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REQUIREMENTS FOR EXPERT WITNESSES – A REAL ESTATE PERSPECTIVE

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ABSTRACT

Often during litigation, courts rely on the expertise of professional witnesses with knowledge on the case at hand. The purpose and requirements for such witnesses are sometimes misunderstood, although well documented in caselaw, textbooks, professional standards and other literature. The purpose of this paper is to investigate the application of these principles in practice when expert witnesses testify and to point out recommendations to ensure professional standards are upheld, and the legal system succeed in its aims to ensure justice for society at large. The paper is structured as a literature review with practical application through the use of actual case studies, to illustrate the requirements of such witnesses as it specifically relates to real estate. The results provide a review of the required qualifications, competencies and other traits of such experts in order to be considered as such, with a recommendation for stronger adoption of international professional standards, and inter-professional communication on the adoption of acceptable standards. It is also suggested that specialised training on technical expertise in expert witnessing as well as specialised real estate principles and valuation be adopted, with further research on these specialised topics as support. The value of the paper is that it provides a reference that can be used as guideline for the requirements for expert witnesses, especially in markets where professional standards are less established, or adopted.

Keywords: Property litigation; Expert witness; Valuation; Professional standards

INTRODUCTION

In many countries, especially developed markets, the principles for the use of expert witness are well documented in textbooks, academic texts, case law, and professional standards. This, however, depends largely, and can vary a lot, on the country, its legal system, the profession, or topic of the witnessing required, and the details of the specific case at hand. Although some witnessing is pure testimony of events, such as an eyewitness, others would be required for expert knowledge on just about any topic for different professions, with Haack (2015) suggesting that the expert witness business is booming. This poses a particular concern, as the legal profession would rely on other professionals to provide expert testimony to guide the proceedings in courts, arbitration, mediation, or other dispute resolution processes to come to an acceptable solution. But some topics might not be so commonly understood by everyone, and experts are required to shed light on topics where their knowledge is superior to that of the court.

In this regard, Haack (2015, p. 41) indicates that the U.S. legal system has always found expert witnesses problematic due to complaints of how opinions are conforming to the interests of the party that hires them, and how often the factual matters are being obscured or confused, rather than to be clarified. Gross (1991) indicates that this is not something new, quoting Taylor (1848) "*perhaps the testimony which least deserves credit with a jury is that of skilled witnesses .... It is often quite surprising to see with what facility, and to what extent, their views can be made to correspond with the wishes and interests of the parties who call them*".

But Sanders (2009) pointed out that methods are at the core of scientific conventions. While conventions surrounding scientific expert knowledge is questioned, there are instruments that expand our senses for progress in physics, astronomy, chemistry, and biology, as well as in such practical disciplines as medicine and engineering. These instruments, according to Sanders, are supported with

aids such as mathematics in its many different forms as well as experimental and quasi-experimental designs and other investigatory devices, which are also critical in helping the reasoning in science, but are further supported by the aids of peer review, publication, replication, and other formal and informal devices, which could also ensure that scientific evidence provided in court is trustworthy. These aspects of expert witness knowledge provide problematic assessment of the credibility and acceptance of witnesses' statements in developed and well-functioning legal systems and professions, even though generally accepted principles such as the Frye Rule and Daubert Standard are applied to guide this. This is even more so for developing economies, whereby the professional standards are less developed, and the legal premises might be less established on which to base decisions. Furthermore, some professions are more prone to uncertainty, especially where there are high levels of multidisciplinary influence, such as real estate, which is highly impacted by the principles of the legal profession, engineering, economics, investment, town planning, and other technical aspects, to name a few.

This paper will provide a summary of the important aspects to evaluate the credibility of a expert witnesses' testimony within the real estate profession in a developing market, with reference to real life examples to illustrate the problematic nature, and suggestions to avoid these.

METHODOLOGY

The research is structured as a qualitative analysis of real estate litigation, based on a summary of scholarly analyses, relevant case law, and real-world examples of court proceedings where the involvement of expert witnesses in real estate litigation is discussed to illuminate its inherent challenges. The paper sheds light on the problematic nature of the field, highlighting key issues that contribute to its complexity and potential for injustice when reliance is placed on inadequate expert testimony.

Utilizing a descriptive framework, the paper puts together theoretical insights from existing literature on the requirements of expert witnesses in general, with a linkage to real estate through reference to professional standards and with concrete illustrations from actual cases and practical examples in order to provide a framework for evaluation of the credibility of real estate expert testimony in developing countries.

The paper will be structured as follows: The introduction provided some brief background to the problem, followed by the methodology, explaining the structure of the paper. The next section, Literature, will provide a review of the general principles of expert testimony and the problems experienced by courts, as well as the specific case law guiding the principles. This is followed by Real Estate Specific Standards and Principles, which will shift the focus to real estate with reference to professional standards to guide the requirements and case law specifically to the profession. This is followed by Practical Application, which provides some practical examples of actual cases to shed some light on the problems that can be experienced and the solutions to these with reference to literature, case-law and professional standards. The Conclusion will summarise the findings of the study and include suggestions for further research.

LITERATURE

Mnookin (2007), reports that long before today's known expert witnesses, the knowledge of people were harnessed for their special skills to adjudicate in legal matters. The early modern British system obtained expert advice from special juries, and advisors assist either the judge or the jury to understand expert issues, with mention of cases dating back to 1351. Today, expert witnesses are being used daily to support courts and other forms of dispute resolution techniques, to varying degrees and levels, which differs in form and function depending on the nature or profession.

Gross (1991, p. 1119) indicates that experts testified in 86% of civil jury trials in California State Superior Courts in 1985 and 1986, indicating an average of 3.3 experts per trial, with plaintiffs calling 64% of them, with over 70% of these cases concerned claims for wrongful death or personal injury. Of these experts, 59% were medical doctors (50%) or other medical professionals. Other professions are newcomers to giving testimony to the courts, although solutions of common problems could be a common occurrence (Gormley, 1955). Of importance is that some professions are more prone to litigation, but would have more established processes and procedures to verify credibility of testimonies, while other professions that do not necessarily have that many representations in courts, might suffer from a lack of real experts with experience of legal or other litigation procedures. For these professions or geographies, it is necessary to investigate the knowns of standards and principles that could be applied in a similar way, or to identify specific problematic areas needed for further investigation, even out of court. These cross-profession comparisons are not uncommon, with Evans (1972) providing details of the principle whereby the testimony of an expert witness can deviate from the rule that no hearsay evidence is allowed in courts, comparing the case State v. Oakley (1962), where the principle of hearsay evidence was applied to a real estate case, to the case Loper v. Andrews (1966) where the same principle was applied in the medical profession, but with different findings. It is thus a matter of the same principle might not be directly applicable to different professions, or geographical areas, and care should taken to assume that it would be.

Generally, the medical profession is well described in terms of requirements, ethical standards, etc., in case-law, as well as other publications such as peer reviewed work, while smaller professions might lack the detail needed to make an accurate call on credibility. In this regard, Berlin (1997) indicates that ideally expert witnesses would seek the truth and would be honest and unbiased, and would not become an advocate or a partisan in the legal proceeding, however, expert witnesses are sometimes accused of doing just the opposite. Berlin quotes references to expert witnesses of caring nothing for the truth, deceiving juries, conducting themselves in a disgraceful manner, ignorant and irresponsible. In this regard, Gross (1991, p. 1120) indicates that nearly 60% of experts were repeat players, with at least two appearances in a six-year period, supporting a notion that in some professions the experts are familiar with the requirements, experienced in testifying and could be good business for some (refer Haack, 2015). More concerning is that it is also indicated that in 63% of trials, there were experts on both sides, with experts in the same general area of expertise providing opposing testimony, questioning if it is truthfully a different view based on own experience and knowledge, or wilful advocacy for a preconceived outcome.

This makes it very difficult to judge and ensure that the true version of facts is considered to resolve a case, even more so when a profession is under-represented in case-law, industry standards, or peer review publications. Even more so, Gross (1991, p. 1231) concludes that the legal system is deeply enmeshed with experts, yet, expert evidence is presented that is frequently misleading, uninterpretable or unreliable, and the witnesses who give it is held in contempt. Pound (1913) referred to this as “an exaltation of incompetency and distrust of special competency in special fields, which seem to be the unhappy by-products of democracy”. Fisher et al. (1995) refer to a “malpractice crisis” ascribed to dishonest lawyers and ignorant juries, but that the most significant shortcoming may be the expert witness. They further indicate that the majority of witnesses are honest and motivated by a duty to be fair and just, but a small, yet significant minority of professional expert witnesses is only motivated by financial incentives.

The aspect of independence is viewed as one of the main obstacles in an un-biased and objective opinion or testimony from an expert witness. It is a fact that these witnesses are professional experts and need to be compensated for their time (Dvoskin and Guy, 2008, p. 207). The problem is that these witnesses might be easily persuaded to conform their opinions to the interests of their hiring party, and they might even confuse or obscure the factual matters of a case rather than clarifying them (Haack, 2015). It is also indicated by Sanders (2007, p. 1582) that it is nearly impossible to believe

that no bias would exist in experts who are vetted, hired, groomed, and rehearsed to present testimony on materials often provided by the person employing them, and who can influence their prospects for future similar employment. Dvoskin and Guy (2008) also suggest that there really is no such thing as a truly objective expert, as they are also human beings, and it would be foolhardy and unconvincing for them to pretend that they are the only people in the world not affected by money. Instead, an expert should acknowledge this bias, which can include statements to confirm monetary compensation for knowledge and experience (Dvoskin and Guy, 2008, p. 207), and be frank about financial arrangements (Fisher et al., 1995, p. 1793).

Apart from the responsibilities for an expert witness to act ethically and provide an independent opinion, the double testimony principle, whereby both parties can call witnesses, or cross-examination, whereby both parties' legal representatives have the opportunity to interrogate a witness, are generally the most common methods to ensure the correct facts are heard. For an expert witness, the cross-examination is a deterrence to manipulate facts in favour of the appointee (refer Dvoskin and Guy, 2008, p. 202) and is an opportunity to test the transparency and credibility of a witness' testimony (refer Dvoskin and Guy, 2008, p. 208), especially if the cross-examination has the support of an opposing witness that can prove the facts of a witness to be false or misleading. Fisher, et al. (1995, p. 1796) on the contrary suggests that experts should be independently appointed by the court, rather than the individual parties, however, this would risk that not all facts are considered and hearing the testimony from both parties that challenges one another's opinions, might still be the most effective way to get a full understanding of all aspects. Posner (1999, p. 93) further caution against expert witnesses in that they can more readily mislead judges, as they are more difficult to pick apart on cross-examination, in that they can hide behind a wall of esoteric knowledge.

The testimony from both sides should also be tried against general scientific principles and practices in the specific profession. Sanders (2009, p. 64) indicates that "A substantial part of having what passes for scientific expertise in a field is an ability to use the tools of the trade and an appreciation of the nuances of the methods of investigation commonly employed in the discipline". It is thus imperative that the ability of an expert to testify on the standards, principles or other tools used, should be tried under cross-examination by a skilled legal team. Mnookin (2007, p. 763) cautions against the idealization of science and the failure to understand that even the best science is still an "all-too-human enterprise", with a myriad of social, institutional, cultural and rhetorical practices in which it is embedded. The result is that experts feel that cross-examination is too-often unfair (Mnookin, 2007, p. 799), but in practice, some expert testimonies failed to meet the expectations (Mnookin, 2007, p. 800). Brodsky, Griffin and Cramer (2010) propose a witness credibility scale, indicating that a witness should be measured on more than just knowledge and intelligence, but aspects such as confidence, trustworthiness, believability and likability could be indicators of a witnesses' credibility.

Rasmussen and Leauanae (2004, p. 166) indicates that an expert witness should be "someone who by virtue of special knowledge, training, or experience is qualified to provide testimony to aid the factfinder in matters that exceed the common knowledge of ordinary people". The reference to "ordinary people" could most probably be extended to anyone in court without the specific knowledge in that field. In this regard, the judge, or any other person in the legal system, would most certainly not have the detailed experience in forensic accounting than a person with academic qualifications and practical experience that specifically relates to accounting and economics. Rasmussen and Leauanae (2004, pp. 166-167) qualify this requirement by stating that academic qualifications should include an undergraduate and post graduate or specialised degree, which would provide solid foundational skills to interpret the theoretical principles. In addition to this, accreditations with professional bodies are indicative of an expert witness' mastering of the principles within a specific profession and should relate to the case at hand. This should also be supported by specific experience in the line of expertise, but also in court proceedings. Berlin and Williams (2000) also provide some detailed clarity on these aspects. They refer to a case where the expert did not have specific experience on a particular procedure, which was qualified by the plaintiff's attorney who referred to previous

decisions by appeal courts that "A witness may be qualified as an expert if he or she has acquired specialised knowledge through experience, training, or education…. A witness need not possess specialised knowledge as a result of experience as well as training and education in order to be qualified as an expert…. Nor need the expert be…an outstanding practitioner in the field in which he professes expertise". This is, however, a very generalised statement, but is there to indicate that some experts might possess different skills for testimony. The mere fact that a witness does not possess certain of these qualities, does not disqualify the expert per se, and the expert's credibility must be made through cross-examination of facts during the testimony, not by a judge before the trial. In the specific case referenced by Berlin and Williams (2000, pp. 1216-1217), the expert was disqualified as witness based on his opinion of facts not in evidence. The American Medical Association Council on Ethical and Judicial Affairs (2024) provides clear guidance on this, and states that: "expert witnesses must…testify only in areas in which they have appropriate training and recent, substantive experience and knowledge". So, although the findings of courts are that selection of expert witnesses should be very inclusive, professional codes of ethics puts a limitation to that and requires of professionals to decide themselves if they are qualified for the instruction. This is not only to protect the public and the judicial system, but also the credibility of the profession. Posner (1999, p. 92) provides a further angle, 5ndicateng that "A witness is not an advisor or consultant, but someone who testifies, who offers what the law regards as evidence", saying that there is a difference between economic expertise and economic witnessing. Therefor there is an important obligation by the witness to act with integrity, and ensure that the testimony provided is indeed of such a standard and clear of bias, that it provides clear facts that can be used to determine the underlying issues at hand. Posner further indicates that the witnesses should stick to their specific expertise, indicating that an economic witness cannot testify if a person disabled in an accident is entitled to compensation by the wrongdoer, but should testify on the quantum of compensation, should the wrongdoer be found guilty. Furthermore, the testimony, according to Michell and Mandhane (2005, p. 636) cannot be admitted if it does not fall outside the expertise of the trier of the fact, ie. an expert witness' testimony cannot be considered as such if it does not add to the knowledge of the court, if it doesn't tell the court something it doesn't know, or ought to know. It can definitely not be something that is considered to be public knowledge and evident to the lay man. Michell and Mandhane (2005, p. 640) indicates that the Supreme Court of Canada set the four criteria for admissibility of an expert as: (i) relevance; (ii) necessity in assisting the trier of the fact; (iii) the absence of any exclusionary rule; and (iv) a properly qualified expert.

REAL ESTATE SPECIFIC STANDARDS AND PRINCIPLES

With a focus on property or real estate specific litigation, Griswold (1996, p. 27) indicates that the qualities that will distinguish an expert witness are education, experience, licenses and certifications, articles published, courses or seminars presented and the opinion of peers. It is thus evident that also for property expert witnesses, the requirement is much wider than a mere license or qualification, but a combination of various qualities that would identify the individual as credible, or suitable for the particular case. Fortune (1964, p. 868) quotes a case where an expert witness is disqualified on the basis that the witness was incompetent and not familiar with the property values in the area under question. It is indicated that it cannot be presumed that an expert is competent merely on a specific aspect, such as familiarity of an area, or being an owner of property in the area, but should convince the court of credibility through testimony. Hoyt and Aalberts (1997) provides specific guidance on the factors to be considered for admissibility of real estate expert witnesses' testimony. They indicate that the admissibility of real estate testimony would also be tested by the Frye Rule (Frye v. United States, 1923) and the Daubert Test (Daubert v. Merrell Dow Pharmaceuticals, Inc., 1993). Under the Daubert Test, the factors to be considered are (i) whether the theory can be and has been tested; (ii) whether the theory has been subjected to peer review and publication; (iii) whether, as to a particular scientific technique, there is a known rate of error the court should consider; and (iv) general

acceptance of the technique in question, although it no longer is a pre-condition for admissibility. This is very specific to the United States, and questions the applicability to other parts of the world with different legal systems. The principles could probably be used in practice, but would have to be tried in the local courts for applicability.

There are, however, a lot of similarities, or common principles applied in professional standards over the world, for instance, the valuations and appraisal profession which makes out a substantial portion of professionals acting as expert witnesses in real estate, are governed in different countries by local boards, but would endorse the International Valuation Standards (refer IVSC, 2021), which is adopted in 137 countries in the world. It can therefore be assumed that these professional bodies would have a lot of similarities in the way they govern local practices, and would also have similar expectations from their members in terms of acting as expert witnesses. The Royal Institution of Chartered Surveyors (RICS) also develops leading international standards, including endorsement of the IVSC published standards, to protect consumers and businesses, ensuring the highest level of professionalism is employed across the built and natural environment (RICS, 2021). The RICS standards are also endorsed widely around the world by developed and developing countries, especially in areas where limited local standards exist, and provide practice guidelines to assist real estate or other built environment professionals in adopting the best methods for analysis, which include a Code of Practice for surveyors who appear as expert witnesses (RICS, 2023). As a principle message, RICS (2023, p. 6) indicates that the primary duty of an expert witness is not to its client, but to the tribunal [court] where evidence is given. It is stated that such evidence must be seen as independent and unbiased, and that it falls within the witness' expertise, experience and knowledge. It must also state the main facts and assumptions, without omitting material facts that might be relevant to the conclusion. It must also be impartial and uninfluenced by the employer.

Crosby, Murdoch and Lavers (2002), however, indicate that valuation witnesses do not always act rationally and that UK courts found that witnesses frequently produce client-biased valuations. It is indicated that there are acceptable tolerances for valuations accuracy and frequently when giving evidence, expert opinions differed more than these tolerances. Although it is acknowledged that it is impossible for valuers to provide an absolute correct value, the principle of variation must be within the acceptable tolerances and not be influenced by client-bias. Crosby, Murdoch and Lavers then investigates the solution for this, indicating the possibility of training and accreditation for witnesses acting as experts, or the notion of a court appointed single witness. In terms of training, they found that there is substantial support for training and education of expert witnesses, especially with regards to approach and technique, which is considered to be based on a substantially established area of knowledge, however, they found significant resistance for compulsory training. Also, they point out that valuation expert witnesses are often appointed for their local property market knowledge, rather than the detailed wider technical and procedural knowledge required in some cases, which make these witnesses more vulnerable to inexperience in the process. As a result, they reject the notion of a single court appointed expert, indicating that the court would be deprived from the opinion of various witnesses, which could eliminate the problems experienced with valuation accuracy, i.e. the fact that absolute accuracy is not possible. This finding contradicts for instance the findings of Fisher, et al. (1995), which was based on research in the medical profession. Furthermore, they implied that there is doubt whether any expert can correctly identify value without recourse to the opinions of other experts, which also supports the previous finding of hearsay evidence that is allowed for real estate expert witnesses.

PRACTICAL APPLICATION

To illustrate the principles discussed in the preceding sections, a number of actual cases are discussed that will highlight the different aspects as it applies to real estate. From this, the problems associated with the uncertainty of the duties of expert witnesses will be discussed, especially as it pertains to

South Africa, which on the one hand can provide insight into the application for a developing country, yet with a legal system with strong influence from the British legislation. Real estate practice, especially with regards to often used valuers as expert witnesses, also endorses both the International Valuation Standards and the RICS Global Standards, and would thus also have resemblances to a developed country.

Case Study 1:

The first case concerned a claim for a portion of the property occupied by a family that were labourers on the farm. In terms of South African legislation, a specific category of labourers was established whereby they would be classified as “labour-tenants”, if they meet certain requirements, inter alia, if the predominant reason for working on the farm is the right to occupy it, rather than financial compensation. If so classified, due to the abolishment of past racial discriminatory legislation, labour-tenants would have a claim against the property they occupied. In this instance, the plaintiff is the head of the family, who claimed a portion of the farm belonging to the defendant, indicating they do so as labour-tenants. The South African Land Reform (Labour Tenants) Act 3 of 1996, in terms of Section 1(xi) defines a "labour tenant" as a person who resides or has the right to reside on a farm; has or has had the right to use cropping or grazing land on the farm they reside on, or another farm of the owner; provides or has provided labour to the owner or lessee of the farm in consideration for the right to use the land; whose parent or grandparent resided or resides on a farm and had the right to use land on that farm or another farm of the owner, and in return for that right provided labour to the owner or lessee; has been appointed a successor to a labour tenant according to the provisions of the Act; and additionally, the Act clarifies that a "labour tenant" does not include a farmworker. The claim of the plaintiff was based on the premisses that they occupied the farm since the late 1800’s when the plaintiff’s grandfather was brought onto the farm by the grandfather of the defendant, where they stayed, and where she was also born in 1945 and then started to work the farm at the age of 12. At face value, the plaintiff appears to meet all the criteria to be defined as a labour tenant, but the defendant claimed that they were not labour tenants, but farmworkers, and if proven farmworkers, they would be excluded from the definition of labour tenants as per legislation, and not succeed in the claim. The determination was then to determine if the claimants were labour tenants, i.e. the facts of the case, in addition to the determination of the quantum of the claim. Due to the specific legislation that is unique to South Africa as developing country, the expert witnesses are requested to provide an opinion on the facts of the case, contrary to the norm that experts are not to argue the facts of the case, but the quantum of the claim (refer Posner,1999). The intricacies of this requirement were that the defendant’s experts attempted to show that the value of the residing rights was less than the total financial and other benefits, by evaluating the quantum of different contributors, in order to come to a resolution pertaining to the facts. This was done by comparing financial benefits received between the years 1965 to 2017 to the current property residing right, adjusting the values through CPI adjustment. They argued that the financial and other benefits were 2 to 3 times more than residing rights and therefor the family worked for these additional benefits, rather than the residing rights, qualifying them as farmworkers. The value of the residing rights was, however, indicated by the defendant’s expert, as a maximum of 10% of the minimum wage prescribed by the Basic Conditions of Employment Act no. 7 of 1997. The time adjusted value of financial benefits was then compared to this value for the residing rights, stating that it was 2 to 3 times more, and thus concluded that the plaintiff was working for the financial benefits as farmworker. The expert for the plaintiff, reported that this method is flawed, indicating that the correct interpretation of the Basic Conditions of Employment Act no. 7 of 1997 is that value of residing rights should be a maximum of 10% of actual financial benefits, not minimum wages prescribed. The finding is that seeing that the financial benefits are only 2 to 3 times that of residing rights, and not 10 times, it suggests that the plaintiff worked for the benefit of the residing rights, not the financial benefit. Also, it was indicated that the quantum of the financial benefits was approximately half of the minimum wage requirement by law (bearing in mind the actual employment was before the stated legislation), further supporting that the

plaintiff worked for the residing right, not predominantly the financial benefit. The expert for the plaintiff furthermore pointed out that some relationships other than an employer / employee contract were established, which contract would be a requirement for farmworker status. This included an inheritance gift from the defendant's mother to the plaintiff, which the defendant's expert included as part of the financial compensation of the plaintiff. The plaintiff's expert indicated that this cannot be compensation, as an inheritance gift would be uncertain due to the uncertainty of the death of the testator, and cannot therefor form part of a formal employment contract, but it supports a very close relationship between the testator and the beneficiary, other than a contract of employment. Also, the expert for the defendant included meat rations in the calculation of financial compensation, mentioning that "if a cow died on the farm it was given to the workers to skin and eat". This was indicated by the expert for the plaintiff to be unacceptable practice, as an animal that died of causes other than being slaughtered, cannot be sold in the open market, thus it would have no monetary value, not to mention the ethical principles of this practice and the uncertainty of death if not slaughtered, and cannot form part of a formal employment contract. The findings of the case were that the judge found that the defendant failed to prove the plaintiff as farmworker, and thus declared her status as labour-tenant, in her capacity as head of the family, i.e. the plaintiff's family would collectively be labour-tenants. The judge ruled that the testimony of the experts for the defendant was not of much help to the court and that the first expert's report was based on the evidence and facts supplied to him by the Defendant, his report is not objective as it is based on wrong information obtained from the First Defendant about cash remuneration and Christmas bonuses allegedly paid to the Plaintiff when the wage book does not show such payments, and furthermore, that the second expert relied on the opinion of the first expert, which was the wrong information. The judge further indicated that the credible and reliable expert testimony is that provided by the expert for the plaintiff and that the integrity of the methodology used, cannot be faulted. Some important points from this case are relevant in conclusion.

- In developing countries, the legislative framework might contain some unique legislation, requiring interpretation in courts, which is less readily available from case-law than in a developed country. This unique legislation might create unique problems needing interpretation and extend the normal understanding of requirements of experts, with a more interdisciplinary analysis. The demands on experts might therefore be skewed more heavily towards the "wider technical and procedural knowledge" than merely the local property market knowledge (refer Crosby, Murdoch and Lavers, 2002, p. 344) and might include requirements to provide an opinion on the facts of the case rather than only the quantum. Few expert witnesses, especially in the light of non-standard cases, exist with sufficient interdisciplinary experience and education, and would support the requirement of more specialised training and qualifications.
- A developing country such as South Africa is not unique in client-biased experts. It is unknown if the experts acting for the defendant had such a biased view knowingly or unknowingly, but importantly, the practice of different experts for plaintiff and defendant, and cross-examination of the experts, enabled the judge to get a good understanding of the underlying facts in order to come to a ruling.
- The judge did not fault the practice of use of the information of one expert by the other, but faulted it on the basis that the information used by the expert was wrong, and therefore was also wrong for the other. This suggests that the practice of hearsay evidence in court by an expert witness would be acceptable, in line with findings of others as mentioned in the literature, as long as such evidence is credible.
- The credibility, reliability, integrity and methodology used by the expert for the plaintiff was commended by the judge, and supports the importance of a well-researched factual report. This would only be possible, especially in very inter-disciplinary cases, if the experts acting on the case have sufficient training and qualifications to thoroughly investigate the fundamental driving factors.

Case Study 2:

In another case, the owner of a Data Centre approached a valuer to perform a valuation for purposes of a lease renewal that is eminent. The contract of lease was agreed some years before the date and it was agreed in the lease agreement that should the tenant elect to renew the lease, both the landlord and tenant would each appoint valuers to provide an opinion of market rent, and the lease would be renewed at the average of the two opinions. The issue at hand was that the lease also made provision for the possibility for the tenant to make changes to the property, with the consent of the landlord, and at the end of the lease, hand back the building either in its current condition, or the original condition. Over the 10 years of the original lease period, the tenant effected changes to the extent that the building was unrecognisably changed, and impossible to be changed back to the original condition. The valuer for the tenant, viewed the clause stating that the building can be handed back in its original condition as sufficient evidence that it should be valued in its original condition for purposes of lease renewal. The problematic nature was that little evidence existed as to what exactly the original condition was. The valuer elected to value it as per his instructions, as a vacant warehouse, which had the potential to be changed into a data centre, as he was instructed by the tenant that it was a warehouse originally that was changed by themselves into a tier 3, state of the art data centre. The owner, on the other hand, maintained that it was always a data centre, the tenant just improved the status and capacity of it. Based on this, and the fact that the building was unrecognisably changed, the owner maintained that the new lease should be based on the building in its current form, as the changes effected became part of the building through accession, and some irreplaceable components of the original building were removed, and with the lease only having the two alternatives of original or current condition, nothing in-between, the only option is to value the current form in the absence of the ability to re-instate the building in its original form. The result is that the valuation for the tenant and the valuation for the landlord differed approximately 10-fold. This is clearly outside of the normal acceptable tolerances for valuations, and appears at face as indicative of client-bias. Not surprising that the matter was not resolved in line with the requirements for rent determination by the original lease, and resulted in a formal legal dispute, with the valuation reports submitted as expert testimony for the respective parties. From recordings of the meeting of the experts, it is evident that the expert for the tenant was instructed to value the building as a warehouse, and that they never had access to pictures and plans showing the building as a data-centre, albeit in reduced grade or quality, and admitted that they would have come to a different conclusion had they had access to that information at the time of valuation. Yet, they did not change their report. On the contrary, the expert for the landlord indicated that he also had the view that the original building should be valued, as that would be in line with the intention of the lease, but was instructed to value the building in its current condition, and it is not for him to decide what should be valued, but only to perform the valuation of what is being requested. The importance of this is that experts might differ substantially in their valuations, not on the value determination per se, but on the differences in terms of what is to be valued in the first place. Perceived client-bias might be a result of a strategy of the legal team of either party to fight a specific outcome, and provide an expert opinion on the value of that outcome. The question is, what is the role of the expert in this instance, and to what extent can the expert insist that the outcome of the facts is not supported by the expert's view of the matter, or is it the expert's place to argue against an opinion of the facts at all? In a similar train of thought, a large piece of farmland was expropriated (eminent domain / compulsory purchase). The legislation and constitution of South Africa indicates that the purpose for which the property is taken is not to be considered by the valuer in determining compensation (also refer Du Plessis, 2015, p. 1736). The land was taken for purposes of development of an integration zone, including social and government provided housing. The land was, however, located in the middle between the informal township and the main town, providing it with an intrinsic value of development potential, with a high demand for such property in the private sector, acquiring farmland with development potential at significant premiums. Nevertheless, no comparable sales existed in the immediate area, nor of the size of the property under dispute. The argument is then, if the land is suitable for private development and comparable to sales of farmland

with development potential, or is it at the scale that only government would be a potential taker, thus any development potential should be disregarded? Thus, the question is not the quantum of value and the determination thereof, but the underlying uncertainty of what it is to be valued? In both these cases, the eventual outcome of what is to be valued would also influence the valuation methodology, i.e. in the case of the data centre, it could be either valued using the profits method as a trade related property or an income capitalisation if valued as a warehouse, while the farmland could be developed by either comparable sales of farmland, comparable sales of land with development potential, or using a residual land value (development) method of valuation. The method and the underlying assumptions for these methods could also have significant impact on the eventual value determination, and the specific skills required from the expert.

Case Study 3:

In another case involving development land, the plaintiff claimed compensation on the basis of enrichment for a piece of land acquired for the purpose of a sectional title (condominium, co-ownership, strata title) development. The land was purchased on a down payment agreement, but when the plaintiff neglected to keep up instalments, the defendant cancelled the sale agreement. The cancellation was disputed, but found legitimate, resulting in the plaintiff claiming compensation for purported funds invested, arguing that the defendant was enriched to the extent of the funds invested. At that stage, the plaintiff had developed 2 of 20 units and installed services such as reticulation electricity, water and sewer, and roads. Important to note, that caselaw in South Africa indicates that "Insofar as useful expenses are concerned, the amount of compensation is limited to the amount by which the value of the property has been increased or the amount of the expenses by the appellant, whichever is the less" (Rhoode v De Kock and Another, 2013). As a start, the plaintiff argued that the expenses included legal fees, salary for directors of the company, etc., whereby the plaintiff had to prove that the value of the property increased by more than these expenses in order to be compensated with at least that amount. Initially two witnesses appeared for the plaintiff, both indicating value that is very close to one another, and just above the land cost plus claimed expenses, which would entitle the plaintiff to full compensation. Both the witnesses had local property market knowledge, but for vastly different types of property, and none on development of sectional title units, nor construction activity. This would at the onset question if the witnesses should have accepted the instruction, as it falls outside of their expertise in terms of experience, as well as formal education. Both witnesses indicated that they have used the comparable sales method of valuation, since it is the preferred method to determine the value of property (Du Plessis, 2015, pp. 1737-8), but comparing the 18 undeveloped units to vacant erven sold in the local town. The expert for the defendant, who had little, if any local market knowledge, but a strong background in property economics, technical expertise, methodology and construction, pointed out that this method is flawed, since the undeveloped units cannot be sold, unless it is fully developed, and also, both experts for the plaintiff divided the undeveloped property by the potential 20 units, indicating that this is the average size of a fictitious comparable erf, which is compared on a rate per meter squared to other erven sold. The problem with this is that no deduction was made for unusable space, such as access roads and other required services. The effective size of the fictitious erven was therefor too large, which inflated the value determined. The fact that both experts used the same method, including the same errors, and came to a concluding value that is very close to the plaintiff's required value, caused a strong suspicion of client-bias. The expert for the defendant testified that the correct method of valuation would be the development approach, or residual land value, as the units to be compared to indicative sales, are those legally possible to sell, i.e. the fully developed units, but then the remaining cost to finish the development should be deducted, taking into consideration the cost of capital and risk. Under cross-examination, the experts for the plaintiff both indicated that the development method was not used, as it was found by courts to be unreliable. In this regard, Margolius (2016, pp. 6-14) describes it as "a complicated exercise involving specialised skills in several spheres". In Estate Marks v Pretoria City Council (1969) the judge say: "The validity of a residual land value projection

vitally depends upon three basic factors, namely (a) the development cost of the projected building; (b) the anticipated nett income from the project and (c) the nett yield required by the prospective purchaser", and the approach suffers from credibility also internationally, as pointed out by Duvall and Black (2000) "Courts that have expressed concern regarding the development approach have focused its reliance on multiple assumptions about the occurrence of uncertain future events. To these courts, the necessity of predicting governmental approval of plans and permit applications as well as the timing of income and expenses for a project in its embryonic stages renders the development approach more akin to educated guesswork than reliable forecasting". Although the applicability of the method could be a topic for further scrutiny, the expert for the defendant testified that there are instances where the method is considered acceptable, such as pointed out by Victoria Land Co (Pty) Ltd v Community Development Board (1981), and that the method is used daily by financial institutions for purposes of determining the equity value of land when financing property developments. It is also used in this regard to determine the equity value for determining progress payments on such development financing, and thus an ideal method to use to determine the value of a project mid-development. The expert also pointed out that the method as applied, is essentially a comparable sales method (of developed units), with adjustments (the remaining development cost). In doing so, it was testified that given the economic conditions at the time, development cost exceeded the value of units that could be sold, thus the value of the partially developed property would be negative, or at least, no value was added by the plaintiff. With this testimony, the plaintiff called for a postponement of the case. On resuming the case, the plaintiff called two more witnesses, being from the same valuation practice, who testified in one report. The one is a junior valuer who performed the market research, while the other is a senior valuer with more technical expertise, including vast experience in the use of the development method for financial institutions. These witnesses also made use of the development method of valuation, indicating a residual value of the partially completed development to a very similar amount to that of the previous witnesses who testified for the plaintiff. The report provided, however, indicated on several instances that the remaining development cost used to perform the calculations were obtained from the plaintiff, and the residual value as determined can only be valid if such development cost is assumed to be possible and accurate. The experts, in their report, thus acknowledged that there is a client-bias, making the court and the instructing party aware of this bias and conflicting view, in line with the requirements of the RICS practice statement 2.5 (RICS, 2023, pp. 8). Upon cross-examination, the senior expert acknowledged that the indicated remaining development cost is not in line with market norms, and should it be adjusted to the indicated norms used, the residual value would in all likelihood be negative. The outcome is that the court established that the plaintiff failed to provide evidence of increased value as a result of expenses incurred by the plaintiff, and thus a claim for enrichment is not warranted. Some final concluding remarks on this case are as follows:

- At face value, the various experts that testified for the plaintiff all indicated a value that would support a claim for enrichment, which if brought in front of a judge or jury with less technical expertise on valuation methodology, might succeed in a wrong verdict or finding. The technical expertise of the expert for the defendant highlighted some critical aspects that could be clarified under cross-examination, and resulted in an acknowledgement of certain facts by the expert for the plaintiff. This highlights the importance of cross-examination and the principle of experts acting for either party to the claim. Furthermore, the necessity for more technical expertise was also highlighted, supporting the requirement for specialised training of experts.
- The experts appointed in this case had backgrounds that is vastly different to the case under dispute. The experience is that within a developing country such as South Africa, where a smaller market, with fewer experts exist, there is a higher likelihood for experts to accept instructions outside of their expertise, but also for legal teams or courts to allow such testimony. This is also observed in First Rand Bank Ltd v Van der Walt. (2018), where the expert for the defendant testified that the expert for the plaintiff was unqualified and his

testimony not credible, yet the testimony for the defendant was rejected on the basis that it was "abstract, theoretical, highly technical and consequently meaningless", while the testimony for the plaintiff was accepted by court, even though the expert did not appear to have the legally required qualifications for such testimony. It is suggested that more clear guidelines are set for what is admissible as expert testimony, with reference to international standards, such as practice statements and guidance notes produced by the RICS that could be very helpful in this regard.

Case Study 4:

A further case involved a lease dispute, whereby the plaintiff was the tenant claiming that the rental charged was inflated, and approached the court to get it reduced. The plaintiff called an expert witness, who made use of the information supplied by a leading property economics report in South Africa, which provided market rental, capitalisation rates and other pertinent data based on a so-called "expert panel method" for data collection. The report also provides information pertaining to the number of respondents that provided an opinion on the information, and the standard deviation between the responses received. The expert for the defendant indicated that by simply using the published rate, suggesting that this rate is the market rent for the property under dispute, the finding would be outside the normal acceptable tolerances for valuation rental determination. Firstly, not all properties are unique. When evaluating a property, the individual characteristics of that property should be taken into consideration, and the going market rent would not simply be the average of the properties surrounding it. The property under dispute was substantially better quality than the average in the area, resulting in the expert for the plaintiff to use the averages to indicate that the rent should be lower. The mere fact that quality of the property and adjustments for that is disregarded, might be an indication of client-bias, and knowingly or unknowingly by the expert, cause difficulty for the court to determine the true facts. The expert for the defendant indicated that the property economist report is a small sample data collection, providing the responses of 2 to 3 opinions of market rent per area. These opinions of market rent received from each respondent, is that respondent's view of the average going rate in the market, and in itself would contain minimum and maximum levels, which are not reported on. By subtracting or adding the standard deviations to the mean in order to get the market range, the expert for the defendant pointed out that the range is outside the usual tolerances for valuation, but would be valid if taking into consideration that the different respondents might report on different quality property. The expert for the defendant made reference to individual properties sold and rented in the market, and through applying capitalisation rates on the sales, provided a calculated acceptable rent, which was compared to other rent observed in the area. This was found to be within the market range pointed calculated from the property economist report, but towards the higher end. The essence of this case is that it points out:

- Potential client-bias can cause an expert to testify on an issue at hand, and knowingly or unknowingly provide skewed information that could be misleading to the court.
- The method applied was to refer to a leading property economist report, confirming that the use of second-hand or hearsay evidence is accepted as evidence from an expert witness, but it should be interpreted, and the duty of the witness would be to put such evidence in context for a clear understanding by the court.
- The technical expertise required to ensure a correct understanding of the application of the property economist report, the data collection methodology, and the implication for the results, is more advanced than simply reporting of observed market information, which is further support for more technical and advanced training that is required by experts.

CONCLUSION

The main emphasis of the paper is to assess the important aspects to evaluate the credibility of an expert witnesses' testimony within the real estate profession. This is performed through an analysis of international literature to identify the main issues experienced, and compare these to actual cases in South Africa as developing country, in order to evaluate the similarities and differences that could make expert testimony more challenging. From this it is identified that the main differences are unique legislation that result in peculiar problems and disputes in need of expert testimony. This is further exacerbated by fewer experts with less specialisation, caused by smaller markets, which creates a gap between the body of knowledge of different professions, often needed due to the interdisciplinary nature of real estate. This lack of specialised experts, and possible lack of communication between different professions, including legal and real estate professions, result in courts allowing expert testimony that would not pass the credibility criteria in some international developed markets. In all cases discussed, technical expertise and qualification was found to be a key requirement and differentiator in successful dispute resolution. The specialisation in the smaller developing market, however, is lacking, with an equal shortage of support from professional bodies. It is suggested that stronger ties between international professional bodies such as the RICS be formed, but that these are also recognised by the legal profession in so far as the choice of expert witnesses is concerned. It was furthermore found that local property market knowledge is important as well as the principle that different experts for each party to a dispute be appointed, similar to the observation in developed countries, but due to the lack of expertise at the technical level, it is pointed out that significant client-bias is evident, which appears to be worse in developing countries due to the market size and smaller pool of professional experts available. Although the principle of one expert per party is endorsed and supported, it is pointed out that additional technical experts be included as part of the dispute resolution process, which could either be by way of a separate technical expert witness for each party, or a single technical expert, independently appointed by court. A similar situation to this was found to be very successful in a lease renegotiation matter (albeit not a dispute), whereby each party appointed an expert to provide an opinion of market rent, and by agreement, the two parties appointed a separate expert to adjudicate on the technicalities between the two initial experts, and provide a recommended outcome, which was supported by the parties. The RICS, in this regard, provides a guidance note on Surveyors acting as arbitrators in commercial rent reviews (RICS, 2013), but is mostly intended for the United Kingdom. Although this would probably have little authority in other global legal jurisdictions, it could provide some informative processes and procedures to ensure successful dispute resolution, and supports the earlier recommendation of stronger adoption of already established international professional standards. Lastly, there was evidence of significant uncertainty to the use of particular valuation techniques. Some of these might be scrutinised by the likes of a Frye Rule or Daubert Standard, while little formal case law exists in the developing market to provide clear guidance on the testing of such uncommon methods. These valuation methods are to some extent guided by international standards, further supporting the stronger adoption of such in developing markets. Furthermore, specialised training on these methods, supported by empirical published research on these methods could not only support the use in developing markets' courtrooms, but also to withstand the scrutiny of a Daubert Standard in developed markets.

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