

SOUTH AFRICA / JUDGMENT

Gouveia v Road Accident Fund (2010/19802) [2013] ZAGPJHC 293 (18 November 2013)

[2013] ZAGPJHC 293**COURT**

South Gauteng High Court, Johannesburg

BEFORE

Weiner

CASE / FILE NUMBER

2010/19802

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Source record**REPUBLIC OF SOUTH****AFRICA****IN THE SOUTH GAUTENG****HIGH COURT****(JOHANNESBURG)****CASE NO:**

2010/19802

In the matter between:

DE

MELIN; DAVID GOUVEIA

Plaintiff

and

THE

ROAD ACCIDENT FUND

Defendant

JUDGMENT**WEINER J:****INTRODUCTION**

[1] The plaintiff was injured when, as a cyclist, he was involved in a collision on 19 July 2009.

[2] The plaintiff is 45 years old and was 41 at the time of the accident.

[3] Prior to the collision the plaintiff:-

- 3.1. was healthy and fit;
- 3.2. was married with two dependent children and enjoying a happy family life;
- 3.3. was mentally and emotionally healthy with no psychiatric or emotional deficiencies;
- 3.4. was of average intelligence and mental functioning, as agreed in the joint minutes of the neuropsychologists of 10 September 2011;
- 3.5. as a result of struggling with English when he returned to South Africa aged 12, was unable to be accommodated in main stream education and completed standard 7 at the Rotander Special school;
- 3.6. worked at his brother's butchery from 1985-1987; as a butcher at Ideal Meats until 1990; purchased that butchery and operated same as owner, manager and blockman until 1995; sold the butchery and became employed by Taki's Biltong a large manufacturer of biltong products owned by Ms de Melin ("plaintiff's wife") and her two brothers where he remains employed;
- 3.7. received on the job training as a butcher and blockman but no formal training;

[4] It was common cause between the parties that:-

4.1. Plaintiff was employed by Taki's Biltong as a production manager in 1995 and he was earning R20 000 per month as at date of the accident. The Plaintiff's duties included:-

- 4.1.1. Receiving meat;
- 4.1.2. Dispatching orders;
- 4.1.3. Managing the fridge and production
- 4.1.4. Production and spice control
- 4.1.5. Ordering stock
- 4.1.6. Managing staff.

4.2. Defendant's industrial psychologist, Mr Van Blerk ("Van Blerk") describes the plaintiff's duties pre-morbidly as:-

"As production manager his job was more hands-on on the production floor. They had about 150 staff members in the factory and Mr de Melin reported that he works with about 60% of them. On the production floor there are three areas which need attention in terms of activities for which he is responsible for, namely the fridge area, the wet area and the receiving area and dispatch area. The process is orders, receiving and weighing, deboning, mixing spice, hanging dry area and ready for dispatch."

4.3. Mr Mike Aristides ("Aristides") is the director of Taki's Biltong. He described the plaintiff's pre-morbid performance as an employer in a workplace feedback report compiled by Ms Roussow, plaintiff's industrial psychologist:-

“The current writer contacted Mr Mike Aristides, a director of Taki’s Biltong and Mr de Melin’s brother-in-law. According to him, Mr de Melin was a very good worker prior to the accident. He was able to work independently and take responsibility for the work and the staff.

If the accident had not occurred, they would probably have appointed Mr de Melin as Director towards the end of this year, i.e. around November to December 2011. He would then have become a 5% to 6% Shareholder, as each of the three Directors would have given him around 2% shares. Mr Aristides noted that since they moved to their new premises about a year and a half ago, they have become “more company orientated”. They wanted Mr de Melin to take over the responsibilities of the day-to-day running of the factory while they would have focused more on the business aspects such as getting new clients.

Receiving shares would have been an incentive, but moreover, he would have deserved becoming a Shareholder, based on his pre-accident performance.”

4.4. Van Blerk, defendant’s industrial psychologist did not interview the plaintiff’s employer regarding plaintiff’s pre-morbid performance. Van Blerk is of the view, in his expert report:-

“Had it not been for the accident it could be assumed that Mr de Melin would have continued working in the same position in their family business until retirement age qualifying for probably inflationary adjustments annually, as at his age and earnings it is realistic to indicate that he had already reached his career ceiling”

4.5. Ms Roussow is, however, of the view that:-

“But for the accident, Mr de Melin would probably have remained in the employ of Takis Biltong, earning at least at his pre-accident levels.

Towards the end of 2011, i.e. in about November/December he would probably have become a 5% to 6% shareholder. It is, however, impossible to say what his earnings would have been once he had become a shareholder, as Mr Aristides was unable to comment on this aspect due to the fact that the business’ income varies from month to month.

Mr de Melin would probably have worked far beyond the retirement age of 65, probably to at least 70 years.

In the unlikely event that he would have left the employ of Taki’s Biltong, he would have been competitive in the open labour market. In this scenario, he would have worked until the age of 65 years. “

[5] The parties have agreed that the defendant will be liable for 50% of the plaintiff’s proven damages.

[6] The defendant has made an interim payment in the amount of R325 000. In addition, the parties have agreed that the defendant is liable for:-

6.1. 50% of the past medical expenses in the sum of R126 175,85;

6.2. 50% of the plaintiff's general damages in the sum of R650 000;

6.3. An undertaking, in terms of 17(4)(a) of the Road Accident Fund Act, 56 of 1996, to compensate the plaintiff for 50% in respect of future medical expenses;

- [7] The parties have further agreed that the plaintiff sustained a significant head injury and, as a result, suffered on-going neurocognitive and psychological sequelae. The neurological damage can be regarded as permanent. The plaintiff is, at present, sympathetically employed and is not employable in the open labour market.
- [8] The plaintiff has lost his sense of smell and taste, suffers from irritability, fatigue, memory loss, aggression and, in the long term, according to Dr Braudie (plaintiff's psychiatrist), he is vulnerable to the onset of major depression and/or psychosis and the likelihood of an earlier than average onset of Alzheimer's disease.
- [9] The parties, although in agreement that the plaintiff is unemployable in the open labour market, differ on whether or not the plaintiff is able to perform some of the duties that he previously performed. Having lost his ability to smell and taste, as well as his memory and other cognitive functions, coupled with the fact that his employer has "replaced him" with a butcher/production manager and a floor supervisor, the court accepts that his employment is sympathetically tolerated within the business rather than contributing meaningfully thereto.
- [10] It has also been agreed that his improvement has reached maximum and that his functioning will not improve hereafter.
- [11] In their joint minute, the Industrial Psychologists agreed that pre-morbidly, but for the accident, he would have remained in the employ of the family business. Mrs Roussouw remarked that his earnings by now would have been what he is currently earning. In addition, he would have become a director and his earnings would have increased. Van Blerk disagreed and remarked that taking his background and education into account, he could, at best, be seen as a semi-skilled worker in the non-corporate sector with earnings assumption based upon the quantum year book of Robert J Koch (2012) with the expected retirement age of 65.
- [12] It is common cause that despite the collision and the plaintiff's diminished work capacity, he is still being paid by Taki's Biltong, the salary he would have received, but for the accident which, according to the evidence was R20 000 per month as at 2009.
- [13] The two issues in dispute are:-

13.1. having regard to the fact that the plaintiff is still receiving his salary, has he suffered, and will he suffer, any loss of income or earning capacity.

13.2. the defendant's contention that any calculation in respect of loss of earnings must take into account that, according to defendant's Industrial Psychologist, the plaintiff was being paid more than he was worth because he was employed in the family business.

[14] His employer and brother-in-law, Aristides regarded plaintiff as an excellent worker and a great asset to the company prior to the accident. Aristides testified that the plaintiff began working for the business in 1995 as a blockman and production manager and that his contribution was much more than that of just a butcher. He had no problem managing staff and was calm and friendly. Whilst the plaintiff was off work after the accident, the company hired a butcher/production manager at a salary of R20 000 per month as well as a floor manager at R8000 per month. These two employees jointly deal with the responsibilities that the plaintiff previously did. His current "job" is to "watch the staff" but problems have arisen. He has become aggressive and argumentative and there have been many complaints about his conduct from the staff and members of the public. As a result of this, a hearing was convened by the Human Resources department of Taki's Biltong which caused a family disagreement as the Plaintiffs' wife was very upset about this. However, the family is attempting to deal with the situation in that they believe that if he stayed at home, his condition would deteriorate. However, Aristides is concerned that his conduct at work is becoming disruptive and that there might come a time when plaintiff's wife will have to make a decision in regard to the well-being of the business as opposed to her husband's continued employment.

[15] The defendant contended that the employment of the floor supervisor was necessary as the business had expanded. Aristides stated that they would have needed a person to assist him but would definitely not have needed an extra butcher and/or production manager. His job would have remained the same and his salary would not have been reduced by the employment of his assistant. Aristides made available to the Court, the new butcher's (Mr Kokkinos') payslip that showed that, as at October 2013, Kokkinos' basic salary was R22 000 gross.

[16] In regard to the two issues raised by the defendant, Plaintiff's counsel contends that plaintiff has "sympathetic employment" and that this cannot affect his claim for future loss of earnings/loss of earnings capacity. In this case, Counsel referred to

Santam Versekeringsmaatskappy Bpk v Byleveldt 1973

(2) SA 146 (A) ("Byleveldt") in which it was held that when an employee was paid purely on compassionate grounds at a time when he could contribute nothing to the business, such salary is not taken into account when dealing with the Plaintiff's claim for loss of earnings.

[17] The defendant, on the other hand, relies on Rudman v The Road Accident Fund 2003

(2) SA 234 (SCA) ("Rudman") in which an injured plaintiff, who continued to receive an income, was held to not have suffered any loss thereof. Jones AJA, at [8], dealt with the court's quo's dismissal of past loss of earnings/earning capacity as follows :-

‘The trial judge dismissed the claims for past loss of earnings and loss of earning capacity for the following reasons: “On the evidence before me I must conclude that the losses suffered as a result of the temporary decline in the income generated by the professional hunting and professional outfitter operations due to the incapacity of the plaintiff are losses suffered by the company and do not represent a diminution in the patrimony of the plaintiff. I may pause to remark that the fact that the plaintiff personally is registered as the professional outfitter does not change the situation. According to the evidence before me it must be held that he was employed by the company in order to conduct that section of the business. The same holds true of the costs of employing a professional hunter to stand in for the plaintiff as well as the employment of the repair and maintenance manager. These persons are also employed by the company to take over functions performed by the plaintiff and they are paid by the company. Any loss which may have occurred as a result thereof is a loss to the company and not to the plaintiff’s private estate. It follows that in real terms the plaintiff’s private estate was not diminished due to his incapacity.”

[18] Jones AJA went on at

[13] to state the following:-

‘For present purposes I am prepared to accept the proposition (without pronouncing finally upon it) that in appropriate circumstances a farmer in Rudman’s position, who operates through a “family” company, may be able to prove and quantify his personal loss in a delictual claim with reference to the loss of income suffered by the company, provided that he does not fall into the trap of regarding the loss to the company as automatically and necessarily equivalent to his personal loss. In the present case, there is evidence to show that the company has lost income because, by reason of Rudman’s injuries, it did not achieve the increases in hunting income that were confidently and reasonably expected. There is also evidence to show that the company has incurred and will in future incur the additional expense of employing others to do what Rudman used to do. However, there is no proof that this produces loss to Rudman. There is no evidence, for example, that the value of his shares in the company is less, or even that he received less from the company by way of dividends or fees or drawings because of the company’s reduced income, or that he will do so in the future.’

[19] In the Rudman case, his earning capacity was found to not have been diminished, in that, although the company may have suffered a loss, there was no evidence that this affected his income. Although, he could no longer perform certain functions, “his real function was that of Chief Executive Officer of a large farming undertaking. He still performs that function... the disabilities from which he suffers... do not impair his capacity to do what matters most” that is to run the company and the trust. Accordingly, Rudman had not shown that he, personally, had suffered any diminution of his patrimony.

[20] The present case is distinguishable and is more in line with the decision in Byleveldt. He does not receive income as of right (as Rudman did in his capacity as director, shareholder and trustee). Rudman’s loss did not impact on his patrimony whereas, in the present case, the plaintiff is not being paid as of right, he has in effect, been replaced and is being paid

purely on the basis of sympathetic employment. His income earning capacity has in effect disappeared. This case is also distinguishable, on the facts, from *Roe V Road Accident Fund* (2009/16157), an unreported judgment of Van Oosten J of this division.

- [21] The defendant's second point was that the plaintiff was overpaid prior to the accident. It was conceded by Van Blerk that it is difficult to place the plaintiff in a particular category in regard to his earnings level. He might have been a semi-skilled worker in the non-corporate sector but he also had 20 years' experience and in some sense, specialised experience and skill in composing the recipes and new products. He was not simply a blockman. In addition, he had certain managerial skills from running his own business and having been employed as a production manager with concomitant duties. The defendant wishes to place the plaintiff in the category of a semi-skilled worker who should have been earning at the time, according to the Paterson scales, approximately R14 800 per month as opposed to his salary of approximately R20 000 per month. Roussow had contended that the plaintiff could more likely be seen as an artisan and, in addition, one would have to take into account his experience and knowledge.
- [22] The court can rely on the factual scenario, that is, in replacing the plaintiff, the employer is paying two employees the amount of R30 000 per month. Although Van Blerk contended that the plaintiff's wife informed him that plaintiff's salary increased by R5000 per annum, this was not put to plaintiff's wife.
- [23] The Paterson scales referred to, in my view, do not take into account various factors and rely too heavily on educational skills achieved. In today's entrepreneurial world, these figures become somewhat difficult to apply.
- [24] It is common cause that Van Blerk did not investigate the particular industry in which plaintiff works to ascertain what market related salaries would be. He regarded the general scenario, which as I stated above, I find unhelpful in this case. Without a factual basis, one cannot simply accept the figures provided by the defendant.
- [25] The plaintiff was earning R20 000 per month as at date of accident. It is agreed that he would have remained in the position and earned at least at the same levels as before. There has not been agreement as to his retirement age with the plaintiff contending that he would have retired at age 70, having regard to the fact that it was a family business, and the defendant contending for age 65. The plaintiff's actuary, Ivan Kramer, based his figures on him retiring at age 65 and I will, accordingly take that age into the calculation.
- [26] I find that, in terms of the authorities referred to above, the plaintiff is sympathetically employed and the amount that he is earning is not to be taken into account in assessing his loss of earnings/loss of earnings capacity. I also take into account that he is unemployable in the open labour market.

- [27] The parties have calculated his prospective income to be between R5 111 140.00 (plaintiff's actuarial report) and R5 202 209.86 (the defendant's actuarial report). For the purposes of this calculation, I will utilise the figure given by the plaintiff.
- [28] The defendant, in its actuarial report, referred to contingencies of 5%, in regard to past loss of earnings, and 20%, in regard to future loss of earnings. In argument, these figures were presented as 5%, in regard to past loss and 15%, in regard to future loss. The plaintiff on the other hand, says that the contingency that should be applied to pre-morbid income should be the normal figure, which would be 12% (based on a retirement at 70) and that, in regard to future loss of earnings, no contingency should be applied to his earnings.
- [29] As Kramer states, the principle used is to place the plaintiff in the same financial position he would have been in but for the accident. This is done by calculating his income but for the accident and calculating his income having regard to his accident. The difference is the loss of income suffered.
- [30] Kramer also refers to a deduction for general contingencies such as savings in travelling to and from work and the possibility of loss of income due to illness or unemployment which the plaintiff might have suffered even if the accident had not taken place. Kramer was instructed to utilise the following deductions:-
- 30.1. 10% in respect to the value of the income but for the accident
- 30.2. 50% of the income having regard to the accident.
- [31] Kramer finds the net loss, in regard to accrued value of income, to be in the sum of R12 800. In respect of gross prospective value of income but for the accident, he utilises the figure R511 140 and deducts a contingency of 10%. Having regard for the accident, he applies a 50% contingency.
- [32] In my view, the contingency that must be applied in the first instance should be in the sum of 10% based on the retirement age considered. In relation to the income, having regard to the accident, I consider that some consideration has to be given to contingencies based on the evidence of all of the parties. In my view, a higher than normal contingency would be applicable and I intend applying a 60% contingency to this amount.
- [33] Accordingly, the nett loss to the plaintiff in respect of prospective income will be R4 600 026 less R2 044 456 which totals R2 555 570. The total loss in regard to the accrued value of income and prospective income would then be R2 568 370.
- [34] In arriving at this conclusion, I have taken into account the speculative aspect of these calculations, together with the fact that the damages awarded now are on a "once and for all principle" and accordingly, a court has to rely on such speculation.
- [35] Accordingly the defendant will be liable to pay the plaintiff:-

- 35.1. R63 087.92 in respect past medical expenses;

35.2. R325 000.00 in respect of general damages;

35.3. R1 284 185.00 in respect of loss of income

[36] The plaintiff is, accordingly, entitled to R1 672 272.92. The defendant has paid an interim amount in the sum of R325 000. The amount payable by the defendant to the plaintiff is, therefore, R1 347 272.92.

[37] Accordingly, an order is made in terms of the draft marked “X”.

Weiner J

Date of Hearing: 12, 13, 14 November 2013

Date of Judgment: 18 November 2013

Counsel for Plaintiff: Mr. E.F. Serfontein

Attorneys for Plaintiff: De Broglio Inc.

Counsel for Defendant: Mr. M. Lufele

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