IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

REPUBLIC OF SOUTH AFRICA

CASE NO: A63/2022

(1)	REPORTABLE: **NO**
(2)	OF INTEREST TO OTHER JUDGES: **NO**
(3)	REVISED: **NO**
(4)	DATE: **18 OCTOBER 2023**
(5)	SIGNATURE:

In the matter between:

NDUMISO THULASIZWE ZONDI Appellant

AND

ROAD ACCIDENT FUND Respondent

JUDGMENT

SENYATSI J (TOLMAY J AND OOSTHUIZEN-SENEKAL AJ concurring **)**

[1] The appeal before us, which was granted with the leave of the court *a quo*, concerns the challenge on the award of R1,5 million granted in favour of the appellant, Mr Zondi. The award was granted because of a motor vehicle collision in which Mr Zondi suffered bodily injuries leading to loss of future income.

[2] The basis of the quibble raised on Mr Zondi's behalf against the judgment is that the amount awarded was inadequate and that the court *a quo* did not exercise its discretion judiciously. The appeal is not opposed by the respondent, RAF and it did not participate in the proceedings at trial. The merits were settled at 100% of the proven damages for the damages. At trial, the general damages were settled for the sum of R850 000(eight hundred and fifty thousand rand) after an interim payment of R500 000 (five hundred thousand rand) had been made during February 2018. The only issue that remained was that of loss of income.

[3] At trial, it was submitted on behalf of Mr Zondi that an amount of R7 236 182 (seven million two hundred and thirty six thousand one hundred and eighty two rand) had to be awarded for loss of earnings based on the uncontested actuarial calculation and the conclusions of the industrial psychologist, Ms Talmud.

[4] At the time of the motor collision, Mr Zondi was 26 years of age. He has grade 10 plus N3 in Engineering qualifications. He had accumulated 8 years of work experience before starting his own business and wanted to complete his trade test which would allow him to expand his business by working as diesel mechanic as well as managing sites. His pre-morbid

prospects of completing the trade test which was in line with his post matric qualification and prior work experience were good, according to the clinical psychologist's report.

[5] The issue before us is whether in exercising its discretion as it did, the *court a quo* erred in awarding the sum of R1,5 million for the loss of earnings.

[6] 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.[1] All that the court can do is to make an estimate, which is often a very rough estimate, of the present value of 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 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.[2] It is manifest that either approach involves guesswork to a greater or lesser extent.[3] When it comes to scanning the uncertain future, the Court is virtually pondering the imponderable, but must do the best it can, on the material available, even if the result may not inappropriately be described as an informed guess, for no better system has yet been devised for assessing general damages for future loss.

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[1] Malherbe Killian NO v RAF (34116/2016) [2019] ZAGPPHC 844(15 September 2016)
[2] Southern Insurance Association Ltd v Bailey NO 1984(1) SA 98 (A) at 113G-I
[3] Anthony and Another v Cape Town Municipality 1967 (4) SA 445 A at 451 B-C

[7] In *Malherbe Killian NO v RAF* [4] in commenting on the assessment of the award and the tool to be used, Legodi J *(as he then was)* held as follows relying on *Goldie v City Council of Johannesburg* [5]; *Southern Insurance Association LTD supra at 114 at 920*:-

" In the case where the court has before it material on which an actuarial calculation can usefully be made, I do not think that the first approach offers any advantage over the second. On the contrary, while the result of an actuarial computation may be no more than an "informed guess", it was the advantage of an attempt to ascertain the value of what was lost on a logical basis, whereas the trial Judge's 'gut feeling' as to what is fair and reasonable is nothing more than a blind guess".

[8] Our courts have warned against the perils parties face when the rely exclusively on the opinions of experts without laying any factual basis for such opinions.[6] 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.[7]

[9] In *Price Waterhouse Coopers Inc v National Potato Cooperative Limited*[8] 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 expert

[4] Above foot note 1 at para 3.
[5] 1948 (2) SA 913 (W) at 920; Southern Insurance Association LTD supra at 114
[6] Road Accident Fund v Madikane (1270/2018) [2019] ZASCA 103 (22 August 2019) at para 1.
[7] 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
[8] [2015] ZASCA 2; [2015] 2 All SA 403 (SCA) para 80.

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.'

[10] Similarly, Wessels JA, in dealing with the nature of an expert's opinion, in *Coopers (South Africa) (Pty) Ltd v Deutsche Gesellschaft für Schädlingsbekämpfung MBH* [9]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".*

[11] An opinion of an expert must therefore be based on facts which have been proven before the court. An opinion based on facts not in evidence has no value for the court. A court has to ascertain whether the opinions expressed by the experts are based upon facts proved to it by way of admissible evidence. It is with this principle in mind that the facts of the matter, as well as an analysis of the experts' evidence, must be considered.[10] The court has to exercise discretion which must be exercised judiciously.

[12] The issue is not whether the appeal court would have awarded a higher award, but rather whether in exercising its discretion to make the award, the court *a quo* misdirected itself.

[9] 1976 (3) SA 352 (A) at 371F-H.
[10] Price Waterhouse footnote 8 above para 99

[13] The Appeal Court can only interfere with the exercise of discretion in awarding damages by the trial Court if the discretion was not exercised judicially. In *Trencon*[11], the Court dealt with the power of an Appellate Court to interfere with the High Court's order. It held that the proper approach on appeal is for an appellate court to ascertain whether the discretion exercised by the lower court was discretion in the true sense[12] or whether it was a discretion in the loose sense. The distinction in either type of discretion, the Court held, "*will create the standard of the interference that an appellate court must apply*".[13]

[14] The Court in *Trencon* remarked, that "*[a] discretion in the true sense is found where the lower court has a wide range of equally permissible options available to it*". In such instances, the ordinary approach on appeal is that the "*the appellate court will not consider whether the decision reached by the court at first instance was correct, but will only interfere in limited circumstances; for example, if it is shown that the discretion has not been exercised judicially* . . .".[14] This type of discretion has been found by our Courts in many instances, including matters of costs and of course the award of damages.[15]

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[11] Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa [2015] ZACC 22; 2015 (5) SA 245 (CC); 2015 (10) BCLR 1199 (CC) (Trencon).

[12] The Appellate Division in Media Workers Association of South Africa v Press Corporation of South Africa Ltd (Perskor) [1992] ZASCA 149; 1992 (4) SA 791 (AD) at 800E *(Media* Workers Association) described the essence of a discretion in the true sense. It held that "if the repository of power follows any one of the available courses, he would be acting within his powers, and his exercise of power could not be set aside merely because a Court would have preferred him to have followed a different course among those available to him". See *Trencon* above n 28 at para 84.

[13] Trenco*n* above n 28 at para 83.

[14] See Giddey N.O. v JC Barnard and Partners [2006] ZACC 13 at para 19; See also Trencon above n 28 at para 88, where Khampepe J remarked:

> "*When a lower court exercises a discretion in the true sense, it would ordinarily be inappropriate for an appellate court to interfere unless it is satisfied that this discretion was not exercised—*
>
> > *'judicially, or that it had been influenced by wrong principles or a misdirection on the facts, or that it had reached a decision which in the result could not reasonably have been made by a court properly directing itself to all the relevant facts and principles'*."

[15] Trencon above n 28 at para 85.

[15] The question is never whether a Court of Appeal would award a higher amount in the exercise of the discretion but whether the trial Court misdirected itself in exercising the discretion as it did.

[16] In the present appeal therefore, the question remains whether the trial Court, in considering the relevant circumstances and available options, judicially exercised its discretion in awarding the loss of earnings as it did in the sum of R1,5 million. For the reasons that follow below, the trial Court cannot be faulted on its exercise of discretion in making the award on loss of earnings.

[17] At trial, the default judgment was not opposed. This places the Court on guard as it had no benefit of any contribution by RAF. In addition, RAF's defence was struck out. On the date day of the trial, the defendant was not represented and the attempt to settle the matter did not yield any results. The trial court was provided with the following medical legal reports:-

17.1. Dr. P.Engel Breunt- Orthopaedic Surgeon;
17.2. Dr Cheyip- Neurologist;
17.3. T. Preininger- Neouro Psychologist;
17.4. M. Sisson-Clinical Psychologist;
17.5. Dr. Van Wijk- Urologist;
17.6. Dr. M. Naidoo- Psychiatrist;
17.7. Dr. Mthembu- Ophthalmologist;
17.8. Dr. Potgieter- Plastic Surgeon;
17.9 Dr. Moja- Neuro Surgeon;
17.10 Dr. Fredericks- Disability and Assessor;
17.11 N. September -Occupational Therapist;
17.12. Jacobson Talmud- Industrial Psychologist and
17.13 G. Jacobson- Actuary.

[18] Mr Zondi bears the onus to adduce evidence that is solid upon which the experts can make a meaningful assessment of loss of earnings. The basis of the Industrial Psychologist's report on loss of earnings was based on the pre-accident earnings. There was no information of earnings as claimed by Mr Zondi post the accident. No IRP5 documents were provided to the Industrial Psychologist and equally, no financial statements were provided. The proposition of the weekly profits as alleged by Mr. Zondi post the accident did not have any factual support because there was no proof that he was a qualified builder as he claimed.

[19] In my view, the experts' reports provided to assist the trial Court to determine the loss of earnings were not helpful. Under the circumstances, the trial Court exercised its discretion judicially and did not misdirect itself in awarding the amount of R1,5 million to Mr Zondi.

[20] It follows therefore, that the appeal should fail.

ORDER

[21] The appeal is dismissed. No order is made as to costs as there was no opposition of the appeal.

SENYATSI J
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

I concur;

TOLMAY J

JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

I concur;

OOSTHUIZEN-SENEKAL AJ

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Delivered: This Judgment was handed down electronically by circulation to the parties/ their legal representatives by email and by uploading to the electronic file on Case Lines. The date for hand-down is deemed to be 18 October 2023.

APPEARANCES

Counsel for the Appellant: Adv J Bam
Instructed by: Ehlers Attorneys

Date of Hearing: 7 June 2023

Date of Judgment: 18 October 2023