IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NUMBER: A99/2020

DELETE WHICHEVER IS NOT APPLICABLE

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

13 AUGUST 2021 Jehapi

DATE SIGNATURE

In the matter between:

ADVOCATE SJ MYBURGH N.O. **APPELLANT**

[In his capacity as Curator ad litem for AF BOTES]

and

ROAD ACCIDENT FUND **RESPONDENT**

JUDGMENT

THE COURT,

[1] This is an appeal against paragraph 1 of the order handed down by Mavundla J on 25 November 2019. Leave to appeal was granted to the full bench of

this Court, by the court *a quo* on 27 February 2020. The respondent is opposing the appeal.

[2] The respondent settled the following issues:

2.1 accepted liability for 100% of the patient's proven or agreed;

2.2 paid an amount of R 2 000 000.00 in respect of general damages;

2.3 furnished an undertaking in terms of section (17)(4) of the Road Accident Fund, Act 56 of 1996.

[3] The only issue that proceeded at trial related to the patient's past loss and future loss of earning / earning capacity on the limited issue of the percentage contingency deductions to be applied to the calculated figures, relating to past loss and future loss of earnings / earning capacity.

[4] In paragraph 1 of the order of court the defendant is ordered to pay the plaintiff an amount of R 5 110 000.00 (five million one hundred and tent thousand rand). It is contended by the appellant that the parties had agreed that the remaining issue to be determined by the court, was that of the patient's loss of earnings. The court *a quo*, however, adjudicated and decided the matter not in accordance with the agreement reached by the parties. In the pre-trial minute the respondent accepted all the Medico Legal Reports as correct, with the exception of that of the appellant's Industrial Psychologist, Ms Botha and that of the actuary Mr Potgieter.

[5] At trial Ms Botha confirmed in her evidence that the actuary of the respondent Mr Edward Alant, of Rosewood Technologies (Pty) Ltd was instructed by the respondent to calculate the loss of earnings on her postulations as provided in the Third Addendum Report she prepared, dated 29 May 2019 and, this is recorded in her

evidence, (Volume 2 transcribed record at page 122) as follows:

> *"So the basis of the calculation which the defendant has accepted this is their actuarial calculation and which they are bound by as they have accepted – I agree*
> *Is that correct – That is correct yes*
> *So we only have to therefore deal with contingencies – that is correct."*

[6] Instead of considering Ms Botha's report dated 29 May 2019 and the actuarial report of Mr Alant as agreed to by the parties, the court *a quo* in its judgment considered Ms Botha's second report dated 13 November 2018, (which was not agreed upon) and that of Mr Potgieter, actuary for the plaintiff dated 14 November 2018.

[7] In respect to Ms Botha the court held the following at paragraph 15 of the Judgment:

> *"In so far as Botha is concerned, she formulated the views on the basis of secondary information presented to her. If that secondary information is suspect, her continuous and future projections of the patient's earnings is invariably flawed and not helpful to the court"*

and in paragraph [16] with regard to appellant's actuary:

> *"Potgieter's calculations are premised on the erroneous supposition that the Patient was earning R10 000.00 per month and concluded that the net past loss was R196 913.00; future loss was R 9 980 575 and total loss R10 177 488.00."*

The court *a quo* in exercising its discretion found that the amount of R10 000.00 was

slightly exaggerated and made a rough estimate that past earnings amounted to R8500.00 x 12. It also held that Botha and Potgieter had failed to consider the probability that the patient would have retired earlier than 65 years of age as a result of the patient's epilepsy.

Issues on appeal

[8] The main issues before us on appeal relate to whether admissions of fact and conclusions on record, particularly those contained in the appellant's medico legal reports of the Neurologist, Dr Wynand Ndlovu and the Industrial Psychologist Ms Botha and, the actuarial calculations of the respondent's actuary Mr Alant were conclusive, thereby rendering it unnecessary for the one in whose t favour the admissions were made to adduce evince to prove such fact. Further, whether it was incompetent for the party making such admission to adduce evidence to contradict admissions it made.

THE LAW

[9] Counsel for the appellant contended that the court *a quo* failed to adjudicate the matter in accordance with the agreements reached between the parties and on what they agreed remained to be adjudicated. Further that the court *a quo* erred in making findings that no evidence or insufficient evidence had been adduced, on the salient facts necessary to prove facts already admitted in order to prove the claim.

[10] Reliance is placed on a plethora of authorities which deal with the binding nature of judicial facts admitted and concluded at pre-trial conferences held in terms of Rule 37 of the Rules of Court. In Gordon v Tarnow Davis AJA stated the following on the import of formal admissions:

> *"But this admission in the plea is of the greatest of importance, for it is what*

Wigmore (paras 2588-2590) calls a "judicial admission .....which is conclusive, rendering it unnecessary for the other party to adduce evidence to prove the admitted fact, and, incompetent for the party making it to adduce evidence to contradict it"

In Saayman v Road Accident Fund the court dealt with the difference between a concession made by counsel during the proceedings and a formal admission and held as follows:

"In the context of civil proceedings an admission is a statement against interest which has the effect of binding the party on whose behalf it is made. If that effect is absent the statement cannot amount to an admission.....An admission, in its formal sense, also requires at least an intention, explicit or inferred and unequivocal to remove a fact that depends on proof from the field of contention."

[11] It is trite that pre-trial conferences give parties an opportunity to curtail the proceedings and that admissions made by a party constitute an election which is binding. Admissions of fact made in terms of Rule 37 of the Rules of Court, at a pre-trial conference constituted sufficient proof and no other evidence is necessary to prove such fact. Reliance for this trite principle is found in judgements of this Division in Sparner v Road Accident Fund where the court confirmed the judgment in Khumalo J in Adv R Ferguson obo LA Ridder v Road Accident Fund

[12] Counsel for the respondent agreed with the findings of the court *a quo* on the following grounds;

(a) in the finding that the appellants Industrial Psychologists and Actuarial reports were unreliable; and

(b) that the court was entitled to exercise its discretion assessing what it deemed to be an award which was fair to both sides.

(c) that the expert reports failed to take into account that the plaintiff had a pre-morbid

condition in the form of epilepsy and, that there was no proof of earnings in the amount of R10 000.00 as alleged.

[13] I return to the admission of the medico -legal reports. At paragraph 21 of the judgement the court *a quo* commented on the pre-morbid epilepsy condition of the patient and, pronounced as a given that 'epilepsy' is a condition that has the potential of curtailing a person's longevity and, that Ms Botha and Mr Potgieter had failed in their postulations to be realistic and factor in the early retirement as a result of epilepsy. This finding was smade despite the fact that the respondent had admitted the medico legal reports of the neurologist Dr Wynand-Ndlovu, which stated that the patient's pre-morbid epilepsy was well managed. The experts opined that the epilepsy had no effect on the patient's earning ability and that he would have achieved his normal working lifespan. The neuro-surgeon Dr D K Mudjaba likewise opined that the patient's epilepsy could not be classified as a post-traumatic epilepsy.

[14] The respondent further accepted as correct the medical reports of the appellant and the actuarial report of Mr Alant dated 6 June 2019 used by the parties. The instructions from the respondent's attorneys Brian Ramaboa Inc confirms Ms Botha's evidence. Accordingly, both parties had admitted the patient's past loss of earning and future loss of earning/ earning capacity as postulated by Ms Botha before contingencies or the cap was applied. The preamble to Mr Alant's report reads as follows:

> *".....We are instructed to estimate the actuarial present value of earnings to assist with determining compensation for loss of earnings. We were specifically requested to estimate the present values of the career path set out in the addendum report dated 29 May 2019 by the Industrial Psychologist Mr ME Botha. We estimated the present value as at 12 June 2019"*

[15] It is correctly pointed by Counsel for the respondent that the process of

assessment of a patient's loss of earning capacity was mainly speculative and, as stated in Southern Insurance Association Ltd v Bailey, it involves speculations into the future. What is then left for the court is to make rough estimates of the present value of the loss.

[16] In the Bailey matter the issue revolved around the objection to the court *a quo's* reliance on the actuarial computation in making a separate assessment of the loss of earning capacity. The court acknowledged that the actuarial calculations were not merely a "gut feeling" but were an "informed guess," in that it was an attempt through logical reasoning to ascertain the true loss of earnings. While the courts discretion still prevails, credence is also given to the logic in the computation which is based on fact. Actuarial calculations are therefore not to be discouraged or disregarded especially when based on admitted facts. In my view, counsel for the respondent failed to deal with the full text where Nicholas JA stated:

> *" All that the court can do is to make an estimate, which is often a very rough estimate, of the present value of the loss.*
> *One is for the Judge to make a round estimate of an amount which seems to him to be fair and reasonable. That is a matte 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. It is manifest that either approach involves guesswork to a greater or lesser extent….*
>
> 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 has 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"

[17] In this matter it is common cause that the facts from which the loss of earning capacity was determined, were admitted by the litigants. At no time during the trial did the respondent seek to resile from the admissions it made at pre-trial. In fact during the trial it gave instructions to its actuary to utilize Ms Botha's report. It is trite that the court in bound to consider only those facts which were admitted and that it is not necessary to call for additional evidence or to rely on facts outside of those admissions to prove the patient's loss of earning capacity. In my view, while the court in the exercise of its discretion is required to make an award which is fair to both sides, the exercise of such discretion is limited where the court is bound by admissions of the parties made at a pre-trial meeting and during the trial. The court *a quo* in my view therefore, erred in disregarding such admissions and agreements to work on the postulations of Ms Botha's third report and the calculations based on the respondent's actuary.

[18] No contingencies were applicable post morbid as the patient would earn no income due to the total loss of earning capacity as at date of collision. What was relevant was for the court to consider, based on the admitted facts, whether the patient would have earned the amounts determined by Mr Alant had the collision not occurred and, what contingencies had to be applied to the amount. This was confirmed by counsel for the respondent.

[19] Counsel for the appellant contended that the evidence of the neurologist Dr Wynamd-Ndlovu. Ms Botha and Mr Duvenhage who were called as a witnesses were therefore, relevant. Mr Duvenhage testified that he had head -hunted the patient. Before the collision he considered increasing the patient's salary by 100%, as well as inviting him to a joint venture in which the patient would have enjoyed in profit

sharing. The postulations of Ms Botha relied upon were those in her first report and additional collateral information dealt with in the addendum reports particularly the third addendum report.

[20] That the patient having suffered a total loss of earnings from the date of collision was a fact accepted by both parties. The earnings calculated by Mr Alant on 12 June 2019 relating to past earnings amounted to R782 677.00 (unlimited uncapped loss) and future earnings in the amount R14 949 456.00 (unlimited uncapped loss) were admitted by the appellant and respondent as correct. Mr Alant contended that a 5% contingency to past earnings and 20% to future earnings be applied and that contingencies of 10% and 40% suggested by the respondent were 'unreasonable'. In this regard he referred to a schedule annexure "TDK2" which was a table in the actuarial report of Mr Potgieter dated 23 June 2020. This report illustrated different scenarios of the patient's past loss of earnings and future loss of earnings applying the different contingencies and "the cap" as at 13 June 2019.

[21] There is not much difference in my view between the calculations of Mr Alant and Mr Potgieter postulating, the past and future loss of earnings, except that in the latter's calculation different scenarios are illustrated and different contingencies are applied. Mr Potgieter's scenario in Basis 5A applies a 0% / 40% contingency to past and future loss of earnings which translates to R 9 753 603.00 before cap and R9 101 222.00 after the cap is applied. At Basis 5B a 5% / 40% contingency is applied, this translates to R9 714 402.00 before cap and R 9 095 209 after the cap is applied. Mr Alant applying a 10%/40% contingency and calculated the past and future loss of income at R9 674 083.00. This translates to R9 088 775.00 after the cap is applied. Counsel for the appellant contended that a reasonable amount would be in the amount not less than R9 988 000 after applying the 5% and 20% deductions and the applicable limitation.

[22] I am of the view that the parties had agreed to use the calculations of Mr Alant and given the illustrations referred to above, I find no reason to differ with the contingencies applied by Mr Alant and would retain the award as illustrated after the cap is applied to R9 088 775.00. I make no order as to costs.

[23] In the result the following order is granted;

1 . The appeal is upheld and the order of the court *a quo* is set aside;
2 The draft order filed by the appellant is to reflect at paragraph 1 that an amount of R9 088 775.00 (nine zero eight eight seven seven five only) is payable to the plaintiff is hereby made an order of court.
3 No order as to costs.

Tlhapi

TLHAPI W

(JUDGE OF THE HIGH
COURT)

I agree,

BASSON AC

(JUDGE OF THE HIGH COURT)

I agree,

MATSEMELA M]

(ACTING JUDGE OF THE HIGH COURT)