to call this witness. It is therefore my respectful view that the court *a quo* cannot be faltered in making reference to this report as it did.

[8] On the other hand, the exclusion of the contended report would not bar the trial court from evaluating evidence that was properly before it to reach the conclusion as it did. It appears from the report of the Appellant's Educational Psychologist, Dr. Phetla, that the child was in Grade 2 when the accident happened in 2014. Then, she was nine years old. She did her Grade 1 in 2012 and repeated it in 2013. No school results for her performance prior to the accident were made available in the report. Her older siblings dropped off from school in Grade 10, 8, 7, and 6 respectively, and like their mother, they are all unemployed. Only two siblings are still studying and doing fairly better. One is a 15-year-old doing Grade 9 and a 22-year-old who is in tertiary. No details about his studies were provided. Information such as the name of the institution, the field of study or his performance in various grades, remains unknown. I am of the view that even on the Appellant's expert's reports including the supplementary reports, the court *a quo*'s conclusion and the award granted were properly reached when one looks at the role of the court when it comes to experts' evidence.

[9] The court's approach to experts' evidence has been described by Nicholaas JA in *Southern Insurance Association Ltd v Bailey NO*⁵ as follows,

"Any enquiry into damages for loss of earning capacity is of its nature speculative, because it involves a prediction as to the future, without the benefit of crystal balls, soothsayers, augurs or oracles. All that the Court can do is to make an estimate, which is often a very rough estimate, of the present value of the loss. It has open to it two possible approaches. One is for the Judge to make a round estimate of an amount which seems to him to be fair and reasonable. That is entirely a matter of guesswork, a blind plunge into the unknown. The other is to try to make an assessment, by way of mathematical calculations, on the basis of assumptions resting on the

⁵ 1984 (1) SA 98 (A) at p.113G-H and p.114A-B.

evidence. The validity of this approach depends of course upon the soundness of the assumptions, and these may vary from the strongly probable to the speculative. It is manifest that either approach involves guesswork to a greater or lesser extent. But the Court cannot for this reason adopt a *non possumus* attitude and make no award. See *Hersman v Shapiro & Co* 1926 TPD 367 at 379 *per* STRATFORD J:

‘Monetary damage having been suffered, it is necessary for the Court to assess the amount and make the best use it can of the evidence before it. There are cases where the assessment by the Court is little more than an estimate; but even so, if it is certain that pecuniary damage has been suffered, the Court is bound to award damages’

[10] In *Michael and Another v Linksfild Park Clinic PTY LTD*⁶ it was held,

“[I]t is perhaps as well to re-emphasise that the question of reasonableness and negligence is one for the Court itself to determine on the basis of the various, and often conflicting, expert opinions presented. As a rule, that determination will not involve considerations of credibility but rather the examination of the opinions and the analysis of their essential reasoning, preparatory to the Court's reaching its own conclusion on the issues raised.” This essential difference between the scientific and the judicial measure of proof was aptly highlighted by the House of Lords in the Scottish case of *Dingley v The Chief Constable, Strathclyde Police* 200 SC (HL) 77 and the warning given at 89D - E that:

‘(o)ne cannot entirely discount the risk that by immersing himself in every detail and by looking deeply into the minds of the experts, a Judge may be seduced into a position where he applies to the expert evidence the standards which the expert himself will apply to the question whether a particular thesis has been proved or disproved - instead of assessing, as a Judge must do, where the balance of probabilities lies on a review of the whole of the evidence.’

⁶ 2001 (3) SA 1188 (SCA) para 34 & 40.

[11] It would appear that the court *a quo* was alive to its role when it quoted⁷ and relied on *MS v Road Accident Fund*⁸ where Fisher J held

“36. The evaluation of the amount to be awarded for the loss does not involve proof on a balance of probabilities. It is a matter of estimation. Where a court is dealing with damages which are dependent upon uncertain future events - which is generally the case in claims for loss of earning capacity - the plaintiff does not have to provide proof on a balance of probabilities (by contrast with questions of causation) and is entitled to rely on the court’s assessment of how he should be compensated for his loss.

39. Actuaries rely on look-up tables which are produced with reference to statistics. Such statistics are derived, *inter alia*, from surveys and studies done locally and internationally in order to establish norms, representativeness, and means. From these surveys and studies, baseline predictions as to the likely earning capacity of individuals in situations comparable to that of the plaintiff are set. These baseline predictions are then applied to a plaintiff’s position using various assumptions and scenarios which should properly be gleaned from proven facts.

40. The general approach is to posit the plaintiff, as he is proven to have been in his uninjured state and then to apply assumptions as to his state with the proven injuries and their sequela. The deficits which arise between these scenarios (if any) are then translated with reference to the various baseline means and norms used. These exercises are designed with the aim of suggesting the various types of employment which would hypothetically be available to the plaintiff in both states. The loss would then be calculated as the difference in earnings derived between the pre- accident (or pre morbid state as it is often called) and post- accident or post morbid state.

41. In this exercise, uncertainty as to the departure from the norms, such as early death, the unemployment rate, illness, marriage, other accidents, and countless other factors unconnected with the plaintiff’s injuries which would

⁷ See para 13 of the court *a quo*’s judgment.

⁸ [2019] 3 All SA 626 (GJ) para 36-41.

be likely, in the view of the court, to have a bearing both on the established baseline used by the actuary and on the manner in which the plaintiff, given his particular circumstances, would fare as compared the established norm are dealt with by way of “contingency” allowances. Given the purported mathematical and percentage based inquiry of the actuarial assessment, these contingencies are expressed in percentages which are brought to bear on the mathematical reflections which have been derived from the assumptions used. In essence the platform for assessment is no more than one a technique which is offered to the court in a bid to allow it to exercise its discretion. This mechanism should not be understood as being prescriptive or confining of the assessment that the court is called on to make. The court has a wide discretion as to the assessment of loss. This task is judicial and is founded to a large extent on experience, intuition, and general right-thinking.”

[12] Given the above, I am of the view that the court *a quo* did not misdirect itself in evaluating the evidence before it. It follows therefore that the appeal should be dismissed. There shall be no costs order as the appeal was unopposed.

[13] For these reasons I propose the following order

14.1 The appeal is dismissed.

14.2 No order as to costs.

TV RATSHIBVUMO
JUDGE OF THE HIGH COURT

I agree

H ROELOFSE
ACTING JUDGE OF THE HIGH COURT

I agree and it is so ordered.

B MASHILE
JUDGE OF THE HIGH COURT

FOR THE APPELLANTS	: ADV TSHAVHUNGWA
INSTRUCTED BY	: NGOMANA & ASSOCIATES ATTORNEYS
	NELSPRUIT
FOR THE RESPONDENT:	: NO APPEARANCE
DATE HEARD:	: 04 FEBRUARY 2022
JUDGMENT DATE:	: 10 MARCH 2022