

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MTHATHA)**

CASE NO.: 3365/2017

REPORTABLE: NO

In the matter between:

NELISA WENDY MBIZO

Appellant

and

**OLD MUTUAL LIFE
ASSURANCE COMPANY (SA) LTD**

Respondent

APPEAL JUDGMENT

TOKOTA ADJP

Introduction:

[1] The appellant instituted a civil action against the respondent suing it for damages in the amount of R3 155 800 arising from an unlawful dismissal from her employment. The matter came before Mnyatheli AJ who ordered a separation of the merits from quantum in terms of rule 33(4) of the Uniform Rules of Court (the rules).

[2] The court adjudicated on the merits and the quantum was to be determined at a later date. It held that the dismissal of the appellant was unlawful. Consequently, the respondent was found to be in breach of the contract

of employment and was therefore found to be liable for damages as may be proved by the appellant.

[3] On 31 January 2022, the matter came before Rusi J for the determination of quantum and was finalized on 2 February 2022. Rusi J dismissed the claim with costs. The appeal is against that order with her leave to this court.

Background:

[4] To put the matter in proper context it is necessary to briefly outline the background. On 24 January 2009, the appellant concluded a written contract of employment with the respondent as a Financial Adviser. On 2 October 2014, she was dismissed from the employment.

[5] She sued the respondent for breach of contract and claimed damages in the amount of R3,1 million being the loss of income from the date of dismissal to a date when she would have retired at the age of 65 years.

[6] At the hearing before Rusi J, the appellant did not give evidence but called her expert witness who testified to prove her damages. The respondent also called its expert witness to counter the quantum claim. The respondent in its defence denied that the appellant suffered any damages and, alternatively, pleaded that she failed to mitigate the loss.

[7] The court a quo commented on her failure to give evidence as follows: It found that the information given to the experts by the plaintiff regarding the period of unemployment and circumstances leading to her decision to embark on studies after she lost employment constituted hearsay evidence. The learned Judge went further, however, and stated that these facts were undisputed and therefore there was no need for evidence. I immediately pause here to say I see things differently. Those facts were exclusively within the knowledge of the appellant and the respondent would not have been able to know them. The onus rested on the appellant to prove them by giving oral evidence which had to be tested.

[8] The court a quo correctly held that for the plaintiff to prove her actual loss she was obliged to tell the court how her dismissal was the direct cause of her inability to earn income from November 2014 to April 2017. It found that it was important for her to tell the court as to what informed her decision to embark on studies post her dismissal to enable the court to assess whether she took reasonable steps to mitigate her loss.

[9] The court a quo found further that considering the plaintiff's failure to give evidence to prove damages she allegedly suffered during the period of unemployment, there was no adequate factual basis for the court to determine her damages. The court held that she failed to prove her damages. It held that regard being had to the fact that there was a clause in the contract giving the employer the right to terminate the contract of employment upon notice, it would be untenable to think that the appellant would have remained in employment until the date of retirement.

The parties' submissions:

[10] Counsel for the appellant submitted that the court a quo in its reasoning revisited the merits of dismissal and it erred in this regard. He submitted that by finding that the employer had a right to terminate the appellant's employment in terms of a clause in the contract she was thereby revisiting the merits of dismissal whereas Mnyatheli AJ had already found that the dismissal was unlawful. He submitted that the court erred in putting the onus on the appellant to prove that she took reasonable steps to mitigate her loss after the dismissal. Counsel argued that the onus rested on the respondent to prove that the appellant did not take steps to mitigate her loss. He relied on the work of Walls SC, as then was, in *Labour Employment Law 1992: Butterworth's: Durban* at Article 40 and *McMillan v Mostert* 1912 EDL 183.¹ He contended that the court erred in speculating that the appellant would not have remained in employment until she retired considering the undisputed history of poor performance.

[11] Counsel for the appellant correctly put the issues for determination by this court as follows in his heads of argument in paragraphs 12-14:

'12 Fundamentally, the issue for determination is whether the Appellant, by not testifying in person, failed to prove damages in respect of her past and future loss of income.

13. Whether the expert evidence of Industrial Psychologists called by both parties does not have value in the absence of Plaintiff's testimony.

¹ See also *Everett v Marian Heights (Pty) Ltd* 1970 (1) SA 198 (C) at 201G

14. This court is enjoined in making a finding on whether the only way to prove damages for breach of contract is by having the Plaintiff testify in person...'

I agree. And essentially our debate with counsel during the hearing of the appeal centered around these issues.

[12] Counsel for the respondent contended that the testimony of the appellant was crucial to her claim on quantum. He submitted that her failure to testify deprived the respondent of an opportunity to cross-examine her on her claims that she suffered a loss of income, whether past or future in the amount claimed or any amount. He contended that the court a quo correctly regarded the evidence of her expert as hearsay evidence. He contended that the appellant's failure to testify resulted in the absence of a factual basis for a determination of any future loss of salary. Accordingly, so the argument went, the appeal ought to be dismissed.

Discussion:

[13] The function of an expert is to give an opinion on the facts and documents given to him by the client. He must then draw inferences from those facts and documentation. The reasonableness or otherwise of drawing inferences from such facts in support of the opinion can only be determined once the plaintiff's evidence has been tested.

[14] In *AM v MEC for Health*² Wallis JA described the functions of an expert witness in the following terms:

‘The functions of an expert witness are threefold. First, where they have themselves observed relevant facts that evidence will be evidence of fact and admissible as such. Second, they provide the court with abstract or general knowledge concerning their discipline that is necessary to enable the court to understand the issues arising in the litigation. This includes evidence of the current state of knowledge and generally accepted practice in the field in question. Although such evidence can only be given by an expert qualified in the relevant field, it remains, at the end of the day, essentially evidence of fact on which the court will have to make factual findings. It is necessary to enable the court to assess the validity of opinions that they express. Third, they give evidence concerning their own inferences and opinions on the issues in the case and the grounds for drawing those inferences and expressing those conclusions.’

[Footnotes omitted.]

[15] The Learned Judge continued and said: ‘The need for clarity as to the facts on which an expert's opinion is based has been stressed in several cases. In *Price Waterhouse Coopers v National Potato Co-operative Ltd*, the following passage from a Canadian judgment was cited with approval:

“Before any weight can be given to an expert's opinion, the facts upon which the opinion is based must be found to exist. As long as there is some admissible evidence on which the expert's testimony is based it cannot be ignored; but it follows that the more an expert relies *on facts not in evidence*, the weight given

² *AM and Another v MEC for Health*, Western Cape 2021 (3) SA 337 (SCA) at para 17.

to his opinion will diminish. An opinion based *on facts not in evidence* has no value for the Court.” [Emphasis added]

[16] The learned Judge of Appeal stated further: ‘The opinions of expert witnesses involve the drawing of inferences from facts. The inferences must be reasonably capable of being drawn from those facts. If they are tenuous, or far-fetched, they cannot form the foundation for the court to make any finding of fact. Furthermore, in any process of reasoning the drawing of inferences from the facts must be based on admitted or proven facts and not matters of speculation. As Lord Wright said in his speech in *Caswell v Powell Duffryn Associated Collieries Ltd*:

“Inference must be carefully distinguished from conjecture or speculation. There can be no inference unless there are objective facts from which to infer the other facts which it is sought to establish. . . . But if there are no positive proved facts from which the inference can be made, the method of inference fails and what is left is mere speculation or conjecture.”³ [Footnotes omitted]

[17] The Learned Judge continued and said:

‘Where the facts are central to the opinions of the experts, *courts should require that those facts be led in evidence* before the experts express their opinions. Primarily that is for the benefit of the court, which is thereby placed in a position where the expert's opinion can be assessed, and, if need be, queried or elucidated, in the light of the factual material before it. It is also conducive to fairness in cross-examination of the experts on behalf of the defendants. Where

³ Ibid paras.20-21; HAL obo MML v MEC for Health, FS 2022 (3) SA 571 (SCA) ([2021] ZASCA 149) paras.212-213;

the case comes on appeal it facilitates a reading of the record. Lastly, if this principle is borne in mind and objections are upheld to leading the expert evidence without a proper factual foundation being laid, that should avoid situations, such as that in *Madikane*, where the case was conducted entirely on the basis of expert evidence without any factual foundation at all for the opinions being expressed.⁴ [Emphasis is mine]

[18] Here we have two opposing opinions of the experts for both parties. In such a case, then for the party, upon whom the onus rests, to get a judgment in his favour, he must get the court to accept his evidence and reject that of the other party. Otherwise, absolution from the instance must be granted.⁵ The test on absolution is whether the evidence of the appellant has the potential for a finding in her favour. The criterion is slightly lower than that of a prima facie case. The evidence need not call for an answer; it is sufficient if there is a possibility that a court acting reasonably may find in favour of the plaintiff.

[19] This principle has been restated in the case of *Rosherville Vehicle Services (Edms) Bpk v Bloemfonteinse Plaaslike Oorgangsraad*⁶ as follows:

'Die maatstaf wat vir die aansoek gebruik word, moet dus daarop gerig wees om te bepaal of die eiser se getuienis die potensiaal vir 'n bevinding in sy guns het. . . . Die maatstaf is dus 'n rapsie laer as die van 'n prima facie saak: die getuienis hoef nie 'n antwoord te verg ('call for an answer') nie. Nogtans moet dit egter die

⁴ At para.215

⁵ *National Employer's Mutual General Insurance Association v Gany* 1931 AD at 199;

⁶ 1998 (2) SA 289 (O) at 293F-G

moontlikheid van 'n bevinding vir die eiser inhou: 'n redelike hof moet daarop ten gunste van die eiser kan bevind. . . ."

Translated as (The criterion used for the application must therefore be aimed at determining whether the claimant's evidence has the potential for a finding in his favour. . . . The standard is therefore slightly lower than that of a prima facie case: the evidence does not need to require an answer ('call for an answer'). Nevertheless, it must contain the possibility of a finding for the plaintiff: a reasonable court must be able to find in favour of the plaintiff. . . .)

[20] Regard being had to the appellant's family problems, her state of health, being in and out of hospital which probably resulted in the deterioration of her work performance, and her decision to embark on studies, her evidence would have thrown some light as to the viability of her retention in her position and the prospects of promotion as projected by her expert. Having elected not to give evidence the court was deprived of firsthand information in this regard

[21] The above discussion deals with all the issues for determination. Accordingly, to begin with, the appellant, by not testifying in person, failed to prove her damages but there is still a possibility that if she testifies, she might prove them. I agree with the view that if an expert expresses his opinion without relying on proven facts in evidence, the weight to be given to his opinion will diminish.

[22] It is implicit in the reasons for judgment as appears from the judgment of the court a quo that judgment was not granted against the appellant on the basis

that she had failed to prove any of the facts which constituted the appellant's cause of action. What was found is that the appellant's reliance on the expert's evidence, instead of herself giving evidence, resulted in her failure to prove the quantum of her claim as such evidence constituted hearsay evidence. However, in my view, the court a quo erred in dismissing the claim and should have granted an absolution from the instance.

Costs:

[23] Counsel for the appellant contended that if this court holds that an absolution from the instance should have been granted then in that event costs should be costs in cause determinable at the end of the case. Counsel for the respondent persisted that the court a quo was correct in dismissing the claim and we should then dismiss the appeal with costs.

[24] The award of costs rests with the discretion of the court which must be exercised judiciously. The general rule is that costs should follow the event. The central inquiry in each case must be whether, when all the factors have been taken into account, it is in accordance with the requirements of the law and fairness to award costs.

[25] The alteration on appeal of a judgment which was in favour of a defendant to one of absolution from the instance does not necessarily entitle the appellant to the costs of the appeal. It may be that such an alteration of the judgment does not have a substantial effect but is merely formal in nature, in which case a costs order in favour of the appellant would not be justified. In the present case, however, no evidence was adduced by either party and it cannot

be said at this stage that it would be fruitless for the appellant's case even if she presented evidence.⁷

Order

[26] In the result, the following order is issued:

1. **The appeal is upheld with each party to pay its own costs.**
2. **The judgment of the court a quo is set aside and substituted with 'Absolution from the instance with costs.'**

B R TOKOTA

ACTING DEPUTY JUDGE PRESIDENT EASTERN CAPE DIVISION

I agree:

M MAKAULA

JUDGE OF THE HIGH COURT EASTERN CAPE DIVISION

I agree:

M HINANA

ACTING JUDGE OF THE HIGH COURT EASTERN CAPE DIVISION

APPEARANCES:

Counsel for the Appellant : B Metu

Instructed by T A Nkele & Sons Inc

⁷ *Shahmahomed v Hendriks and Others*, 1920 AD 151 op bl. 171; *Kruger v Sekretaris van Binnelandse Inkomste* 1970 (4) SA 687 (A) at 692B

Counsel for the Respondent : E A De Villiers-Jansen SC

Instructed by Cliffe Dekker Hofmeyer

Heard on 29 April 2024.

Date delivered: 14 May 2024.

: