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**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
(LIMPOPO DIVISION, POLOKWANE)**

Case Number: 873 / 2019

(1) REPORTABLE: **YES/NO**

(2) OF INTEREST TO OTHER JUDGES: **YES/NO**

(3) REVISED: **YES/NO**

DATE: 24 Oct 2024

SIGNATURE:

In the matter between:

P[...] M[...] M[...]

PLAINTIFF

and

ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT

MARAIS C AJ:

INTRODUCTION:

[1] As law students, we often questioned the relevance of studying old philosophers' works. To some, philosophy was a difficult topic to grasp or pass on your first attempt. I found myself in the situation before me, seeking the advice of old philosophers on

whether the evidence of an expert witness must be simply accepted as true and correct or whether we, as lawyers and jurists, should delve deeper and ask the more difficult question of whether the expert reports or recommendations make logical and reasonable sense.

[2] In claims against the Road Accident Fund, we depend significantly on specialists to assess the fairness and equity of a plaintiff's claim and, if deemed valid, to ascertain a reasonable and just compensation sum under the circumstances.

[3] It is crucial for attorneys or trust advocates seeking expert reports to engage specialists who comprehend the fundamental principles of civil procedure legislation, particularly the regulations governing the presentation of evidence in court. Neglecting to accomplish this constitutes a tragedy for jurisprudence and reveals a deficiency in the expert's adherence to their own ethical standards and code of conduct.

[4] On 23 July 2016, at around 16:18, the Plaintiff, a fifty-year-old adult female at the time, was a passenger in a taxi with registration number [D.....GP] and a trailer that was hitched to the taxi with registration number [KR..GP] (the "vehicle" or "taxi") when it was engaged in an accident. T.T. is said to have been the driver of the taxi. Further allegations state that the taxi overturned while travelling from Mokopane to Polokwane on the N1, where the driver allegedly lost control of the vehicle due to a burst tyre.

[5] The Plaintiff pleaded that because of the negligent driving of T.T., she suffered injuries as follows:

- a. L1 compression fracture.
- b. C-spine fracture.
- c. Pelvis fracture.
- d. Loss of control of the anal sphincter.
- e. A left ankle fracture.
- f. Below knee backslap.

[6] In her particulars of claim, the Plaintiff also stated that she was initially admitted to Mankweng Provincial Hospital and subsequently transferred to CN Phatudi Hospital. Her ongoing pain and suffering, which will persist, are a result of her sustained injuries. She is currently experiencing psychological trauma, which will continue. She has required hospital and medical treatment and will require additional medical care. She has lost and will continue to lose amenities. She has incurred a loss of earnings and future earning capacity. Additionally, she has lost full anal sphincter control, necessitating the use of adult nappies..

[7] On 12 June 2023, the Honourable Kganyago J granted an order whereby the issue of merits and quantum were separated, as provided for in rule 33(4) of the Uniform Rules of Court (or “rules of Court”) and that the Defendant is 100% liable on the merits in favour of the Plaintiff. The issue of quantum was postponed *sine die*.

[8] The matter came before me for the first time on 09 October 2023. I was called upon to determine the issue of quantum. However, no notice of set down was served upon Defendant, and Plaintiff failed to file heads of argument. I postponed the matter to 18 October 2023 and ordered Plaintiff to serve and file a notice of set down upon Defendant, forthwith, and further to file heads of argument on or before 17 October 2023.

[9] The Defendant's intention to defend the matter and their plea, which included three special pleas, necessitated that the matter be properly brought to their attention. The special pleas pertaining to general damages are not to be adjudicated upon at this juncture. The Defendant's plea contains a bare denial. After filing their special pleas and plea, the Defendant took no further steps.

[10] When I received the heads of argument and began reading through the expert reports, which were accompanied by their expert affidavits, I noticed that the expert reports were more than two years old, prior to the hearing of the matter (some dating

back as far as 2018 and 2019) and that several of the experts' signatures on their reports, differed significantly from their signatures on their expert affidavits.

[11] On 18 October 2023 the matter proceeded on default. I issued an order directing the Plaintiff to submit updated expert reports that were no older than two years at the time of the hearing in this matter. Additionally, I directed that several experts be subpoenaed to appear before me and provide an explanation for the discrepancy between their signatures on their affidavits and those of the reports. The matter was subsequently removed from the roll, costs to be costs in the cause. It is important to note that the Plaintiff's counsel conceded that only two of the eight expert reports and affidavits filed bore identical signatures, while six expert signatures were distinct.

[12] To facilitate the experts who were subpoenaed to appear on 26 April 2024, I permitted the matter to be heard virtually, as a significant number of them practised outside of Polokwane. The matter was unable to proceed on this day due to the Plaintiff's counsel's connection issues and difficulties with some of the experts. Further, the Plaintiff neglected to submit the updated expert reports in accordance with my order dated 18 October 2023. I subsequently had to postpone the matter *sine die* to allow the Plaintiff to file heads of argument and coordinate with local experts to appear in person in court on the next appearance date. Only those experts who practised outside of Polokwane would appear virtually. The virtual appearance would occur in an open court.

[13] The matter was subsequently set down for 25 September 2024. A formal notice of set down was delivered to the Defendant, but the Plaintiff specified in the notice that the hearing was scheduled for 25 to 27 September 2024. The matter was never certified trial-ready for three days.

[14] On 25 September 2024, the hearing proceeded partially in person in open court and partially in a virtual format, which was also held in open court. Only five expert witnesses attended. The matter proceeded on the issue of loss of past and future

earnings only. The determination of general damages was postponed *sine die* at the request of the Plaintiff's counsel, as Defendant had not yet accepted or rejected it.

EXPERT EVIDENCE

[15] The first expert witness summoned was Ms SP Pale, an occupational therapist. She appeared in person and stated under oath that she received her qualification from the University of Cape Town and has been working as an occupational therapist since 2016. Ms Pale was shown her expert reports and expert affidavits, and she conceded that the signatures were different. This, she attributed to the fact that when she signed her report electronically, she did so in a 'more clearer' manner than she would ordinarily sign a document by hand. Ms Pale indicated multiple times that the attorneys (presumably the Plaintiff's attorney on record) brought the expert affidavit to her Polokwane office, where she signed it [alone]. She later changed her version, claiming that she went to a commissioner of oaths office with the attorneys on 26 July 2023, and signed the affidavit in front of him. She also signed an additional affidavit on 22 November 2023, based on her updated expert report. The signatures on the two affidavits also differ from each other.

[16] In Ms. Pale's updated report, she states that the Plaintiff's highest grade achieved in school was grade 9 and that she obtained a "Masecho Clothing Certificate of dressmaking". From 1996 to 2016, the Plaintiff was self-employed as a dressmaker. Her work required light physical labour.

[17] After administering an objective "FCE ErgoScience" test meant to elicit the ability to satisfy the physical demands of any occupation, Ms Pale concluded that Plaintiff will only be able to perform sedentary to never lifting labour in terms of dynamic strength exercises. Plaintiff's posture tolerance level ranged from sedentary to never. The mobility task demonstrated that the Plaintiff could perform light to sedentary motion. Plaintiff's overall balance was moderate, and her tolerance for an 8-hour workday or 40-hour work week was also sedentary.

[18] The expert opined that Plaintiff will *“always struggle to find employment”* regardless of her work experience and that it would be impossible for her to continue running her own business *“as a self-employed seamstress due to her impaired working speed and severe pain and impairments post the accident”*.

[19] Dr. Ramushu was the second witness called to testify, and she was present in person. She has been practising as a specialist Orthopaedic Surgeon for the past 12 years. Dr. Ramushu conceded that the signatures on her expert report and the affidavits subsequent thereto differ. She explained that the initial expert report contained her "long" signature, which she has since "shortened," which is why the signatures differ. Dr Ramushu testified that she signed the affidavits before a commissioner – the same commissioner before whom Ms Pale allegedly signed her affidavit.

[20] Dr Ramushu's report states that the Plaintiff had no scar on her left ankle, and it was healed. There was a bony swelling over the lateral malleolus, and there was no tenderness of the ankle joint. On her lower back, there was also no tenderness. Tension signs were negative. Her left leg had power of 4 out of 5 from L4 to L5. The Plaintiff was wearing adult diapers during the consultation as she suffers from poor perianal sensation and anal tone. Her reflexes were normal and there were no other obvious abnormalities detected. An X-ray showed that the left ankle had bony deformity distal fibula with normal ankle mortise, with a loss of height at L1. There was scoliotic deformity at the thoracolumbar junction and faecal loading. A malunited L1 compression fracture was observed with Cauda Equina syndrome.

[21] In conclusion, the expert stated that the Plaintiff has reached her maximum level of medical improvement and that she will have some discomfort with closed shoes and should be afforded excision of the bony deformity. For pain, the Plaintiff regularly uses analgesia, and she is also on antiretroviral medical treatment.

[22] The third witness called to testify was Ms M Kheswa, an industrial psychologist. She appeared virtually. Her practice is situated at 386 Justice Mohamed Street, Pretoria. She has been practising as an industrial psychologist for more than 15 years.

[23] Ms. Kheswa was informed that her signatures on the two medico-legal reports and subsequent affidavits are inconsistent. Ms. Kheswa clarified that she utilised a "kokie-pen" to execute her electronic signature on the reports, while she utilised a standard pen to sign the affidavits. The affidavit was received by her *via* email, printed, and signed at her office. No one else was present when she signed it. Subsequently, she instructed her secretary to return the signed document to the attorney *via* courier. The initial affidavit was ostensibly executed on 28 August 2023, in the presence of a commissioner at the South African Police Service ("SAPS") in Garsfontein. The second affidavit was purportedly signed on 22 November 2023, in the presence of the same commissioner who signed the affidavits of the first and second witnesses. However, Ms Kheswa claims that she is unaware of the date or location of the 'commissioning', as she was not present.

[24] The first expert report by Ms Kheswa is dated 19 July 2021 (the "July 2021 report"), and the second report is dated 17 November 2023 (the "November 2023 report").

[25] In the July 2021 report, it is recorded that the Plaintiff's immediate family is "Florah", her mother, who was born in 1945, uneducated and a pensioner. Her son, "Alona" was born in 1986 (thus aged 35 at the time of the report) and allegedly in grade 11. Her daughter, "Khomotso" was born in 1995 and had a degree in education and was an educator. The last-born child of the Plaintiff is a girl, "Dineo" born in 2009 and was in grade 7 at the time of compiling the report.

[26] It was recorded that the Plaintiff resided in a "02-bedroomed house with her family". After the accident, the Plaintiff was diagnosed with arthritis. Plaintiff stated to the expert that she obtained grade 7 at "Nekane Primary School" but could not recall in

which year. There is also no documentary evidence to prove this. From 1992 to 1995 the Plaintiff was a dressmaker at Lebowakgomo Masetlho Clothing and earned approximately R280.00 per month. From 1995 to the date of the accident, the Plaintiff was self-employed as a hawker and vendor selling chickens, mopane worms, school clothes and various other items. She made a profit of approximately R4'000.00 to R5'000.00 per month – without any documentary proof to support this. After the accident, the Plaintiff was allegedly hospitalised at the Polokwane Provincial Hospital for “14 days” and then transferred to Phatudi Hospital for an unknown period, and then transferred back to Polokwane where she spent “at least 02 months”. This report vastly differs from the November 2023 report.

[27] In the November 2023 report, it is recorded that Plaintiff's immediate family is “Norah”, her mother, who was born in 1945, uneducated and a pensioner. Her son, “Apnah”, was born in 1986, completed grade 12 and obtained an N5 Mechanical Engineering qualification. Her daughter, “Khomotso” was born in 1995 and had a degree in education and was an educator. The last-born child of the Plaintiff is a girl, “Dino” born in 2009 and was in grade 9, when the report was compiled.

[28] It was further recorded in the November 2023 report that the Plaintiff resided in a 07-roomed house with her family and has been a Government Disability Grant beneficiary since 2014 – which date was prior to the accident. The allegation of being diagnosed with arthritis after the accident was not confirmed in this report. Plaintiff stated to the expert that she obtained grade 9 at “Segalajwan High School” and again could not recall in which year, and there was no documentary evidence to prove this. The Plaintiff did not give a timeframe for her first employer but stated that she worked for “01 Rack Room” and earned approximately R3'400.00 per month. Then, from 2005 to the date of the accident, Plaintiff was allegedly a self-employed informal trader who made a profit of approximately R5,200.00 to R12,200.00 per month. There is no documentary evidence to prove this alleged income. After the accident, the Plaintiff was allegedly hospitalised at the Polokwane Provincial Hospital for three weeks and then transferred to Dr CM Phatudi Hospital for “01 months and 01 week” (sic).

[29] As a consequence of the accident, the expert determined that the Plaintiff suffered a loss of earnings, as she was unable to resume her informal trade and will unlikely do so in the future. The expert is of the opinion that the Plaintiff could have continued trading until the age of 65 to 70 had the accident not occurred. In November 2023, the Plaintiff was 57 years old at the time of the report's filing. Curiously, the expert did not request that Plaintiff provide bank statements from after the accident to demonstrate whether she continues to earn money as a trader. Additionally, it is crucial to bear in mind that informal traders typically engage in cash transactions.

[30] The fourth witness called to testify was Dr Mazwi, a neurosurgeon by profession. He appeared virtually. He confirmed that he has been in practice for approximately 10 years, and his practice is situated at Office 1035 Stanza Bopape Street, Hatfield, Pretoria.

[31] Dr. Mazwi confirmed under oath that he received the expert affidavit *via* email, printed it, and subsequently signed it. He was alone when he affixed his signature to the alleged affidavit. He subsequently gave the document to his secretary, who couriered it back to the attorney on record.

[32] Dr. Mazwi signed two purported affidavits to verify his expert reports. The initial purported affidavit was signed on 25 August 2023 and 'commissioned' at Postnet Brooklyn Mall. However, the stamp does not indicate that it was commissioned; rather, it indicates that it is a certified true copy. The second alleged affidavit was commissioned at Postnet Brooklyn Mall on 03 November 2023. Dr. Mazwi maintained that he did not sign the documents at Postnet, Brooklyn Mall, but rather at his office, where he was alone at the time.

[33] According to the expert, the Plaintiff sustained a mild head injury as a consequence of the accident with a Glasgow Coma Scale of 15/15. Dr. Mazwi confirmed that the Plaintiff has substantial long-term mental disturbance. The matter

was referred to a neuropsychologist. She additionally sustained a compression fracture of the lumbar spine at L1, with neurogenic bladder dysfunction. In addition, the Plaintiff struggles with chronic migraines and bowel dysfunction. She further sustained a left ankle injury that was deferred until she could be seen by an Orthopaedic surgeon.

[34] Dr Mazwi's conclusion is that the Plaintiff suffered a combined whole person impairment of 41% and qualifies for compensation for general damages. Whereas I am only called upon to adjudicate the loss of earning capacity, this issue will not be taken further at this stage.

[35] Dr Baloyi, an independent medical assessor with a practice in Polokwane, was the fifth witness to testify, which he did virtually. He verified that he has been a medical assessor for the past six years and has been a doctor for the past 13 years.

[36] Dr. Baloyi was informed that the signatures on his expert reports and those appended to this 'affidavit' differ substantially. Dr. Baloyi conceded the significant discrepancy in the signatures but provided an explanation for the discrepancy: the reports were signed electronically, while the affidavits were signed in person. The signatures of the two expert reports, signed electronically, are also distinct. In response, Dr. Baloyi clarified that he used a different laptop for the first report compared to the second report. His new laptop bore an electronic signature that was distinct from his previous one.

[37] Dr. Baloyi further confirmed that hard copies of the affidavits were delivered to his practice, in Polokwane, for signature. It was presented to him by his secretary, and he signed it whilst being alone. Dr. Baloyi maintained that he did not sign the document before a commissioner of oaths. The initial purported affidavit was executed on 12 July 2023, and the subsequent one was executed on 24 October 2023. Before two distinct attorneys, the two purported affidavits were 'commissioned'.

[38] I afforded the Plaintiff's counsel an opportunity to reply or raise questions after I questioned the experts, but he stated that he had no further questions. This was an opportunity missed by the counsel, as he could have clarified the issue of why the signatures were not appended before a commissioner of oath. His silence on this issue causes a negative inference to be drawn.

[39] Two expert reports and subsequent affidavits thereto were prepared by Ms M Lebese, a clinical psychologist. Her signatures appended to her two reports and the subsequent affidavits appeared to be similar and she was not called to testify in person or virtually. I accepted her report and subsequent affidavit, as provided for in rule 38(2) of the rules of this Court.

[40] After consulting with the Plaintiff, Ms Lebese confirmed in her report that the Plaintiff has been taking retroviral medication since 2015 (which is before the date of the accident) and has never had any mental or cognitive issues before the accident. The Plaintiff confirmed to Ms Lebese that she had only attended school till Form 2. Prior to the accident, she was an informal trader. The Plaintiff informed Ms. Lebese that she was unable to continue operating her dressmaking business because her sewing machine had been stolen. This version differs from the information given to the other experts. To the other experts, she stated that she is unable to work as a result of her injuries suffered.

[41] The clinical psychologist performed numerous tests on the Plaintiff, and the expert concluded that the Plaintiff suffers from moderate to severe depression symptoms. Her neurological test results indicate minor cognitive deficits such as below-average to average memory and attention and/or concentration. From a neuropsychological standpoint, the expert determines that the Plaintiff has reached the point of maximum medical improvement, with no further significant and spontaneous recovery expected. The Plaintiff has lost amenities of life as a result of the accident, which also affected her emotional, psychological, social, occupational, cognitive, physical, and interpersonal functioning.

[42] An actuary report was compiled by Mr DT Mureriwa from One Pangaea Expertise and Solutions, situated in Pretoria. The actuary also compiled two different reports based on the different or updated expert reports. In his second report (based on the November 2023 report), he opined that the purported profit that the Plaintiff states she earned as an informal trader, which ranged between R5'200.00 and R12'500.00 per month, seems to be above the upper quartile of self-employed individuals in the informal sector per Robert Koch 2016 - given the Plaintiff's level of education, expertise and capacity to work.

ANALYSIS OF THE EVIDENCE

[43] The industrial psychologist does not provide a rationale for the substantial discrepancies between the two reports. The November 2023 report, the second to be compiled by this expert, appears to have been deliberately exacerbated. The Plaintiff's assessment of past and prospective earnings is excessively inflated, as evidenced by the industrial psychologist's data analysis. This, in turn, had a direct impact on the actuary's calculations.

[44] I agree with the actuary when he states the income allegedly earned by the Plaintiff seems to be above the upper quartile of self-employed individuals in the informal sector. More so, as the expert did not have any documentary evidence to prove what the Plaintiff's income was prior to the accident.

[45] Our courts have held that an individual undergoing retroviral treatment is not inherently considered to have a diminished life expectancy. Nevertheless, life expectancy can only be ascertained after a thorough examination of the individual's prior medical treatment records. This was not done. The Plaintiff commenced her treatment before the accident.

[46] The estimates were conducted without considering that informal traders or hawkers, who were significantly impacted by the Covid-19 pandemic, were unable to work at all. They were legally barred from travelling to purchase products for subsequent resale door-to-door or on the streets. This factor also had to be taken into account when assessing the loss of earnings.

[47] The estimates presented in the actuarial report dated 01 August 2021, appear to be rational and coherent, only in as far as it was considered based on the July 2021 report, considering the Plaintiff's pre- and post-morbid conditions—encompassing physical, mental, and emotional aspects, as well as the prevailing economic circumstances. The Plaintiff's age, as well as the fact that she is a beneficiary of a disability and/or old age grant, ought to have also been the primary determining factor. The latter was not considered when the calculations were done.

[48] The actuary applied a 5% contingency for past loss of earnings and 15% for future loss. Uninjured, the actuary opines that the Plaintiff could have earned R313'955.00 and post-morbid, she could suffer a loss of earnings in the amount of R801'985.00. These figures are without the proposed contingencies of 5% and 15%, respectively.

LEGAL PRINCIPLES AND DISCUSSION:

[49] Expert witnesses are called upon to provide opinions on the facts pertaining to their expertise. If their expert reports rely on hearsay rather than substantive evidence to substantiate their opinions, the reports are of little assistance to the Court.

[50] When an expert relied on hearsay evidence in formulating their report, as the industrial psychologist did in this instance, it was the obligation of the Plaintiff's counsel to challenge the hearsay evidence to guarantee its admissibility and appropriate evaluation by this Court. The counsel failed to meet this requirement, despite the clear necessity, as the expert reports significantly differ from one another.

[51] In trials, it is customary for any party aware of the potential introduction of hearsay evidence to invoke a limited sanction under the provisions of section 3(3) of the Law of Evidence Amendment Act 45 of 1988. When the scope of the evidence is restricted, and its admissibility may be disputable, it may be suitable to admit it provisionally to allow the trial to proceed. The party requesting the admission of hearsay evidence must then seek leave from the Court to have the evidence deemed admissible.

[52] As to the nature of an expert's opinion, Wessels JA stated that '*an expert's opinion represents his reasoned conclusion based on certain facts or data, which are either common cause, or established by his own evidence or that of some other competent witness. Except possibly where it is not controverted, an expert's bald statement of his opinion is not of any real assistance. Proper evaluation of the opinion can only be undertaken if the process of reasoning which led to the conclusion, including the premises from which the reasoning proceeds, are disclosed by the expert.*'¹

[53] As quoted in the case of **PriceWaterhouseCoopers Inc & Others v National Potato Co-Operative Ltd & Another 9451/20120 [2015] ZASCA 2 (4 March 2015)**² "Courts in this and other jurisdictions have experienced problems with expert witnesses, sometimes unflatteringly described as 'hired guns'. In **The Ikarian Reefer**³ Cresswell J set out certain duties that an expert witness should observe when giving evidence. Pertinent to the evidence of Mr in this case are the following:

¹ *Gentiruco AG v Firestone SA (Pty) Ltd 1972 (1) SA 589 (AD) at 616H; See also Wigmore on Principles of Evidence (3ed) Vol VII para 1923; Coopers (South Africa) (Pty) Ltd v Deutsche Gesellschaft für Schädlingsbekämpfung MBH 1976 (3) SA 352 (A) at 370G-H and at 371F-H.*

² Para 98.

³ *National Justice Compania Naviera SA v Prudential Assurance Co Ltd ('The Ikarian Reefer') [1993] 2 Lloyd's Rep 68 [QB (Com Ct)] at 81 – 82. Approved in *Pasquale Della Gatta, MV; MV Filippo Lembo; Imperial Marine Co v Deilemar Compagnia Di Navigazione Spa 2012 (1) SA 58 (SCA) para 27, fn 12 and Schneider NO and Another v AA and Another 2010 (5) SA 203 (WCC) at 211E-I.**

'The duties and responsibilities of expert witnesses in civil cases include the following:

- 1. Expert evidence presented to the Court should be and should be seen to be the independent product of the expert uninfluenced as to form or content by the exigencies of litigation ...*
- 2. An expert witness should provide independent assistance to the Court by way of objective unbiased opinion in relation to matters within his expertise ... An expert witness in the High Court should never assume the role of advocate.*
- 3. An expert witness should state the facts or assumptions on which his opinion is based. He should not omit to consider material facts which detract from his concluded opinion.*
- 4. An expert witness should make it clear when a particular question or issue falls outside his expertise.'*

*These principles echo the point made by Diemont JA in **Stock**⁴ that: 'An expert ... must be made to understand that he is there to assist the Court. If he is to be helpful he must be neutral. The evidence of such a witness is of little value where he, or she, is partisan and consistently asserts the cause of the party who calls him. I may add that when it comes to assessing the credibility of such a witness, this Court can test his reasoning and is accordingly to that extent in as good a position as the trial Court was.'*

[54] Legal principles and tools for evaluating credibility and dependability stipulate that before any significance can be attributed to an expert's opinion, the underlying facts must be established as existent. Provided there exists admissible evidence underpinning the expert's testimony, it cannot be disregarded. However, it follows that

⁴ *Stock v Stock* 1981 (3) SA 1280 (A) at 1296 E-G.

the more the expert's reliance on facts not in evidence, the lesser the weight accorded to their opinion. A factually unsupported opinion holds no merit for the Court.⁵

[55] The probative value of expert testimony is regarded similarly to that of a standard witness's testimony. The Court is not obligated to adhere to the expert witness's opinion. The objectivity of an expert witness and the credibility of their opinions may be questioned, particularly when they agree to fulfil their role in a limited capacity, present a product shaped by the demands of litigation, exhibit a lack of independence or bias, possess a vested interest in the litigation's outcome due to a relationship with the retaining party or otherwise, advocate for the position of the retaining party, or selectively analyses only the evidence that corroborates their conclusions or exclusively consider the evidence supplied by the retaining party.⁶

[56] The acceptance of the expert reports is further complicated by the improper commissioning of their subsequent affidavits. The bulk of the experts testified under oath that they did not sign the declarations before a commissioner but rather independently at their offices. If not properly commissioned, those affidavits must be rejected. Consequently, the expert report that the disregarded affidavit was intended to validate should also be rejected, or at the very least, minimal weight should be attributed to the opinions indicated therein.

[57] I am disinclined to believe the occupational therapist's amended version that she signed her affidavit before a commissioner. She asserted this subsequent to repeatedly claiming that she signed it in her office. In my view, after evaluating how most other experts executed their declarations independently at their respective offices, it is likely that the occupational therapist also signed her declaration at her office rather than before a commissioner of oaths.

⁵ As quoted in the case of *PriceWaterHouseCoopers Inc & Others v National Potato Co-Operative Ltd & Another* (451/2012) [2015] ZASCA 2(4 March 2015) at para 99.

⁶ Ibid.

[58] I am of the view that the industrial psychologist did not satisfy the criteria for an expert witness. First, she failed to establish a foundation for her status as an expert witness in a trial, with the exception of her industrial psychology credentials. Secondly, her assessments were substantially predicated on unverified evidence that she had obtained from the Plaintiff rather than on established facts. Third, her testimony, when viewed objectively, was merely that of an advocate advocating for the Plaintiff. Fourth, it was not objective; rather, it was intended to substantiate the conclusions she had reached. Fifth, whereas she did not sign the affidavits before a commissioner of oaths and the vast discrepancies between her two reports, should weigh adversely against her.

[59] Although the Plaintiff endeavoured to substantiate her loss of earnings via the report and calculations of the industrial psychologist and the actuary who based his report on the findings of the industrial psychologist, the actuary's calculations lack evidentiary weight due to the fact that I am unable to accept the industrial psychologist reports and affidavits, as (a) their reliance on reports and subsequent declarations, were not properly commissioned and sworn to under oath and (b) the significant discrepancies between the two reports. No rationale is provided for the discrepancy between the first report, which states that the Plaintiff earned between R4,000.00 and R5,000.00 per month before the accident, and the second report, which indicates an average monthly income of R5,200.00 to R12,200.00. An inference is drawn that the industrial psychologist did not base her report on factual information but rather on unverified evidence or unestablished facts. If it were grounded in verified facts, the figures would not have varied so significantly.

[60] In ***A M and Another v MEC for Health, Western Cape 2021 (3) SA 337 (SCA)*** at para 21, the SCA stated:

“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.'

[61] In addition to the industrial psychologist's reliance on hearsay evidence for her report, a document within the Hospital Records Bundle A⁷ requires more scrutiny about the loss of earnings and earning ability. This document headed "Dept of Health & Social Deve" contains every information regarding the Plaintiff, excluding her employment data. It is reasonable to anticipate that if the Plaintiff were self-employed, as claimed, she would have included such information in this document. However, this section of the document was not completed, giving the impression that the Plaintiff was unemployed.

[62] Jurisprudence must evolve, and during its evolution, it should consider the contemporary environment, including advancements in technology and socio-economic aspects. In other words, jurisprudence will perpetually be orientated towards the future. To do this and envision the future, we must first reflect on history and revert to the fundamental principles of law.

[63] Descartes is renowned for his methodological scepticism. He contended that one ought to question whatever can be doubted, even expert witness, until reaching an indubitable conclusion. Although he did not explicitly address expert witnesses in contemporary terms, his philosophy implies that we ought to exercise caution in accepting others' knowledge without rigorous scrutiny.⁸

⁷ Page 80.

⁸ Descartes' *Meditations on First Philosophy* (1641); See also: <https://1000wordphilosophy.com/2018/08/04/descartes-meditations-1-3/> accessed on 14 October 2024.

[64] John Locke contended that specialists, while frequently dependable, are vulnerable to human limits. He underscored the significance of personal reasoning and scepticism, arguing that we ought to critically evaluate expert testimony and use our own judgment to determine its authenticity. According to Locke, reliance on specialists should not supplant the necessity for individual investigation and logical reasoning.⁹

[65] Karl Popper highlighted the fallibility of all human knowledge, encompassing expert opinion, within the philosophy of science. Popper indicated that experts may be erroneous and should not be accepted uncritically. He thought that scepticism and the continual interrogation of authority were vital for the progression of knowledge.¹⁰

[66] Recently, philosophers such as Collins and Evans have explored the concept of "interactional expertise." They contend that non-experts can occasionally confront specialists effectively, especially when they possess sufficient knowledge of the domain to engage critically. This viewpoint endorses a prudent stance towards expert testimony, promoting informed scepticism.¹¹

[67] Upon examining the philosophical foundations of our legal system, modern jurisprudence, and the specific evidence the Plaintiff was required to establish, logic dictates that I treat the expert findings with considerable scepticism.

[68] The financial compensation resulting from the injuries experienced in an accident caused by the Defendant must be substantiated. The Plaintiff bears the burden of proving each pertinent fact from which these conclusions may be inferred based on a balance of probabilities.¹²

⁹ *An Essay Concerning Human Understanding* (1690); See also: https://www.philotextes.info/spip/IMG/pdf/essay_concerning_human_understanding.pdf accessed on 14 October 2024.

¹⁰ *The Logic of Scientific Discovery* (1934) and *Conjectures and Refutations* (1963); See also: <https://philotextes.info/spip/IMG/pdf/popper-logic-scientific-discovery.pdf> accessed on 15 October 2024.

¹¹ Harry Collins and Robert Evans: *Rethinking Expertise* (2007)

¹² *Evins v Shield Insurance Co Ltd* [1980] 2 All SA 40 (A) at 58.

[69] The Plaintiff's claim for past and future loss of earnings must thus be dismissed. In the absence of admissible evidence presented to the Court demonstrating a loss of earnings and a prospective loss of future earnings due to the accident, no claim for quantum is compensable.

[70] The Plaintiff's injuries and subsequent hospitalisation are undisputed. The expert reports indicate that she will likely need additional medical care. It is my *prima facie* view that the Plaintiff's claim pertains to general damages. However, that is not for this Court to determine.

[71] I queried the Plaintiff's counsel on the handling of past and future medical expenses, which he was unable to affirm. Having considered all the evidence as stated above, I will address this matter in my subsequent order, as to do so at a later stage will not be in the interest of justice.

Accordingly, I make the following order:

ORDER:

[72] The Defendant shall furnish Plaintiff with an undertaking in terms of section 17(4)(a) of the Road Accident Fund Act, 56 of 1996, in respect of future medical, hospital and related expenses.

[73] The Plaintiff's claim for general damages is postponed *sine die*.

[74] The Plaintiff's claim for past and future loss of earnings is dismissed.

[75] There shall be no order as to costs.

[76] The Registrar of this Division is directed to bring this judgment under the attention of the Director for the Limpopo Provincial Council (“LPC”) forthwith for their further investigations into the expert declarations that were not properly commissioned.

C MARAIS
ACTING JUDGE OF THE HIGH COURT
LIMPOPO DIVISION, POLOKWANE

APPEARANCES:

HEARD ON : 25 September 2024

JUDGMENT DELIVERED ON : **24 October 2024**. This judgment was handed down electronically by circulation to the parties’ representatives by email. The date and time for hand-down of the judgment is deemed to be **24 October 2024 at 10:00**

APPEARANCES:

Counsel for the Plaintiff:	Adv Motseamedi
Attorney for the Plaintiff:	Mohale Incorporated
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Counsel for the Defendant:	none
Attorney for the Defendant:	
Email Address:	