

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

(1) REPORTABLE: No
(2) OF INTEREST TO OTHER JUDGES:
No

CASE NO: 38498/2017

In the matter between:

MLALELI SIBANDA

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

Neutral citation: *Mlaleli Sibanda v Road Accident Fund* (Case No: 38498/2017)
[2023] ZAGPJHC 614 (01 June 2023)

JUDGMENT

This judgment is deemed to be handed down upon uploading by the Registrar to the electronic court file.

Gilbert AJ:

1. On 24 March 2023, I granted judgment in favour of the plaintiff for general damages of R325 000.00 and ordered that the defendant furnish the plaintiff with the usual undertaking in terms of section 17(4)(a) of the Road Accident Fund Act, 1996 in relation to the plaintiff's future medical costs.
2. I did not grant any special damages as the plaintiff had not adduced sufficient evidence to sustain claims for loss of earning, whether past or future, or of earning capacity, as reasoned in my judgment.
3. I also did not grant the plaintiff any costs of experts.
4. The plaintiff seeks leave to appeal my decision on the confined basis that I erred in not ordering that the Road Accident Fund ("the Fund") pay the costs relating to the plaintiff's experts.
5. In paragraph 60 of my judgment I concluded in relation to the costs of the experts as follows:

"Insofar as the costs of the experts are concerned, I have already found that the actuarial report that was filed was not adduced under oath and in any event did not lead to any success in relation to the plaintiff's claim for loss of earnings and earning capacity. Further, ... no evidence was led by the plaintiff to factually found the basis for any of the expert reports. The expert reports have not contributed to the plaintiff's success in this matter. Rather, I have relied upon the plaintiff's evidence

before me in order to find on those claims upon which he succeeded. If anything, the plaintiff's evidence adduced before me conflicts with the factual assumptions or facts that appear in the experts' reports. In the circumstances, I do not intend granting costs in relation to the experts."

6. The Constitutional Court in *Glenister v President of the Republic of South Africa* 2013 (11) BCLR 1246 (CC) in paragraphs 7 to 9 said as follows:

*"[7] In essence, the function of an expert is to assist the court to reach a conclusion on a matter on which the court itself does not have the necessary knowledge to decide. It is not the mere opinion of the witness which is decisive but his ability to satisfy the court that, because of his special skill, training or experience, the reasons for the opinions he expresses are acceptable. Any expert opinion which is expressed on an issue which the court can decide without receiving expert opinion is in principle inadmissible because of its irrelevance. The rule was crisply stated in *Gentiruco A.G. v Firestone S.A. (Pty.) Ltd*¹: '[T]he 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'. Expert witness testimony on an ultimate issue will more readily tend to be relevant when the subject is one upon which the court is usually quite incapable of forming an unassisted conclusion. On the other hand the opinion of the witness is excluded not because of a need to preserve or protect the fact-finding duty of the court, but because the evidence makes no probative contribution.*

¹ 1972 (1) SA 589 (A) at 616H.

[8] *In addition to the above, the Court in Ferreira² posited the rule that in certain circumstances, only with the assistance of an expert witness could the Court give proper effect to a constitutional right. We were, however, not faced with those circumstances in Glenister II. The application before us and the issue upon which we were called to adjudicate was the constitutional validity of impugned statutes. The determination of constitutional validity is well within the competence of this Court. This Court sought no assistance from an expert in reaching its conclusions nor was the expert witness testimony required to give effect to the litigant's constitutional rights. The applicant's expert was therefore of no 'appreciable help' on the particular issue of constitutional validity with which the Court was seized.*

[9] *Furthermore, the applicant's expert witness was not qualified as such before this Court, having no specialised knowledge that would have assisted the Court in deciding the issues. The probative weight of the expert evidence was negligible as this Court did not rely on any expert testimony in its determination. Were a qualified expert to provide assistance to the Court, indeed qualifying costs would be appropriate. That is not the case here. In the light of this conclusion, there was no reason why qualifying costs should have been afforded to the applicant. Ordinarily, this Court would have dismissed this application without further reasons because Rule 42(1) has not been properly engaged in the sense that its requirements have not been met. However, it is important, to address the aspect regarding the costs of an expert with which Glenister II did not deal.*³

² 2004 (2) SACR 454 (SCA) at 382.

³ My emphasis.

7. The guiding principle upon which I, *inter alia*, relied is informed by *Glenister*. As appears from my judgment, I did not receive “*appreciable help*” from any expert witness on any particular issue, and so there was no reason why the costs of experts should be awarded to the plaintiff.
8. The plaintiff avers in his application for leave to appeal that the expert reports were used by him to substantiate his successful claim for future medical expenses and general damages and so he is entitled to the costs of the experts. But it is not whether the plaintiff made use of the expert reports but rather whether the court had any appreciable assistance from those report, or there is some other justifiable reason why the expert costs should be permitted, and which reason is placed before the court for it to consider in the exercise of its discretion.
9. The plaintiff avers in his application for leave to appeal that I did utilise the expert reports to award future medical expenses and general damages and so I erred in finding that the reports did not contribute to his success. But this is factually incorrect – I did not utilise the expert reports to find in favour of the plaintiff on future medical expenses and general damages. I explained in paragraph 60 of judgment why I did not use the expert reports. This notwithstanding that I invited the plaintiff’s attorney during argument on the application for leave to appeal to refer me to where I had relied upon the expert reports.
10. The plaintiff’s attorney argument developed during the hearing into the following submission: as I had granted future medical expenses and

general damages, it must follow that I relied upon the expert reports and so expert fees should have been allowed. This submission is both logically flawed and factually incorrect. As a matter of logic, it does not follow because certain heads of damages were granted that I must have had regard to expert evidence. As a matter of fact, as I have stated, I did not rely upon the expert reports to award the relief that I did but relied on the evidence of the plaintiff.

11. The plaintiff's attorney's argument developed further, contending that as a matter of law and the practice of the court, I was obliged to consider expert evidence before awarding general damages and future medical expenses and so it must follow that the plaintiff is entitled to the costs of the experts. Again, the logic is flawed. Assuming that the law does so require, it does not then follow that I must have relied upon the expert reports. As stated, I did not rely upon the expert reports. Should the plaintiff's attorney be correct that in law I had to consider expert evidence before granting general damages and future medical expenses, then that would not be a basis for granting leave to appeal in relation to my refusal to grant expert fees given that I did not consider expert evidence in making those awards, but may be grounds for appeal in that I may have erred in granting those heads of damages.
12. The plaintiff's attorney, during oral argument, submitted that apart from the usual use of expert evidence in a trial to come to the assistance of the court, the expert reports in any event were necessary for purposes of complying with various prescriptive requirements for purposes of

prosecuting a claim against the Fund and were further necessary for purposes of rendering the matter trial-ready. Leaving aside that this is not a ground of appeal that features in the application for leave to appeal and was not something advanced in the trial court, this submission is problematic.

13. In support of this submission, my attention was drawn during argument on the application for leave to appeal to the Supreme Court of Appeal decision of *Road Accident Fund v Duma and Three Similar Cases* 2013 (6) SA 9 (SCA) and the recent Full Bench decision of this Division in *K obo M and Another v Road Accident Fund* 2023 (3) SA 125 (GP).
14. The SCA in *Duma* found that a claim for general damages could not be awarded until the claimant had complied with the prescribed procedure for determination of serious injury as provided for in sections 17(1) and 17(1A) of the Road Accident Fund, 1996 as read with relevant Regulations and the Fund was satisfied that the injury had been correctly assessed by the medical practitioner as serious.⁴ In *K obo M* the Full Bench found that this also applied where default judgment was sought against the Fund.
15. The reasoning of the plaintiff's attorney was that as the prescribed method in terms of the Regulations required that a RAF 4 form be completed by a medical practitioner to assess whether a claimant's injury was 'serious' and that this was a requirement towards establishing general damages in terms of section 17(1), it must follow that I should

⁴ Para 19.

have awarded expert fees as I could not have otherwise granted general damages.

16. I did not consider a RAF 4 form, and did not consider any expert evidence in relation thereto. I did not consider any aspect relating to a RAF 4 form, or have regard to the requirements of section 17(1) and 17(1A) before general damages could be awarded. My attention was drawn to these requirements and to the cases of *Duma* and *K obo M* for the first time during the application for leave to appeal.
17. During the preparation of this judgment I did come across in the electronic court file an RAF 4 form attached to the expert report of the orthopaedic surgeon Dr Barlin, who completed the form and concluded that the injury was 'serious'. The report was confirmed under oath.
18. I was not directed to this report and/or the attached RAF 4 form and did not rely upon or draw any appreciable help from the report. The report, and so the expert evidence of Dr Barlin which confirms that report, suffers from the same deficiency as the other reports, as identified in my judgment, namely that the plaintiff as the relevant factual witness did not confirm the facts upon which the report is based.
19. The submission was made that the expert reports had to be provided to ensure that the matter was trial-ready in terms of the prevailing practice directives, and so on that basis that costs thereof should have been awarded. But making a matter trial-ready is not an end in itself. Where those reports did not ultimately render any appreciable assistance to the

court, I not of the opinion that there are reasonable prospects that another court will find that I erred in my discretion in declining the expert costs in relation thereto because those reports may have been used to obtain the enrolment of a matter as trial-ready.

20. Insofar as the grounds of appeal are advanced that I erred because I did not exercise my discretion in terms of the prevailing practice directives to interrogate the expert reports by way of calling for oral evidence (and so point out that the factual basis for the reports had not been established), those directives do not impose a duty upon the court to ascertain what deficiencies there may be in the expert evidence, to then point those out to the litigating party and so effectively advise the party as to its shortcomings in the evidence.
21. In any event even if the experts had been called in relation to their expert reports, the fundamental difficulty remained that the factual basis upon which the experts gave their expert evidence had not been established. That factual basis could not be established by the experts but needed to be established by factual witnesses, such as the plaintiff. As I have stated in my judgment, the plaintiff did not confirm the factual basis in the reports and that such evidence as he did give conflicted in various material respects with the factual basis described in the reports. Again, it was not incumbent upon the court to point out these deficiencies.

22. Although the plaintiff's attorney stated that to the best of her recollection, the factual basis of the report was put to the plaintiff to confirm, my notes are otherwise. While the plaintiff was asked whether he consulted doctors and whether those doctors asked him questions, which he confirmed, I do not recall, and neither do my notes reflect, that the plaintiff was actually asked whether he confirmed the facts that appear in the reports.
23. Having considered the further grounds of appeal in the application for leave to appeal as well as the further submissions made by the plaintiff's attorney during the course of a full argument much of which went beyond the grounds stated in the application for leave to appeal, I am not of the opinion that the appeal would have reasonable prospects of success.
24. I am also not of the opinion that there is some other compelling reason why the appeal should be heard, particularly so where the issue that is sought to be appealed is one of costs.
25. However the applicant's attorney during argument did give me occasion to consider whether my order excluding "*the costs relating to any experts or their reports*" may be overly broad. My intention was to exclude the costs of the experts and their reports insofar as it related to their preparation for and adducing expert evidence, because, for the reasons already stated, those reports and expert evidence was of no assistance. But it may be that there are other costs of experts, as

distinct from disallowed fees as experts for purposes of giving expert evidence in court, that may be found by the Taxing Master under Uniform Rule 70(3) to be costs reasonably incurred by the plaintiff in relation to his claim,⁵ such as potentially those in relation to the completion of the RAF form 4 by Dr Balin. What those may be are best left to the Taxing Master.

26. No argument was made in relation to this category of costs at the trial, nor did I consider same, and so it is open to me, having now heard further argument during the application for leave to appeal, to clarify my order in relation thereto.⁶ That amended order will naturally be considered by the Taxing Master in the context of this judgment, and my earlier judgment, in determining what costs of experts may be allowed upon taxation.

27. The following order is granted:

27.1. the application for leave to appeal is dismissed;

27.2. my judgment of 24 March 2023 is varied so that paragraph 61.4.1 thereof reads as follows:

⁵ *Road Accident Fund v Registrar, Transvaal Provincial Division, and another* 2003 (5) SA 268 (T)

⁶ *Firestone South Africa (Pty) Ltd v Genticuro A.G.* 1977 (4) SA 298 (A) at 306H – 308A, especially 307G-308A. See also *Lynmar Investments (Pty) Ltd v South African Railway and Harbours* 1975 (4) SA 445 (C) at 446C – 447B.

“61.4.1 the costs do not include the costs of experts relating to their adducing, or potentially adducing, of expert evidence at trial, such as preparation, attendance and qualifying fees.”

Gilbert AJ

Date of hearing: 17 May 2023

Date of judgment: 1 June 2023

Appearance for the plaintiff: Attorney L R Molohe-Madondo

Instructed by: SS Ntshangase Attorneys

No appearance for the defendant.