

SOUTH AFRICA / JUDGMENT

Kruger v Road Accident Fund (31685/14) [2017] ZAGPPHC 337 (15 June 2017)

[2017] ZAGPPHC 337**COURT**

North Gauteng High Court, Pretoria

BEFORE

M S Makamu

CASE / FILE NUMBER

31685/14

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Source record**IN****THE HIGH COURT OF SOUTH AFRICA****GAUTENG****DIVISION, PRETORIA****CASE****NUMBER: 31685/14****DATE:**

15 June 2017

STEPHANUSJOCOBUSKRUGER PLAINTIFF

V

ROAD

ACCIDENT

FUND

DEFENDANT

JUDGMENT**MAKAMU AJ:**

- [1] The Plaintiff lodged a claim and instituted action against the Defendant, arising from injuries he sustained when a motor vehicle driven by M Erasmus, insured by the Defendant collided with his vehicle driven by the Plaintiff on the 25th July 2011.
- [2] The merits in regard to general damages had already been settled between the parties. The only issue to be decided by this court in this matter is the loss of earnings pre-accident and post-accident.

- [3] The Plaintiff was self-employed as building contractor and project manager; although he had two undisputed contracts that he had completed and the third one he says he ceded it to another project manager as he could not fulfil his obligations, due to the injuries sustained.
- [4] The Plaintiff produced two calculations by the actuary, one based on Industrial Psychologist report and one based on Defendant's argument. The Defendant did not submit any expertise calculations but relies on practicality.
- [5] The Plaintiff said he voluntarily ceded his contract in regard to project management due to his indisposition, although before the accident he was ready to proceed with the contract. That is where he is claiming an amount of R157 932.00 as pre-accident loss of earnings. This claim is disputed by the Defendant in its entirety..
- [6] He also claimed an amount of R2 577 234.00 as loss of post-accident earnings, which amount is disputed by the Defendant too in part. The Defendant hold the view that the Plaintiff is still able to do his work even though he may not be personally hands on, when it comes to executing or carrying heavy things.
- [7] The Plaintiff has painful and weak arm which prevent him from doing the job he loved to do and he has to subcontract or ask his employee to perform the same.
- [8] The Defendant argued that it is not that the Plaintiff will lose income or earnings as he can still use one of his employees to do exactly what he used to do and will still earn the amount that he could make and this is supported by the fact that in his bank statements it is clear that he is still earning the same or better than pre-accident.
- [9] The Plaintiff is 54 years old, he expect to continue to work until he attains the age of 65 and plans to work until he is 70 years old, and will then accept high contingency which will reduce his retirement age to 67.5. He believes that is very reasonable .
- [10] The Plaintiff relies on the reports by the Industrial Psychologist and the Actuary.

The amount claimed by the Plaintiff is significantly reduced due to the CAP applied by the Road accident Fund Act. The amount as calculated by the Actuary and Industrial Psychologist is R8 664 952.00 which is project management and future loss of earnings.

- [11] I am not going to dwell more on the formula applied to calculate, however in short the total amount claimed by the Plaintiff is R2 393 316.00 which they believe could be the justifiable figure to be awarded to the Plaintiff.
- [12] The Defendant argues that the amount claimed is not realistic due to the following reasons: Firstly that the initial amount of R157 932.00 cannot be said to be a loss as no contract was signed by the Plaintiff before the accident. This argument was not opposed by the Plaintiff. The Plaintiff only had two project management contracts that he has done and completed since 2000, and the third one the contract was not even signed as such it cannot be regarded as loss of income.

- [13] The Plaintiff cannot claim to have had regular project management contracts as he had only technically 3 contracts over a period stretching for over 10 years period. The Plaintiff cannot say he was definitely going to have regular project management contracts amounting to R157 000 per year or any contracts at all of that nature.
- [14] The question to be asked is whether the Plaintiff has suffered loss of future income or loss of earning capacity as defined in *Southern Insurance Association LTD v Bailey* 1984(1) SA 98 (A).

The Plaintiff could not lose future earning capacity as he is involved in construction work which is done mainly by subcontractors or employees and can still be done under his supervision, as demonstrated in his bank statements, that after the accident he earned more than what he used to earn before the accident.

- [15] The Plaintiff is 54 years of age naturally his strength is diminishing and will constantly rely on his younger more energetic employees, even if he feels like he would prefer to execute a particular task on his own. The earning capacity is not lost when his faculties are still in place and can still operate on supervisory capacity.
- [16] The Plaintiff relies heavily on the reports by Industrial Psychologist and the Actuary whose expertise is defined in *Bailey* case where the court said: "On the contrary, while the result of Actuarial computation may be no more than an "informed guess", it has the advantage of an attempt to ascertain the value of what was lost on logical basis; whereas the trial Judge's "gut feeling" as to what is fair and reasonable is nothing more than a blind guess". The recommendation is nothing else but speculation by the Actuary and Industrial Psychologist.
- [17] Eksteen J. said in *Motor vehicle assurance fund v Kenny* 1984 (4) SA 432 (E) said: "Direct and credible evidence of what happened in a collision must generally carry greater weight than the opinion of an expert, however experienced he may be, seeking to reconstruct the event from his experience and scientific training." In other words the Industrial Psychologist and the Actuary base their recommendation on their scientific training than the actual situation as demonstrated in the question of the project management amount where the contract was not even signed but he claims that he could be in a possession to earn such amount on a yearly basis.
- [18] I would like to refer to, Corbett, *The Quantum of damages in bodily and fatal, injury cases*, volume 1. General Principles fourth edition by JJ Gauntlett SC, page 46 paragraph J loss of earning capacity says: "The injuries suffered by the plaintiff might have impaired future ability to earn a living, either temporarily or permanently. In such a case at the trial the Plaintiff is entitled to claim damages for future loss of earnings or more accurately stated reduced earning capacity, over the period of impairment".
- [19] The author went further and say: "However in the case of damages for loss of future earnings, unlike certain other items of general damages, there are certain known or ascertainable factors in individual cases which do afford some guidance to the court. It is

submitted therefore, that the proper approach of the court is what is stated by Ettlinger AJ in *Goldie v City Council of Johannesburg*, and referred to *Union Government (minister of R & H) 1913 AD 385*, *Hulley v Cox 1923 AD 234* and *Craig v Franks 1936 SR 41* " in support of the proposition that it is wrong to calculate the amounts to be awarded under these heads of damage on the basis of annuity, and that while such an actuarial calculation affords useful guidance, the true basis is what the court considers, under the circumstances of the case, to be fair and reasonable amount to be awarded the plaintiff as compensation. This may be so, but in the case where it is necessary to award compensation for future loss of earnings, I have difficulty in appreciating what better starting point there can be than the present value of the future income which the plaintiff has been prevented from earning. From this point proper allowance must be made for various contingencies, but if the fundamental principle of an award of damages under the "lex aquilia" is compensation for patrimonial loss, then it seems to me that one must try to ascertain the value of what was lost on some logical basis and not on impulse or by guesswork."

- [20] The plaintiff is not employed but relies on his own construction business. The earnings are not constant and guaranteed but depend on several variables, amongst others, regular contracts which are not guaranteed, he is at an advanced age manual work will naturally start to decline and he may depend entirely on his employees. The economic situation of the country which may influence availability of work and general decline in construction work.
- [21] The future loss of earning is very uncertain and it is more of thumb suck than a person who is traditionally employed. The inability of the plaintiff to execute some of the work does not translate to complete failure to earn income as he could subcontract or instruct his own employee to do the same work that he could have done personally like welding and other duties. It is more of personal preference rather than a compulsory demand that the plaintiff do the work himself. It does not mean that the plaintiff will not be able to earn such income.
- [22] The challenges faced by the Plaintiff are better addressed by general damages rather loss of earnings. I do appreciate the fact that the Plaintiff loves his work and would like to perform it personally, and that may be handy in case he is deserted by his employees or the decline of business which may cause him to down scale and he find himself being the only person who can do some oof the work.
- [23] In as far as loss of past earnings, I am not persuaded that indeed the R157 932.00 was almost money in the pocket due to the lack of frequency acquisition of similar contracts of project management and he could have still managed the project as he does not use his own resources but to oversee the project and his son was also available to assist him to do site inspection.
- [24] It is not realistic to say he could have earned as much as he claimed but the accident, he cannot earn that amount of money any more is not truthful as he is running his own company and can always delegate the kind of work he had to personally do like welding and other things he loved to do to other employees

[25] The inability to do his work personally can only be fair to award the plaintiff the offer made by the Defendant, as a result I make the following order.

The plaintiff is awarded an amount of R950 772.00 plus interest of 10.5% and the costs.

M.S MAKAMU

ACTING JUDGE OF THE HIGH COURT

Appearances:

Counsel for the Plaintiff : Adv. A A Lubbe

Instructed by :

Ehlers Att

Counsel for the Defendant : Adv. R M Phiri

Instructed by :

Tau Phalane Inc

Date Heard :

01 June 2017

Date of Judgment :

15 June 2017

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