EXPERT WITNESSES

UNRAVELLING COMPLEXITIES IN THE COURTROOM

Certain civil and criminal cases are too complex to be resolved without expert guidance. The role of an expert is a unique and vital one namely to assist the court in cases where specialised knowledge is required that is beyond the judge's expertise.

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In complex legal cases involving specialised fields such as psychiatry, ballistics, medicine, finance, engineering or cybersecurity, expert witnesses play a crucial role. These experts bring advanced knowledge, skills and experience directly relevant to the case, offering critical insights into both criminal and civil matters. Their expertise allows them to provide informed opinions on topics that are often beyond the scope of the court's general understanding. As Judge Gregorowski once stated: **"Judges cannot claim the same level of experience and study, and if experts have a fixed standard and offer their opinions with certainty, it would be unwise for the judges to disagree with them"** (Moorcroft, nd).

However, when a court lacks the specialised knowledge needed to assess certain matters, it faces the challenge of determining whether to accept the expert's opinion. To do so, the court must evaluate whether the expert's qualifications and evidence support their conclusions. A mere opinion is insufficient; the expert's statements must be backed by concrete facts and evidence that validate their expertise. Ultimately, while the expert's insights are valuable, the court retains the final authority to accept or reject any evidence, ensuring that it does not simply adopt an expert's opinion without careful scrutiny (Moorcroft, nd).

The role of expert witnesses

In South African legal proceedings, expert witnesses play an indispensable role, helping to demystify complex, technical or scientific issues that may otherwise overwhelm the court. Their input is invaluable, enabling judges to understand intricate evidence and arrive at

informed, fair decisions. These witnesses provide specialised knowledge that judges rely on to make sound rulings, highlighting the immense responsibility they carry. Without their expertise, judges could struggle to draw accurate conclusions or deliver just outcomes, stressing the critical nature of expert testimony (Lerm, 2015).

Expert witnesses have a responsibility to break down complex concepts into clear, comprehensible explanations for the court. They carefully analyse evidence, documents or data relevant to their field, offering well-informed opinions on the validity and significance of the materials in the case. This clarity ensures that the court gains a deeper understanding of the case's crucial elements (Barter, nd).

However, it is essential for witnesses, especially expert witnesses, to remember that deliberately using peculiar technical terminology, pompous language or slang for the purpose of impressing the court, may annoy or confuse the court rather than helping it to comprehend what they are saying. The penny must drop the first time around (Van Zyl, 2015).

Selecting an expert witness

During a criminal or civil case, a party seeking expert advice knows that selecting the right expert witness is a crucial step. The defence or State should carefully choose an expert with the relevant knowledge and experience to shed light on the matter at hand. Once appointed, the expert must get to work, compiling a detailed report based on their findings, analyses and professional opinions. This document is not just for the party that tasked the expert as it is submitted to the court and shared with the opposing side (Barter, nd).

In South Africa, the process is clear: expert witnesses are required to submit written statements (**inter alia** affidavits and/or affirmations) that thoroughly explain their opinions, analyses and the reasoning behind their conclusions. As the trial progresses, the opposing party is granted the opportunity to cross-examine the expert witness, probing their methodology and challenging the opinions they have offered. The expert's credibility is put to the test as their work becomes a central part of the case (Barter, nd).

Dr Henry Lerm, a lawyer from Gqeberha, offers the following tips when instructing an expert witness:

- Ensure that the expert has the necessary qualifications, experience and knowledge related to the specific issues in question. Consider their academic credentials, publications in reputable journals, conference presentations, prior courtroom experience and how well they have performed under cross-examination. It is also important to determine whether the expert has ever been discredited.
- Be cautious if there is a close social connection between the lawyer and the expert, as this could compromise the expert's independence. In such cases, it may be advisable to seek a different expert.
- Assess the nature of the relationship between the expert and the lawyer's client, particularly if the expert has previously provided psychotherapy or medical treatment to the client. Calling such an expert may raise concerns of bias. Similarly, investigate any close relationships between the opposing party and their expert, as this information could be useful during cross-examination.
- Ensure that the expert compiles a clear and comprehensive report that is easily understood by you, your opponent and the court. The report should be relevant to the key issues being addressed.
- Avoid attempting to influence the expert's opinion or the evidence they present in any way. Doing so could later have serious repercussions (Lerm, 2025).

Be wary of being influenced

Expert witnesses must be cautious not to let external influences affect their objectivity. The issue of "knowledge and/or experience gaps" creates a risk that some experts may skew their opinions to benefit the side that instructs them, rather than providing an independent and unbiased opinion. To address this concern, various rules and guidelines have been developed over time to ensure experts uphold their duty of impartiality (Lerm, 2015). According to Dr Lerm, one of the most insightful codes of conduct are derived from the **National Justice Compania Naviera SA v Prudential Assurance Co Ltd (The Ikarian Reefer) (No 1) [1993] F S R 563**, as outlined by Creswell J, which includes several crucial points:

"1. Expert evidence presented to the court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation.
2. An expert witness should provide independent assistance to the court by way of objective, unbiased opinion in relation to matters within his (or her) expertise ... An expert witness should never assume the role of an advocate.
3. An expert witness should state the facts or assumptions upon which his (or her) opinion is based. He (or she) should not omit to consider material facts which could detract from his (or her) concluded opinion.
4. An expert should make it clear when a particular question or issue falls outside his expertise.
5. If an expert's opinion is not properly researched because he (or she) considers that insufficient data is available, then this must be stated with an indication that the opinion is no more than a provisional one."

Dr Lerm argued that in essence, experts are expected to offer original, objective and unbiased assistance to the court, rooted in the facts or assumptions they rely on. They must be willing to acknowledge when something falls outside their expertise or when they lack sufficient knowledge to form a firm opinion (Lerm, 2015).

The code has been widely accepted, including by South African legal scholars such as Zeffertt, Paizes and Skeen in **The South African Law of Evidence** (5th edition published in 2003), and was quoted with approval in **Schneider NO and Others v AA and Another 2010 (5) SA 203 (WCC)**, emphasising their primary ethical duty to provide the court with an objective opinion. In this case, Judge Davis issued a cautionary reminder to experts in the case by warning against experts becoming "hired guns" and emphasised that an expert's role is to offer the court the benefit of their expertise, free from external influence (Winfield and Fletcher, 2021). This case, which focussed on the home-schooling of two children, saw a CEO of a home-education advocacy group called as an expert witness by the children's mother. However, it was revealed that the organisation had funded the litigation and a second expert was allegedly brought in to discredit the testimony of a third expert. These conflicts of interest were not disclosed to the court (Lerm, 2015). This case highlighted

the severe consequences when an expert's impartiality is compromised. The court found that the expert had a vested interest in the outcome, a fact known to both the attorney and counsel involved (Winfield and Fletcher, 2021). The court found that the legal representatives had failed in their fiduciary duty, stressing the importance of transparency. The court also reiterated the primary duty of an expert witness: to provide an objective and unbiased opinion, not to serve as a tool for one side of the case. The court stated that the expert witness must provide "the court with as objective and unbiased an opinion, based on his or her expertise ... An expert is not a hired gun who dispenses his or her expertise for the purposes of a particular case nor does he or she 'assume the role of an advocate'" (Lerm, 2015). In response, the court ordered punitive costs, reported the attorney and counsel to the relevant professional bodies and damaged the expert's professional reputation (Winfield and Fletcher, 2021).

The court has a critical role in assessing expert opinions, especially when it lacks the specialised training to evaluate them. It must ensure that the expert is qualified and that their opinion is based on sound evidence. A mere statement of opinion, unsupported by facts, is insufficient to assist the court (Moorcroft, nd).

Admissibility of expert evidence

In the legal world, the admissibility of expert evidence hinges on the principle that an expert's testimony is only valid when it can help the court through their special knowledge and skills. Essentially, this means that expert evidence is admissible when it is relevant, and conversely, inadmissible when it is irrelevant (Moorcroft, nd). This aspect was further clarified in **Mathebula v Road Accident Fund (05967/05) [2006] ZAGPHC 261 (8 November 2006)**, where the court stated: **"An expert is not entitled, anymore more than any other witness, to give hearsay evidence as to any fact, and all facts on which the expert witness relies must ordinarily be established during the trial, except those facts which the expert draws as a conclusion by reason of his or her expertise from other facts which have been admitted by the other party or established by admissible evidence."**

A significant concern in legal proceedings is the growing trend of witnesses presenting themselves as experts but who, in reality, lack the requisite qualifications to provide admissible or meaningful evidence. This problem undermines the integrity of expert testimony, which is meant to assist the court in forming its opinion based on facts, not beliefs or opinions. South African law generally rejects the admissibility of opinion evidence, as the court itself is responsible for drawing inferences from the facts presented (Bekker, 2023).

This was illustrated in **Price Waterhouse Coopers Inc and Others v National Potato Co-operative Ltd and Another (451/12) [2015] ZASCA 2; [2015] 2 All SA 403 (SCA) (4 March 2015)** where the court ruled that an expert's opinion, based on facts not in evidence, has no probative value. The court approaches expert testimony in the same way it evaluates the testimony of any other witness. Expert testimony is not automatically binding and the credibility of an expert's opinion can be called into question. The court held that an "expert witness's objectivity and the credibility of his or her opinions may be called into question, namely, where he or she:

- accepts to perform his or her mandate in a restricted manner;
- presents a product influenced as to form or content by the pressures and demands of litigation;
- shows a lack of independence or a bias;
- has an interest in the outcome of the litigation, either because of a relationship with the party that retained his or her services or otherwise;
- advocates the position of the party that retained his or her services; or
- selectively examines only the evidence that supports his or her conclusions or accepts to examine only the evidence provided by the party that retained his or her services."

The plaintiff's expert, a chartered accountant and auditor, was criticised for lacking the necessary qualifications to offer expert evidence on the auditing practices in question. Despite his academic background and past qualifications, he had not been involved in auditing for over two decades and had limited practical experience. His testimony was therefore deemed insufficient to provide meaningful assistance to the court (Bekker, 2023).

Tips for witnesses

Adv (ret) Zaais van Zyl cautioned that expert witnesses should be cautious of leading questions and ensure their subject knowledge is current when they testify (Van Zyl, 2015). Regarding cross-examinations, Adv Elize le Roux accented key strategies during the Intelligence Forensics and Prosecution Workshop, held in Gauteng at the end of October 2024. She advised witnesses to keep their answers concise and avoid unnecessary elaboration. Adv Le Roux also cautioned against providing weak responses such as "as far as I know," which could undermine their credibility. She outlined the four fundamental answers during cross-examinations as "yes, no, I don't know, or I'm not sure".

Adv Le Roux's advice was: "You are not expected to know everything, so don't hesitate to say, 'I don't know,' when that is the honest answer." Witnesses should not feel pressured into believing they are uninformed or hiding something simply because they truthfully

respond with "I don't know". Similarly, if the correct answer to a question is 'no,' it remains the truth, regardless of how many times or in how many different ways the question is asked. Lawyers argue while witnesses testify, therefore it is important that the witness focusses on answering questions truthfully without engaging in arguments with the attorney. Arguing will only distract the witness from his or her role as a witness. Adv Le Roux also stressed the importance of engaging the judge or magistrate directly, maintaining eye contact and projecting one's voice to ensure clarity and effective communication in court.

In South African law, expert witnesses are crucial in clarifying complex issues for the court, contributing to a more fair and informed legal process. Their qualifications, selection and presentation are carefully considered, as their input often helps judges and magistrates to navigate intricate cases. Expert evidence is especially valuable when the subject matter is too complex for legal professionals to fully grasp. However, challenges arise when experts lose objectivity, often due to pressure from the lawyers who hire them, potentially leading to biased testimony. This is especially true in cases involving contingency fee arrangements, where financial incentives may influence expert opinions. Lawyers should resist such temptations, as legal services should remain guided by ethics, not driven by profit motives.

A decade ago, Adv (ret) Zaais van Zyl advised experts to remember that their credibility is only as strong as their most recent testimony - that advice remains valid. Expert witnesses often testify without having a full understanding of the facts or rely solely on information provided by the accused, defence counsel or prosecutor long before the trial. This is particularly common with some psychiatrists and psychologists, whose testimony can be easily undermined during cross-examination. It is crucial to attend court and gather the background evidence firsthand. "Your reputation as an expert is at stake - guard it jealously," (Van Zyl, 2015).

DISCUSSIONS OF EXPERT WITNESSES AND/OR EVIDENCE FROM THE PEN OF POLLEX

During the years, **Servamus's** legal eagle, Pollex has written numerous articles regarding expert witnesses.

The references to experts in the first part of this current discussion **supra**, are virtually all experts who gave oral evidence in a court where they were subjected to cross-examination. Some of these experts **supra** are in the service of the State. Accordingly, we will now, very briefly, focus on experts whose findings are described by means of an affidavit and/or an affirmation and/or a certificate and/or an ordinary statement which are handed in at court.

We refer of course to section 212(4) and (5), as well as section 213 of the Criminal Procedure Act 51 of 1977 (the CPA) (as amended). Subsection (4) of section 212 of the CPA referred to **supra**, provides as follows, namely -

"212 Proof of certain facts by affidavit or certificate

(4)(a) Whenever any fact established by any examination or process requiring any skill -

(i) in biology, chemistry, physics, astronomy, geography or geology;
(ii) in mathematics, applied mathematics or mathematical statistics or in the analysis of statistics;
(iii) in computer science or in any discipline of engineering;
(iv) in anatomy or in human behavioural sciences;
(v) in biochemistry, in metallurgy, in microscopy, in any branch of pathology or in toxicology; or
(vi) in ballistics, in the identification of fingerprints or body-prints or in the examination of disputed documents,

is or may become relevant to the issue at criminal proceedings, a document purporting to be an affidavit made by a person who in that affidavit alleges that he or she is in the service of the State or of a provincial administration or any university in the Republic or any other body designated by the Minister [of Justice] for the purposes of this subsection by notice in the **Gazette**, and that he or she has established such fact by means of such an examination or process, shall, upon its mere production at such proceedings be **prima facie** proof of such fact: Provided that the person who may make such affidavit may, in any case in which skill is required in chemistry, anatomy or pathology, issue a certificate in lieu of such affidavit, in which event the provisions of this paragraph shall **mutatis mutandis** apply with reference to such certificate.

(b) Any person who issues a certificate under paragraph (a) and who in such certificate wilfully states anything which is false, shall be guilty of an offence and liable on conviction to the punishment prescribed for the offence of perjury".

Note that subsection (5) of section 212 of the CPA is similar to subsection (4) **supra**. The main difference is that subsection (5) provides for expert witnesses in respect of "precious metal" (such as unwrought gold and platinum), and "precious stones" (such as unpolished diamonds).

For examples of such subsections (4) and (5) of section 212 of the CPA affidavits, see Pollex in **Servamus:** January 2014.

Be reminded that this section 212 of the CPA has to do with "experts in the service of the State".

As far as expert witnesses are concerned who are not in the service of the State, it is suggested that "the statement" referred to in section 213 of the CPA, be used. Be further reminded that section 213 of the CPA is about an ordinary statement and not an affidavit.

For an English and Afrikaans example of this section 213 of the CPA statement, see Pollex in **Servamus**: December 2000.

Editor's note

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