IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, JOHANNESBURG)

REPUBLIC OF SOUTH AFRICA

Appeal Case No: A2023/011280

Court *a quo's* Case No: 34481/2018

(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED: YES/NO

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SIGNATURE **DATE**

JUSTINE PHIRI **APPELLANT**

And

ROAD ACCIDENT FUND **RESPONDENT**

FULL COURT APPEAL - JUDGMENT

SENYATSI, J:

[1] This appeal is against the judgment of Nichols AJ. The appeal is with the leave of the court *a quo*. The appellant, Mr Justine Phiri ("Mr Phiri") was injured when he was struck by a vehicle while crossing the road after

motor vehicle collision on 18 July 2012. He is now 45 years old. He instituted an action against the respondent, the Road Accident Fund ("RAF") to recover damages as well as past and future loss of income as a result of the accident.

[2] It was alleged that Mr Phiri had suffered a fractured right humerus, a head injury and a right knee injury as a result of the accident. He sought compensation in an amount of:

a. R20 000.00 for "*non-emergency medical treatment*". He later abandoned this claim, correctly, in our view. Section 17(4)(a) of the Road Accident Fund Act 56 of 1996, replaces the right claimed in the summons with a right to an undertaking from the RAF covering future medical costs

b. R300 000.00 for future medical expenses.

c. R200 000.00 for past loss of earnings.

[3] The issue on appeal concerns the dismissal of the claim for general damages and the claim for past and future loss of income by the court *a quo*.

[4] The merits were agreed by the parties at 80-20 in favour of Mr Phiri. However, the RAF was not represented at the trial, as a result Mr Phiri

sought judgment by default. The RAF's defence was struck out on 13 May 2021 before Makola AJ.

[5] Mr Phiri testified in support of his claim. He had also called three expert witnesses, namely Dr Kladhi an orthopedic surgeon; an occupational therapist Ms India and an Industrial Psychologist, Ms Magotla.

[6] At the hearing of the appeal, counsel for Mr Phiri conceded that the assessment of the general damages to determine their seriousness had not occurred in this case. Accordingly, the court *a quo* correctly did not adjudicate the claim for general damages and postponed the determination thereof *sine die*. The decision follows the finding by the Supreme Court of Appeal in *Road Accident Fund v Farai*, which is binding on this court. In these circumstances the court has no jurisdiction to deal with the question of general damages[1]. Accordingly, the concession was correctly made.

[7] Given this, the remaining issue in the appeal relates to the dismissal of the claim for past and future loss of income. The grounds for appeal are that the court *a quo* erred in dismissing the claim for loss of earnings outright. It was argued that the court should have applied higher-than-normal contingencies to deal with the difficulties. Essentially, Mr Phiri's

[1] Mphala v Road Accident Fund (698/16) [2017] ZASCA 76 (1 June 2017) at paragraph 12.

claim was for the net profit at R700.00 per week. This was computed from the date of the accident and for a period of two years, when he was unemployed and thereafter at R450.00 per week. It is therefore necessary to first have regard to the case pleaded by Mr Phiri and consider it in conjunction with the evidence led before the court *a quo*. In the particulars of claim, it was alleged that:

> a. The RAF1 form he had signed stated he was unemployed and this appeared in the particulars of claim.
>
> b. At the same time, it was stated that prior to the accident, he was employed as a labourer and was earning an amount of R3 000.00 per month.
>
> c. The summons further alleges that Mr Phiri has not worked since the accident "*to date*", and an amount of R700 000.00 is claimed for future loss of income.

[8] At some stage, the claims were amended upwards. Once more the notice of amendment makes no attempt to set out the increased claims in line with Rule 18(10).

[9] Similarly, the particulars of claim do not begin to set out how this claim is made up as is required by Rule 18(10). The purpose of the Rule is to allow the defendant to see how the claim is calculated.

[10] On the other hand, Mr Phiri's evidence was that before the accident, he worked as a hawker, selling goods like car polish. He testified that he made a profit of about R700 per week and worked six days per week. Further, that as a result of the accident he was in hospital for about a week and thereafter needed physiotherapy. He testified that he could not work for two years thereafter. Once he started working, he managed to work between three to five days per week, earning about R250.00 profit per week.

[11] There was an inherent contradiction between the documents filed with the RAF initiating the claim, and the particulars of claim. There was also an inherent contradiction within the particulars of claim. Notably, the pleaded case conflicted with the evidence led by Mr Phiri.

[12] His explanation was that he was employed prior to the collision, as a labourer earning R3 000 per month. His further evidence was that at the same time he was also a hawker earning R700.00 profit per week, which translates to R2 800 every four weeks. Adding two or three days each month, depending on the number of days in the month and depending on when in the week he took a day off, one can see that the allegation in the particulars that he earned R3 000 per month is close to his evidence that he earned R700 per week. However, this is not supported by any cogent facts from his evidence.

In the heads of argument before us, it is said: "Prior to the accident the claimant reported that [he] was [a] self- employed hawker earning an income of approximately R400 to R 1000 per day. He reported that he made a profit of approximately R700 to R1000 per week after taking into account all operating expenses.''

[13] Regarding the RAF1 form, he said in evidence that "*They did that because they wanted me to give a letter or a sick note which I can take to the hospital and I could not do that because I was not employed*." Mr Phiri is Setswana speaking and testified through an interpreter. In so far as the reference in the particulars of claim describe him as unemployed, Mr Phiri testified that "*maybe that other person did not understand me clearly.* Mr Phiri testified that by unemployed he meant 'self- employed' as a hawker.

[14] Mr Phiri testified that about 18 months after the accident he applied for work at Impala Mines as a machine operator but he was unsuccessful because he was found to be physically unfit. He did not have the strength to perform in such a role. He returned to his earlier job as hawker for three years but later left it. Thereafter, he applied for employment in a civil construction company for a job that entailed carrying cement and bricks. It is his evidence that he could not take the job as, he did not have the physical strength required. The question then arises, if Mr Phiri did

not have the strength why did he apply for the jobs? In our view, he may well have been desperate for an income of any kind. His testimony was not challenged or contradicted.

Expert Evidence

[15] During his testimony Dr Tladi confirmed a broken humerus which had not been properly operated on and he also confirmed reduced strength in the shoulder with reduced mobility and that Mr Phiri will always experience pain.

[16] Ms India the occupational therapist, testified next and stated that Mr Phiri could lift a weight of 3 kgs to waist level although with pain.

[17] Ms Magotla testified, that in effect Mr Phiri's ability to earn a living after the accident is less than it was before the accident but she conceded that her conclusion in that regard was solely based on the information presented to her by Mr Phiri. This does not assist the Court in our view because it is based on an assertion not factually supported.

[18] A report by an actuary formed part of the trial bundle but the actuary was not called to testify and neither is there an affidavit by the actuary confirming his report. There is therefore no actuarial evidence before this appeal court.

Analysis

[19] The court's role is to determine whether the party burdened with the onus of proof has succeeded in discharging it.[2] The reasons provided for the dismissal of the claim was that there was no objective information to support Mr Phiri's self- report on the income he earned. The industrial psychologist determined the average income at R 3400.00 per month while Mr Phiri in evidence stated that his profit was R 2800.00 per month. This in turn contradicted his evidence in chief and as already alluded to, the particulars of claim.

[20] The approach to these contradictions and their significance merit careful consideration. They clearly occupied the court *a quo*. It bears mentioning that Mr Phiri has a Grade 11 education and did not complete his matric qualification. He gave his evidence through an interpreter. He was legally represented at the trial. He did not call those responsible for completing his RAF claim form to assist explain the errors.

[21] An adverse inference must be drawn against Mr Phiri in that regard because it is unlikely that he could have repeated his assertion both when

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[2] Stellenbosch Farmers' Winery Group Ltd v Martell et Cie (427/01) [2002] ZASCA 98 (6 September 2002) para 34.

he completed the hospital form and repeated the same information on the RAF4 form . This in our view, is so basic and elementary that to contend as he seemed to suggest at trial, that he meant informal trading is highly unlikely. The probability exists that the change of heart on the information was an afterthought owing to the potential claim to be made against. In our view, there is no evidence that Mr Phiri, on the evidence, suffered a loss of earning capacity and a concomitant loss of earnings.

[22] Our courts have warned against the perils parties face when they rely exclusively on the opinions of experts without laying any factual basis for such opinions.[3] In a trial action, it is fundamental that the opinion of an expert must be based on facts that are established by the evidence and the court assesses the opinions of experts on the basis of whether and to what extent their opinions advanced are founded on logical reasoning. It is for the court and not the witness to determine whether the judicial standard of proof has been made.[4]

[23] In *Price Waterhouse Coopers Inc v National Potato Cooperative Limited*[5] the Court said: "*The basic principle is that, while a party may in general call its witnesses in any order it likes, it is the usual practice for*

[3] Road Accident Fund v Madikane (1270/2018) [2019] ZASCA 103 (22 August 2019) at para 1.

[4] MV Pasquale della Gatta; MV Flippo Lembo: Imperial Marine Co v Deiulemar Compaggnia di Navigazione Spa ZASCA 2012 (1) SA 58 58 ((SCA) paras 25-27; Michael & Another v Linksfield Park Clinic (Pty)Ltd & Another 2001(3) SA 1188(SCA) paras 34-40

[5] [2015] ZASCA 2; [2015] 2 All SA 403 (SCA) para 80.

expert witnesses to be called after witnesses of fact, where they are to be called upon to express opinions on the facts dealt with by such witnesses.''

[24] In *Coopers (South Africa) (Pty) Ltd v Deutsche Gesellschaft für Schädlingsbekämpfung MBH*[6] the Court said:

> *'. . . 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'*.

[25] The evidence by Mr. Phiri at trial was weak in so far as loss of earnings damages are concerned. As already stated, the hospital form and RAF 4 form both state that he was unemployed at the time of the accident. The explanation given by Mr Phiri on his understanding when stating he was employed in the informal employment sector does not help this Court.

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[6] 1976 (3) SA 352 (A) at 371F-H.

[26] He failed to provide proof of his earnings from the informal business he alleged to operate. It cannot be enough for this Court to assume because he is allegedly trading informally, it cannot be expected of him to provide sufficient evidence to the satisfaction of the Court to prove his earnings. Doing so will open a minefield of non-meritorious claims against the RAF which will not be in the interest of justice.

[27] The reports by the industrial psychologist and the actuary for the actuarial calculation on the alleged loss are, in our view, without the actual factual foundation. It would be unwise to exercise a discretion in favour of making an award without sufficient evidence adduced by the appellant. The Court cannot be expected to come up with the quantum of the alleged loss of earnings without factual evidence from Mr Phiri. There was no evidence as to when he would have retired with and without the accident. Consequently, the Court *a quo* was correct for not finding that future loss of earnings had been suffered by Mr Phiri.

[28] Regarding general damages, an RAF4 form was submitted to the Fund on behalf of Mr Phiri as is required to advance a claim for general damages. The RAF never responded. The Court *a quo* correctly ruled that it did not have jurisdiction to entertain the general damages in the absence of the RAF's response on whether it considered the injuries to be serious or not.

[29] Ultimately, the question is whether there is evidence upon which the court ought to give judgment in favour of Mr Phiri. In our view, there was not enough evidence to rule in favour of Mr Phiri.

Order

[30] As a result the following order is made:

30.1. The appeal is dismissed in relation only to the question of loss of earnings.

30.2. The appeal relating to the question of general damages is removed from the roll.

30.3. No order as to costs.

SENYATSI J
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

I agree;

WRIGHT J
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

I agree;

SIWENDU J
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

Delivered: This judgement was prepared and authored by the Judges whose names are reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on Case Lines. The date for hand-down is deemed to be……

APPEARANCES

APPELLANT Ms L R Molope-Madondo

Instructed by Sepamla Attorneys

RESPONDENT No appearance

Date of hearing: 11 October 2023

Date of judgment: 22 January 2024