REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 34198/2015

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

13 MAY 2020 .....
DATE SIGNATURE

In the matter of:

BADERSCHNEIDER, STEFANIE Plaintiff

and

THE ROAD ACCIDENT FUND Defendant

JUDGMENT

BESTER AJ

[1] On 2 April 2012, the plaintiff was involved in a motor vehicle collision. She instituted a claim for damages against the defendant. The parties settled the

question of liability on the basis that the defendant shall be liable for 80% of the plaintiff's admitted or proven losses flowing from the incident. At trial the plaintiff persisted only with a claim for past hospital and medical expenses.

[2] The plaintiff is ordinarily resident in Germany and returned there approximately a week after the incident. Her claim is composed of two parts: R65 784,45 in respect of medical and hospital expenses incurred in South Africa, and €30 403,63 for costs incurred for her return to Germany under medical supervision. Although it seems that she underwent further treatment in Germany, those costs were not claimed in this action.

[3] At the commencement of trial, the defendant raised a legal objection from the Bar. I was informed that the facts giving rise to the objection only became known to the defendant earlier that morning. By agreement between the parties, I was handed a document which formed the basis of the objection. In terms thereof, the plaintiff ceded her right, title and interest in her claim for *inter alia* past hospital and medical expenses to HUK-COBURG-Krankenversicherung AG, on 27 September 2019.

[4] On the strength of the cession, the defendant argued that the plaintiff no longer had *locus standi in iudicio* to pursue the claim, and that, until such time as the cessionary has been substituted as the plaintiff in the matter, the trial could not proceed.

[5] The cession took place after *litis contestatio* had been reached. In *Waikiwi Shipping v Thomas Barlow & Sons*[1] the Appellate Division made it clear that, where a cession takes place after *litis contestatio*, the transfer of rights only becomes effective if the Court allowed the cessionary to be substituted as the plaintiff. The Court has a discretion whether or not to allow the substitution, and will refuse to do so if there is any prejudice to another party. If the cessionary wishes to proceed with the action in its own name, it requires the Court's permission to be substituted, and until that is done, the cedant retains *locus standi* to pursue the claim.[2]

[6] In the result, the defendant's objection was dismissed, and the trial proceeded.

[7] The plaintiff's Rand denominated claim, for costs incurred in South Africa, consisted of sixteen items, of which thirteen were admitted by the defendant during opening address, amounting to R59 906,17. The remaining R3 475,20 was not pursued further by the plaintiff.

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1 *Waikiwi Shipping Co Limited v Thomas Barlow & Sons (Natal) Limited and Another* 1978 (1) SA 671 (A) at 678 G.

2 *Brummer v Gorfil Brothers Investments (Pty) Ltd* 1999 (3) SA 389 (SCA) at 410 E – H.

[8] The plaintiff's Euro denominated claim, for expenses relating to her return to Germany, consisted of five items. She called two witnesses in her attempts to prove these items.

[9] The plaintiff's first witness was Dr David Frederik van der Merwe, an orthopaedic surgeon. He testified that he treated the plaintiff at the Nelspruit MediClinic from her admission on 3 April 2012 until her discharge on 9 April 2012. He did not prepare a medico-legal report, but a letter written by Dr van der Merwe to the plaintiff's attorneys on 2 July 2018 (thus more than six years after the incident) was introduced through his evidence. In the letter, he set out the injuries the plaintiff sustained: (i) a right clavicle fracture, (ii) a right pelvic fracture, and (iii) a liver laceration.

[10] Mr Roos, for the defendant, objected to Dr Van der Merwe's evidence regarding the plaintiff's injuries, on the basis that such evidence is of an expert nature, and no notice in terms of Uniform Rule 36(9) had been given that he will be called as an expert. Mr Botha, for the plaintiff, did not seek leave to introduce Dr Van der Merwe's expert evidence without notice, and left the matter there. Dr Van der Merwe could not speak to any of the expense vouchers contained in the documents bundle with which the plaintiff sought to support her claim.

[11] The second witness for the plaintiff was Dr Mark Bryan Deacon, a specialist orthopaedic surgeon. Dr Deacon examined and interviewed the plaintiff on 6 December 2019 in Switzerland. He had not been involved in her treatment.

[12] Dr Deacon compiled a medico-legal report pursuant to his examination of the plaintiff, and notice had been given that he would be called as an expert witness. His expertise and qualifications were not challenged by the defendant.

[13] The opinion on which the plaintiff sought to rely, was expressed as follows in Dr Deacon's report and confirmed by him during his testimony:

> "Observation and possible intervention might have been required during aeromedical transfer due to the seriousness of her injuries. The patient suffered significant trauma which necessitated hospitalisation before and after transfer. She would require observations, bed rest (unable to sit for a prolonged period of time due to her injuries) and analgesia during such a flight and would need to be monitored for possible complications and treated should such arise.
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> In my opinion the patient warranted this medical assistance during her repatriation to ensure the safety of herself during a long international transfer in the form of monitoring, patient comfort, analgesia and medical expertise should the possibility of complications arise."

[14] Dr Deacon testified that he had some experience with commercial medical repatriation by air. He testified that a patient in the situation that he understood the plaintiff to have been in, would have required two people to

assist her, so that she could be carried on a stretcher if she could not walk, and that at least six economy seats would have had to be booked for her and the two individuals accompanying her. He was however unable to comment on the costs pertaining to such repatriation or speak to the specific vouchers that the plaintiff had included in the documents bundle.

[15] The facts relied upon by Dr Deacon in his report and evidence were obtained by him from the plaintiff and gleaned from the medical documentation that he reviewed in respect of her treatment. These facts were not admitted by the defendant, who argued that the evidence was hearsay. Since the probative value of the evidence of these facts depends on the credibility of persons other than Dr Deacon, I agree.[3] The plaintiff did not seek to establish a basis upon which the Court should receive the hearsay evidence, and no reasons presented themselves to do so.

[16] Mr Roos argued that Dr Deacon's opinion should thus be disregarded. He referred to *Lornadawn Investments v Minister van Landbou,*[4] where Botha J approved of what was said in *The Queen v Landouceur,* 10 LCR 156:[5]

> "It is axiomatic that where a Court is asked to accept the opinion evidence of an expert, the facts on which the opinion is based, if not admitted by the

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3 See section 3 of the Law of Evidence Amendment Act 45 of 1988.

4 *Lornadawn Investments (Pty) Ltd v Minister van Landbou* 1977 (3) SA 618 (T) at 623 E – G.

5 See also *Coopers (South Africa) (Pty) Ltd v Deutsche Gesellshaftfürschädlingsvekämpfung MBH* 1976 (3) SA 352 (A) at 371 G.

> other party to the action, must be established in the ordinary way by direct or by circumstantial evidence. It is also axiomatic that an expert is not entitled, any more than any other witness, to give hearsay evidence as to any facts, … unless and until the facts on which the opinion is given have been established in the ordinary way, and, to the extent that these facts remain unproven, or to the extent that the opinion does not reflect proven facts, the opinion [must] be disregarded."

[17] I agree with the defendant that Dr Deacon's opinion on these matters must be disregarded, in circumstances where his underlying assumptions regarding the injuries, the treatment thereof and the plaintiff's condition at the time of her flight, have not been proven.

[18] The defendant elected not to call any witnesses.

[19] In *Mutual & Federal v Da Costa*[6] the Supreme Court of Appeal endorsed what is referred to as the 'robust approach' to the assessment of the quantum of damages, as set out in *Hersman v Shapiro,*[7] where Stratford J explained as follows:

> "Monetary damage having been suffered, it is necessary for the Court to assess the amount and make the best use it can of the evidence before it. There are cases where the assessment by the Court is very little more than an estimate; but even so, if it is certain that pecuniary damage has been suffered, the Court is bound to award damages. <u>It is not so bound in the case where evidence is available to the plaintiff which he has not produced; in those circumstances the Court is justified in giving, and does give, absolution</u>

6 *Mutual & Federal Insurance Co Limited v Da Costa* 2008 (3) SA 439 (SCA) at [20].

7 *Hersman v Shapiro &Co* 1926 TPD 367 at 379 – 380.

> from the instance. But where the best evidence available has been produced, though it is not entirely of a conclusive character and does not permit of a mathematical calculation of the damages suffered, still, if it is the best evidence available, the Court must use it and arrive at a conclusion based upon it." (emphasis added) [8]

[20] The plaintiff's claim required her to prove the costs incurred in respect of the medical transfer, which required her to prove the specific costs incurred, their necessity and their reasonableness. For this, she sought to rely on vouchers. In *Howard & Decker v De Sousa*[9] the way private documents are proved was summarised in the following terms:

> "The law in relation to the proof of private documents is that the document must be identified by a witness who is either (i) the writer or signatory thereof, or (ii) the attesting witness, or (iii) the person in whose lawful custody the document is, or (iv) the person who found it in possession of the opposite party, or (v) a handwriting expert, unless the document is one which proves itself, that is to say unless it:
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> (1) is produced under a discovery order, or
> (2) may be judicially noticed by the Court, or
> (3) is one which may be handed in from the Bar, or
> (4) is produced under a subpoena *duces tecum*, or
> (5) is an affidavit in interlocutory proceedings, or
> (6) is admitted by the opposite party."

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8 See also *Venter v Bophuthatswana Transport Holdings (Edms) Bpk* 1997 (3) SA 374 (SCA) at 381 B – D.

9 *Howard & Decker Witkoppen Agencies and Fourways Estates (Pty) Ltd v De Sousa* 1971 (3) SA 937 (T) at 940 E/F – G/H.

[21] The vouchers which the plaintiff sought to rely, were not document which prove themselves. None of the other options were followed by the plaintiff.

[22] The parties agreed at a pre-trial conference that *"the documents in the* [trial] *bundles are what they purport to be without admitted the truth and contents thereof…"*. I respectfully agree with the approach of Sutherland J in *Thomas v BD Sarens*[10] :

> "The almost universal practise of preparing a bundle of all the documents that might be referred to in evidence is a boon to ordinary litigation. However, it invariably occurs that not all the documents in a bundle are traversed in evidence. In my view, a document not traversed in evidence is not before the Court, unless a prior agreement exists that it be admitted in a fashion other than through legitimate reference in evidence by a witness competent to comment thereon. The customary mantra that 'all documents in the bundle are what they purport to be without any admission to the truth of their contents' confers no evidential status on a document unless it is introduced through a witness capable of addressing the contents, called by one or other of the opposing parties."

[23] In July 2019 the plaintiff delivered a notice in terms of uniform rule 35(9), in which she sought the defendant's admission that the schedule of expense items and the underlying vouchers were properly executed and are what they purport to be. The plaintiff added a request in its notice that is not catered for in the sub-rule: if the admissions are not made, the defendant must provide

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10 *Thomas v BD Sarens (Pty) Ltd* – 2012 JDR 1711 (GSJ) in [19].

reasons for its refusal to do so. Such a request can of course be made in terms of Uniform Rule 37(4).

[24] No response was received within the allowed ten-day period. The sub-rule provides that, if no response is received, the party that issued the notice may produce the documents at trial without further proof. However, any admission in terms of this rule would not amount to an admission of the contents of the document.[11] The plaintiff subsequently brought an application to compel the defendant's compliance with the notice, which order was granted on 25 September 2019. Pursuant thereto, the defendant delivered a notice in which it refused to make any of the admissions sought, without providing the reasons for its refusal.

[25] In the minute of a further pre-trial conference, held on 3 October 2019, the parties recorded that the plaintiff inquired from the defendant whether the latter required the presence of every treating doctor and medical specialist who treated the plaintiff both in South Africa and Germany to attend at court on the trial date to prove each and every account listed in the two schedules, and, if so, whether the defendant will pay for the costs pertaining thereto.

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[11] *Selero (Pty) Ltd v Shauvier* 1982 (2) SA 208 (T) at 216.

[26] The defendant's response was that it is the plaintiff's prerogative to conduct her trial as she sees fit. The plaintiff again requested the defendant to admit the expenses or at least provide reasons for its refusal to do so. This was met with the response that it is for the plaintiff to prove her claim.

[27] Despite being clearly forewarned that she would be required to prove her expenses at trial, the plaintiff failed to produce any evidence to prove the contents of the vouchers she relied upon, or the necessity for and the reasonableness of the costs reflected therein.

[28] In closing argument, Mr Botha, for the plaintiff, raised three arguments. First, he pointed out that the schedules were provided to the defendant months before the trial, and the defendant refused to provide reasons as to why it denied the claims. That, of course, amounts to nothing more than a plea *ad misericordium*.

[29] Mr Botha also argued that the costs were clearly reasonable, because, as he put it, *"an airline ticket price is an airline ticket price*". This proposition does not hold true. It also ignores the problem that the documents had not been proven in the first place, and that it requires the Court to draw conclusions from vague statements in the unproven documents. For instance, the only statement (from an unidentified author) to be found in these vouchers

regarding charges by or for the persons who accompanied the plaintiff, is the following:

> "The escorting persons are physicians and paramedics for whose services the respective daily rates have been determined with our cooperation partner. (€1000.00 / €750.00 daily rate)."

[30] The plaintiff did not, for instance, explained why these persons had to be paid in Euro.

[31] Lastly, the plaintiff argued that it would have been too expensive to bring the witnesses to court in South Africa. There are several fatal difficulties with this argument. To start with, this does not excuse the plaintiff from having to prove her claim. In any event, there is no evidence as to who the individuals are who had to testify, and that they are all in fact in Germany or elsewhere outside of the Republic of South Africa. The argument also wrongly assumes that there are no alternatives to a witness's physical presence in court.

[32] Mr Botha conceded that the plaintiff made no attempt to present any of this evidence on affidavit. Rule 38(2) provides that whilst witnesses at the trial of any action shall be orally examined, a court may at any time for sufficient reason order that all or any of the evidence to be adduced be given on affidavit on such terms and conditions as it may seem meet. No attempt was made to make use of this rule, not even when I inquired as to whether this avenue was

considered by the plaintiff. In fact, the parties expressly agreed that no evidence shall be led by affidavit, according to the minute of the pre-trial conference held on 11 April 2019, and the issue was not revisited at the subsequent conference where this very issue, namely the cost of bringing witnesses to South Africa, was raised by the plaintiff.

[33] In addition, no consideration was given to the possibility of video conferencing as a way of procuring oral evidence from the unidentified witnesses. As was remarked by Satchwell J in *Uramin v Perie*[12]:

> "It is now almost trite that video conferencing 'is an efficient and an effective way of providing oral evidence both in chief and in cross-examination' and that this is 'simply another tool for securing effective access to justice'. (see para 10 of the speech of Lord Carswell in Polanski v Condé Nast Publications Limited [2005] UKHL 10). This process has been utilised in numerous South African Courts." (further footnotes omitted).

[34] This is not a matter where the plaintiff failed to produce the best evidence to prove her damages; rather, she failed to produce any evidence.

[35] In the result, the plaintiff is only entitled to judgment in the amount admitted by the defendant at the commencement of trial, reduced in terms of the

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[12] *Uramin (Incorporated in British Columbia) t/a Areva Resources Southern Africa v Perie* 2017 (1) SA 236 (GJ) in [35].

agreement regarding liability. The plaintiff is therefore entitled to 80% of R59 906,27, thus R47 925,02.

[36] The plaintiff's counsel urged me to award costs in favour of the plaintiff on the attorney and client scale, because, he argued, the defendant was unreasonable in refusing to admit the various claims. No such unreasonableness was however shown to exist.

[37] The defendant argued that no costs should be allowed because the plaintiff was not substantially successful. I agree. The plaintiff originally sued for the sums of R1 719 031,03 plus €36 797,95. She succeeds in an amount of less than R50 000,00. It would in my view not be just to burden the defendant with the cost of the action.

[38] In the result the following order is made:

1. Judgment is granted in favour of the plaintiff for the payment of R47 925,02.

2. The above amount shall bear interest at the rate of 9% per annum, calculated from 14 days after date of this judgment.

3. No order is made in respect of costs.

A Bester
Acting Judge of the High Court of South Africa
Gauteng Local Division, Johannesburg

Heard:	27 and 28 January 2020
Judgment:	Handed down electronically on 13 May 2020
Counsel for the Plaintiff:	Adv Botha
Instructed by:	A Wolmarans Inc
Counsel for the Defendant:	Adv JT Roos
Instructed by:	Ningiza Horner Inc