

INDUSTRIAL PSYCHOLOGISTS: A PROFESSION IN TROUBLE?

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COURT IMPRESSIONS – A CAUSE FOR CONCERN

- **Ntombela v Road Accident Fund (209709/2016) [2018] ZAGPJHC 41 (19 March 2018):**
- *“The industrial psychologists’ performance warrant special mention. Their **inadequate** and **superficial** conduct has already been alluded to. It appears that persons practising in this field regard themselves as mere **conduits of data** which they wrap up in jargonised waffle. It is hard to seek out of these reports the aspects in which the **expertise** they profess is evident. The entire edifice of these reports was built on the **say-so** of a person who any professional ought to have appreciated was not in a position to express the views that he did, still less that they **slavishly and uncritically relied** upon such views. They have **short-changed their clients**. I shall **disallow their costs** in whole.”*

“INADEQUATE” – PART 1

- Practice Manual of the Gauteng Local Division of the High Court of South Africa:
- **6.5.5:** *“In all trials in which the parties have opposing expert witnesses, such opposing expert witnesses must meet and reduce their agreements and disagreements to writing in joint expert minutes, signed by them....”*
- **6.15.9.9.1:** *“Expert reports must be drafted in a format designed for lucidity, brevity, and convenient cross-referencing and, to this end, must be in numbered paragraphs, and when referring to other expert reports refer to the numbered paragraphs therein.”*
- **6.15.9.9.2** *“Joint minutes must identify exactly what is agreed and what is not agreed, with reasons stated why agreement cannot be achieved, especially as to whether the disagreement relates to a fact clinically observed or an interpretation of facts.”*

“INADEQUATE” – PART 2

- Checklists for personal injury matters where children or adults are injured.

Had the accident not occurred checklist

Item	Issue	Plaintiff IP name:	Defendant IP name:
1	Was the injured employed at the date of the accident?		
2	As at the date of the accident, please state the injured's employer (or whether the injured was self-employed), position and date that he/she commenced employment with the employer.		
3	Please provide a summary of earnings for the one year prior to the date of the accident. Please be careful to provide rand values for the basic salary, and other benefits such as annual bonuses, overtime, allowances; if the injured belonged to a pension/provident fund please state the exact name of the fund (refer to the Financial Service Boards registered active funds database in this regard available on www.fsb.co.za under the retirement funds section); if the injured belonged to a medical aid scheme please state the exact name of that scheme and whether the employer provided a medical aid subsidy; and any other benefits. If you have been provided with IRP5's please refer to the tax codes document on the SARS website.		
4	If you have not been provided with proof of earnings whatsoever, please state as such:		
5	Did the injured's employer make use of a formal salary survey in setting earnings levels?		
6	Please provide the likely earnings progression of the injured had the accident not occurred. Before doing so, please answer the following questions:		
7(a)	Did you have a documented earnings history for the injured prior to the date of the accident and did the injured receive promotions historically?		
7(b)	Did you contact the employer to ascertain whether the injured would have been promoted? If so when would the promotion or promotions have taken place and what is the likelihood that the promotion(s) would have taken place? Was the injured specifically earmarked for promotion or would he/she have had to apply along with other candidates?		

- Focus must be on objective information.

“SUPERFICIAL” – PART 1

- **Ndlovu v Road Accident Fund (39302/10) [2013] ZAGPJHC 201; 2014 (1) SA 415 (GSJ):**
- *“...large tracts of text are repeated in the same document. This is valueless and only increases the number of pages a judge is required to read.”*
- **Nonyane v Road Accident Fund (3126/2016) [2017] ZAGPPHC 706 (10 November 2017):**
- *“The tendency to think that our courts capitulate to every evidence or report of an expert is wrong and has to be dispelled and discouraged. Each case has to be determined on its merits. That responsibility for evaluation of the reliability of facts and or evidence lies in the domain of the courts contrary to belief of those participating in the court proceedings.”*
- **Hlalele Obo Hlalele v Road Accident Fund (41304/2013) [2015] ZAGPJHC 54 (26 March 2015):**
- *“The essential dispute appears to be that each industrial psychologist lives in a different dreamland.”*
- **Bvuma v Road Accident Fund (2010/17220) [2012] ZAGPJHC 258 (14 December 2012) :**
- *“This judgment is yet another example of the ‘sausage machine outsourcing’ approach to Road Accident Fund litigation. Where there was a claim for ‘loss of earnings/loss of earning capacity’, there was no attempt by any legal representatives to conduct any enquiry into or obtain any information about the plaintiff’s factual situation of employment. Instead the attorneys for both parties simply referred the plaintiff to a multitude of medical ‘experts’ resulting in an absence of factual information relevant to the claim for loss of earnings.”*

“SUPERFICIAL” – PART 2

- **Matabane obo M v Road Accident Fund (2014/31190) [2015] ZAGPJHC 248 (30 October 2015):**
 - *“Dr X also attempted to convince me during his testimony that, having regard to the mechanism of the accident and the fact that it resulted in a fractured femur, there is a possibility of an undiagnosed head injury, which would not have been picked up by the medical staff at the hospital due to the serious injury to the leg. This, in my view, is speculative in the extreme.”*
- **Ngwane Road Accident Fund (RAF273/15) [2017] ZANWHC 82 (17 October 2017):**
 - *“On the other hand the only witness called by the defendant Mr X was not an impressive witness. He was very evasive in answering questions, and could not even make simple concession when the opportunity presented itself. Despite him being an Industrial Psychologist by profession, it was only after a lengthy cross-examination and him taking us back and fro that he conceded after being pressed, to the fact that he is required as an expert to express an opinion on the employability of a person, a fact which he at the beginning indicated that it is not within his expertise.”*

“CONDUITS OF DATA”

- **M v Road Accident Fund (12780/15) [2017] ZAGPJHC 65 (21 February 2017):**
- *“A further shortcoming emerged when Ms X opined on the plaintiff’s loss of earnings/earning capacity. She clearly had insufficient information on this aspect. This is so despite the fact that sufficient and full information on the plaintiff’s past and current earnings was available to her before and during the trial. On the objective evidence, there was clearly no basis for the approach adopted by Ms X for assessing the plaintiff’s potential earnings on the basis of the Paterson Scales alone, and excluding his actual income information in the face of available and actual earning information.”*

“EXPERTISE” – PART 1

- **Schneider NO & Others v AA & Another, 2010 (5) SA 203 (WCC):**
 - *"In short, an expert comes to court to give the court the benefit of his or her expertise. Agreed, an expert is called by a particular party, presumably because the conclusion of the expert, using his or her expertise, is in favour of the line of argument of the particular party. But that does not absolve the expert from providing the court with as objective and unbiased an opinion, based on his or her expertise, as possible. An expert is not a hired gun who dispenses his or her expertise for the purposes of a particular case. An expert does not assume the role of an advocate, nor gives evidence which goes beyond the logic which is dictated by the scientific knowledge which that expert claims to possess."*
- **Stock vs Stock 1981 (3) SA 1280 (A):**
 - *"An expert....must be made to understand that he (or she) is there to assist the court. If he (or she) is to be helpful he (or she) must be neutral. The evidence of such a witness is of little value where he, or she, is partisan and consistently asserts the cause of the party who calls him (or her)."*

“EXPERTISE” – PART 2

- Communicate the truth in an ethical, objective, and effective way.
- Maintain your autonomy, authenticity, and integrity.
- Uphold the values of your profession.
- Interact with attorneys and with the judge in an atmosphere of mutual respect.
- Engage in an ongoing dialogue with your attorney so that, together, you can educate as well as learn from the judge as to what questions he/she may have.
- Speak directly to the issues.
- Make complex matters understandable without oversimplifying.

REPUTATION

- **Kunene v Road Accident Fund (07/8693) [2011] ZAGPJHC 194 (8 December 2011):**
 - *"In addition, although Ms X made the above concessions, it became abundantly clear that the report that she allegedly wrote, on which her evidence was based, was not in consequence of an assessment made by her. It appeared that the assessment on which the report is based, was done by a colleague."*
- **Fulton v Road Accident Fund (2007/31280) [2012] ZAGPJHC 3; 2012 (3) SA 255 (GSJ) (1 February 2012):**
 - *"In coming to the aforesaid conclusion I have not lost sight of the evidence of Mr X who testified on behalf of the defendant. He is an industrial psychologist. He attempted to convince the court that the plaintiff suffered no loss of future earnings...., I found Mr X to be partisan and also lacking the necessary objectivity. This also affects his credibility."*
 - I am now advising all Counsel with whom I work to establish as their opening question in cross examination:
 - (a) Whether or not the Industrial Psychologist personally interviewed the plaintiff;
 - (b) The duration of said interview;
 - (c) The information requested of the plaintiff and instructing attorney prior to attending said interview.

"SAY-SO" – PART 1

- **Statistics South Africa (<http://www.statssa.gov.za/?p=4669>):**
- *"Misinformation and hearsay have the power to influence an economy."*
- **Lazarus v Rand Steam Laundries (1946) (Pty) Ltd 1952 (3) SA 49 (T):**
- *"It seems to me that the judicial officer must be placed in such a position that he is not called upon to make an arbitrary or merely speculative assessment, a state of affairs which would result in injustice to one of the parties."*
- **Boy Petrus Modise v Passenger Rail Agency of South Africa, case number A5023/2013:**
- *"....,I may not allow a suspicion nor my sympathy for the plaintiff, to translate into a basis for awarding damages where the evidence does not allow this."*

"SAY-SO" – PART 2

- **Donough v Road Accident Fund (8962/06) [2010] ZAGPJHC 100:**
- *"I find it totally unacceptable that the plaintiff's experts,.... omitted to contact the plaintiff's employers post-accident, to corroborate their opinions. Clearly their opinions are merely based on the say-so of the plaintiff....To show the court's displeasure in the manner in which these experts conducted their investigations, I have decided that they should not be entitled to their full qualifying fees."*
- **Du Plessis v Road Accident Fund (87933/2016) [2018] ZAGPPHC 104 (9 March 2018):**
- *"No explanation is forthcoming from the plaintiff why pay slips are not available nor bank statements for that matter. The variables in the contradictory evidence are just too many. The court is implored, notwithstanding the contradictory evidence to essentially embark upon conjecture and speculation in exercising a wide discretion in awarding loss of income and earnings. I am not at large to do so."*

“SAY-SO” – PART 3

- **Mlotshwa v Road Accident Fund (9269/2014) [2017] ZAGPPHC 109 (29 March 2017):**
- *“The court is alive to the nature of the informal sector in South Africa and that the livelihood of many of our people is dependent on generating an income in this sector. Our courts can never discriminate against members of society engaged in this sector. However, the courts cannot turn a blind eye to the duty of a litigant, where he bears the onus, to provide sufficient proof of income. The proof of such income even if based on estimates or averages, is after all, often than not, peculiarly within the knowledge only of the plaintiff. The defendant cannot be prejudiced simply on the say so of a litigant of an average income he earns per month and what remains after payments, without providing evidence as to how the average before the payments was generated. It appears common cause between the parties that there has been a past loss of income and there will in all likelihood be a future loss of earnings. However, the paucity of evidence is such that it calls upon me, in exercising the wide discretion I am afforded, to embark upon conjecture and speculation in quantifying the damages. I am not at large to do so.”*

“SLAVISHLY AND UNCRITICALLY RELIED”

- **AD and Another v MEC for Health and Social Development, Western Cape Provincial Government (27428/10) [2016] ZAWCHC 180 (7 September 2016):**
- *“The salary information contained in the PEC survey and Koch’s Yearbook is hearsay. This is inevitable in this field. However there is a difference in the quality of the hearsay. It is reasonable to infer that the PEC survey accurately captures the data furnished by the participating employers. There is a reasonably precise breakdown, indicating the employee numbers making up each figure. Koch’s figures for non-corporate workers, on the other hand, are not really explained in his work. I do not suggest that he would not be able to substantiate them but he was not a witness and Ms X did not display a very sure grasp of the distinction between corporate and non-corporate employers or how Koch had arrived at his figures.”*
- **CRITICAL QUESTIONS IN DATA ANALYSIS**
- Is the source reliable?
- How strong is the evidence overall?
- Where can I get more information?

“SHORT-CHANGED THEIR CLIENTS”

- Incorrect interpretation of pay-slips or earnings data.
- Unsubstantiated arguments.
- Lack of collateral evidence supporting their opinions.
- Lack of knowledge pertaining to job evaluation and specifically the Peromnes and Paterson Job evaluation systems.
- Lack of understanding of contingency deductions.
- Can have a substantial financial impact on the value of a claim.
- This in turn has a significant impact on funding at many levels; including the Road Accident Fund, the Medical Protection Society, the Department of Health and insurance companies; to name just a few.

“DISALLOW THEIR COSTS”

- In general cost orders (including the cost of the industrial psychologist’s report and or any reservation fee or court appearance fees) follow the result of the case.
- Where matters are settled between the parties, this usually includes the Road Accident Fund or any other defendant to pay the expert’s costs on a party and party scale.
- However where the matter runs to trial and the case is decided by a Judge, the Judge has extensive discretion as to granting costs.
- As a punitive measure where the Judge is of the view that the industrial psychologist has not applied himself, the Judge may specifically disallow the costs of the industrial psychologist.

AUDIENCE PARTICIPATION EXAMPLE

- Many Industrial Psychologists rely on the Quantum Yearbook for earnings data for the non-corporate sector. The following are examples of questions that may be put to you during evidence regarding this data:
 - (a) Precisely what Statistics South Africa data was used to derive the 2018 scales?
 - (b) How is the survey conducted and is data verified?
 - (c) With respect to the often quoted unskilled salary scale of: R 8,700 – R 25,500 – R 73,000; is this in relation to full-time or part-time employment?
- We will review (c) in the discussion on contingencies.

STATISTICS SOUTH AFRICA SURVEY DATA

- Statistics South Africa survey data is based on an interview between the enumerator and the participant.
- *"What is your (choose one) annual/monthly/weekly/daily/hourly wage or salary before deductions? (Include tips and commissions)"*
- If the participant is reluctant to divulge his/her earnings or doesn't know how much he/she earns, the enumerator is instructed to present a Prompt Card to the respondent and they can then choose the category in which their earnings fall.
- The variables *Monthly earnings for employees* and *Monthly earnings for Employers and Self Employed* is then a derived variable based on the reported earnings and frequency.
- This variable is therefore not only based on hearsay earnings reported by the participant but also subject to human error in capturing the amounts and converting to monthly earnings.
- Participant may report net earnings not gross earnings and have no knowledge of fringe benefits such as employer pension contributions and employer medical aid subsidies.
- No audit or fact checking.
- I am therefore of the view that it has limited value.

QUESTIONS?

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