

SOUTH AFRICA / JUDGMENT

Road Accident Fund v Bee (A07/16)

[2016] ZAWCHC 122 (20 September 2016)

[2016] ZAWCHC 122**COURT**

Western Cape High Court, Cape Town

BEFORE

Nuku, Hlophe, Steyn

CASE / FILE NUMBER

A07/16

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IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: A07/16

DATE: 20 SEPTEMBER 2016

In the matter between:

THE ROAD ACCIDENT FUND.....Appellant

And

GLENN MARC BEE.....Respondent

JUDGMENT:

20 SEPTEMBER 2016

NUKU J

[1] This is an appeal against an award of damages by Van Staden, AJ. The appeal is with the leave of the Court a quo and is limited to the following:

1.1 an amount of R4 049 614.00 in respect of past loss of earnings; and

1.2 an amount of R7 532 400.00 in respect of future loss of earnings.

[2] The respondent, a 56 year old business man was involved in an accident on 25 November 2007 whilst cycling. He sustained severe injuries including a base skull fracture, a diffuse axonal brain injury, a sub-dural haematoma of the right anterior parietal area, occipital and parietal lacerations to the skull, a chest injury, a pelvis injury, anterior compression

fractures of the T9, T10, T11, T12 and L1 vertebrae, a deep laceration of the right inguinal area, multiple bruises and lacerations to both legs and feet, multiple bruises and lacerations to both arms, and an injury to the right knee.

- [3] The respondent was treated at Vincent Pallotti Hospital. His treatment included the following: he underwent a craniotomy for the drainage of the sub-dural haematoma, a left front burr hole was drilled and an intracranial pressure monitor was inserted, he had a debridement of the scalp and skin flap with a skin graft from his right thigh, he was intubated and ventilated, he had a bronchoscopy and a vertebroplasty. He was discharged from hospital on 21 December 2007.
- [4] The respondent was a member of Bee Painters and Waterproofers CC ("BPW"). In the plaintiff's particulars of claim, he was described as the co-owner of BPW. The other member and co-owner of BPW was Russ Bee, the respondent's brother. Russ Bee had started the business during 1980 and was later joined by the respondent during
1982. The respondent and Russ Bee had an agreement that entitled them to share the profits of BPW equally.
- [5] BPW was in the business of painting, waterproofing, roofing, epoxy flooring and post construction redecoration. The primary focus was on the maintenance of existing premises within the industrial and/or commercial sector, although they also did work within the domestic sector. The manner in which BPW conducted its business was that BPW would secure the contract for the work and then outsource it to sub-contractors who would do the painting, waterproofing, roofing, epoxy flooring and post construction decoration.
- [6] The responsibilities of the respondent prior to the accident included the following: managing big contracts within the industrial and commercial sector, issuing quotations, submitting tenders, outsourcing various work components to specific employees and sub-contractors, overseeing the entire work process, liaising/meeting with stakeholders, overseeing the technical side of the business, attending directors' meetings, and attending to the overall responsibility for the day to day running of the Cape Town office.
- [7] For the period of his absence from work, the respondent received payments equivalent to those received by Russ Bee.

- [8] When the respondent returned to work he was unable to carry out some of the functions that he did prior to the accident. As a result of the respondent's reduced capacity BPW had to hire someone to assist the respondent. Notwithstanding the respondent's reduced capacity, the respondent continued to receive payments equivalent to those received by Russ Bee.
- [9] The respondent, in his reduced capacity after the accident, was not able to manage big projects and could only manage small jobs relating to the painting of relatively small buildings, as well as a limited amount of waterproofing work. He could not oversee roofing or flooring work.
- [10] The respondent did not use the salary he earned from BPW to prove and quantify his loss of income. Instead he quantified his loss of income with reference to the loss of income suffered by BPW. The respondent also did not take into account the payments he received during the period of absence from work claiming that these were gratuitous payments which could not be taken into account for purposes of computing his loss of income. The respondent, after his return to work, was not functioning at the same level as he was before the accident. He therefore claimed that a portion of the payments he received from BPW constituted gratuitous payments which could not be taken into account for purposes of computing his loss of income. The respondent also claimed that as a result of the injuries sustained in the accident he would retire earlier than he would had he not been injured.
- [13] The appellant's attack on the award for past and future loss of earnings is mainly twofold: the first is that the respondent did not make out a case that this was an appropriate case where the respondent's loss of income could be proved and quantified with reference to the loss of income suffered by BPW. The second is that the Court a quo should have taken into account the payments received by the respondent as these were not gratuitous payments but payments which the respondent was entitled to in law.
- [14] It was not seriously disputed that the respondent's earning capacity was compromised by the injuries he sustained in the accident. Prior to the accident, the respondent was regarded as the chief executive officer of BPW, and was responsible for the Cape Town office. He assumed the overall responsibility for the day to day running of the office. He had staff reporting to him. He attended meetings with clients and paint manufacturers. He prepared quotations in respect of various painting jobs and managed large contracts. After the accident he could not return to work for a period just over one year. When he returned to work during January 2009, the respondent initially did so on an ad hoc basis. He could not drive a car. He had to rely on his nephew, Jared Bee to take him to work, to the building sites and back home. When he re-learned to drive, he had to make use of a GPS to find his way around including places that he was quite familiar with prior to the accident.
- [15] Various experts filed reports confirming the respondent's compromised earning capacity. These included the following:

15.1 The industrial psychologists, Dr. Richard Hunter and Mr. Dawie Malherbe who agreed that the respondent's working ability was impacted on by his injuries, and that this would continue for the remainder of his career. They also agreed that after the respondent's return to work, he was functioning in a reduced scope.

15.2 The occupational therapists, Ms Buchanan and Ms Joan Andrews, who agreed that the respondent's work ability and employability

have been compromised by the injuries sustained and that the respondent's employment was protected or sheltered employment.

[16] Russ Bee testified that they (respondent and Russ Bee) conducted the business of BPW as though it was a 50:50 partnership. They determined their earnings with reference to what the business could afford, taking into account the performance of the previous year as well as bookings for the following year. Their salaries were never determined by the work they performed, but were determined by their needs. Their salaries were equal. After the accident the performance of the business declined.

[17] The respondent called Mark Edwards ("Edwards"), a forensic accountant to give expert evidence as to the quantification of the respondent's past and future loss of earnings. His evidence was that he analysed the financial statements of BPW for the financial years 2001 to 2014. He had regard to BPW's income tax returns, the income tax returns of the respondent, Russ Bee, as well as some of the staff members of BPW. He compiled a report dated 18 June 2013. He signed a joint minute with Jean-Marie van der Elst ("van der Elst"), a forensic accountant, instructed by the appellant, dated 16 May 2014 ("the joint minute"). Although he stood by his report dated 18 June 2013, he regarded the joint minute as accurately reflecting the situation pertaining to the business of BPW.

[18] In terms of the joint minute, Edwards and van der Elst agreed that the revenue of BPW in the uninjured scenario would have grown in line with the chosen industry index of the Western Cape Building-Alterations and Additions ("the index"). This was premised on the analysis of the business of BPW for the years 2001 to 2008 where there was a 95% correlation coefficient between the performance of BPW and the chosen index.

[19] Edwards and van der Elst agreed that, but for the accident, the business of BPW would probably have continued to grow in line with the index. They also agreed on the variable operating expenses of the revenue, both actually incurred and the projected operating expenses. Although they agreed on the gross profit percentages (this being revenue less the costs of sales) for the years 2009 to 2014, they could not agree on the gross profit margin to be applied to BPW post 2014. Edwards then applied a gross profit percentage of 40% on the incremental income post 2014. The respondent's past and future loss of earnings was thus calculated with reference to assumptions made in respect of the performance of BPW before and after the injuries to the respondent.

[20] It is this manner of computing the respondent's loss of earnings that the appellant attacks. The appellant contends that on the proper application of the principles stated in Rudman

v. The Road Accident Fund 2003 (2) SA 234 (SCA) ("the Rudman case"), the Court a quo should not have used the loss of income suffered by BPW in computing the respondent's loss of earnings.

[21] It is necessary to quote the portion of the judgment of the Court a quo on the basis of which it distinguished the respondent's case from the Rudman case. The Court a quo in paragraphs 52 to 54 of the judgment stated the following:

"52. The defendant relied on Rudman, and more particularly the conclusion in Rudman that where a company suffered a loss, it does not necessary (sic) follow that the owner or shareholder of the company has also suffered a loss. It was specifically pointed out in that matter that the loss to the company should not necessarily be regarded as automatically equivalent to the personal loss of the shareholder.

53. In contrast counsel for plaintiff relied on a number of cases, including Miles v Road Accident Fund[1] ("Miles case") described by counsel for plaintiff as "surprisingly on point". In this matter it was held that, in computing the damages of the plaintiff, in that matter, the turnover, profit and performance of the CC in question, as well as the future prospects should be used as a yardstick for the assessment of a plaintiff's loss of income and earning capacity. The Court found that the mechanism of crediting the plaintiff in the books of account of the CC with a salary, is something which the plaintiff normally does upon the advice of his accountants in order to achieve the legitimate object of minimising the overall amount of income tax, which is payable by both the plaintiff and the CC. The fortunes of the CC in that matter were quite clearly inextricably bound up with the wellbeing of the CC, as well as the time and effort expended by the plaintiff in the business of the CC. The performance of the CC depended vitally on the efficiency with which the plaintiff conducted and managed this business.

54. In Miles the court distinguished Rudman by stating that in Rudman there was no proof of the plaintiff (Rudman) actually having suffered losses as a consequence of his personal injuries. I agree with these contentions in Miles. In my view Rudman is also distinguishable from the matter under consideration, because the business involved in Rudman was the operation of a game farm. The CC's business in this instance involves the providing of a service. There is no question of valuable underlying assets, such as a game farm. I therefore agree that the so-called Rudman-principle should not be applied in the matter under consideration."

[22] In the Miles case, Hartzenberg AJ succinctly stated the applicable law as follows:

"24.1. A close corporation, and for that matter a company, has a separate and distinct estate from the estates of its members or shareholders which, for good reason, must be acknowledged and given effect to. The same applies to a trust which has an estate separate from the estates of its trustees or beneficiaries.

[2]

24.2. Under the *lex Aquilia* a defendant is obliged to compensate a plaintiff for the difference between the value of the plaintiff's

estate after the commission of the delict and the value it would have had if the delict had not been committed. The capacity to earn money is considered to be part of a person's estate and loss or impairment of that capacity constitutes a loss if such loss diminishes the estate.[3]

24.3. A physical disability which impacts upon capacity to earn does not necessarily reduce the estate or patrimony of the person so injured. It may in some cases follow quite readily that it does, but not on the facts of this case. There must be proof that the reduction in earning capacity indeed gives rise to pecuniary loss.[4]

In an appropriate case, a plaintiff "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 he does not fall into the trap of regarding the loss to the company as automatically and necessarily equivalent to his personal loss.[5]

[23] The appellant, in the Court a quo, relied on the Rudman case as it does before us. The Court a quo came to the conclusion that, on the facts, this matter is distinguishable from the Rudman case. The Court a quo followed the Miles case. It also held that this matter is distinguishable from Rudman, because the business involved in Rudman was the operation of a game farm, whereas the business BPW is the provision of a service, and there is no question of valuable underlying assets, such as a game farm.

[24] Mr. Potgieter SC, who appeared together with Mr. Bisschoff, on behalf of the appellant, submitted that the Court a quo erred in following the Miles case. He submitted that this case is distinguishable on the facts from the Miles case for the following

reasons:

24.1 Miles held 99% members interest in a close corporation, Guy Miles Brokerage Close Corporation whereas the respondent holds a 50% members interest in BPW.

24.2 Miles, in effect conducted his personal brokerage business under the auspices of the close corporation whereas the respondent is not the sole decision-maker in BPW.

24.3 Substantial factual evidence was led pertaining to Miles' reduced work capacity, more specifically the fact that he conducted

fewer interviews, and therefore showed a significant decrease in the number of appointments he attended to as opposed to those that he attended to prior to the injury. A proper calculation could therefore be made as to the effect thereof on the close corporation's losses, whereas there was no such evidence (documentary or otherwise) presented pertaining to specific quotes and how effectively or otherwise this was done by the respondent to factually establish a reduced productivity on his part, which in turn would have been inextricably linked to any losses by BPW.

24.4 Any profit or surplus income would accrue for Miles' benefit as he was effectively the sole member of the close corporation;

conversely the losses of the close corporation would directly equate to the losses of Miles. Despite the impact the accident might have had on the respondent, he still received a similar salary to that of his brother, and also earned income from the business in accordance with their equal interest in BPW.

24.5 Miles was in effect the alter-ego and the directing mind of the close corporation whereas same cannot be said of the respondent in the present case. The respondent's decision-making ability did not directly impact on BPW as the respondent's brother, Russ Bee, still functioned normally and an employee (his nephew, Jared Bee), as well as others, fulfilled the functions of the respondent.

24.6 The fortunes of the close corporation were quite inextricably bound up with the well-being of Miles, as well as the time and effort expended by him on the business. In the case of the respondent, there is clear evidence that despite any impact the accident might have had on him, he still received a similar salary to that of his brother, and also earned an income from the business in accordance with their equal shares.

24.7 Whereas there was an almost complete convergence of the interests of Miles and the close corporation, same does not hold true in respect of the respondent and BPW.

[25] Mr. van Heerden SC, who appeared for the respondent, submitted that on the facts of this case the Rudman case as contended by the appellant, is not applicable. He submitted that the Court should follow the approach of using the turnover of the business to quantify the respondent's loss of earnings. For this he relied on a number of cases, including Road Accident Fund v. Oberholzer [2006] 3 All SA 593 (E) ("the Oberholzer case"); Road Accident Fund v. Ronaasen N.O. [2007] ZAECHC 153 (22 June 2007) ("the Ronaasen Case"); Sandler

v. Wholesale Coal Suppliers Limited 1941 AD 194 at 198 ("the Sandler case"); and Miles

v. Road Accident Fund (7410/2009) [2013] ZAKZPHC 41 (14 June 2013) ("the Miles case").

[26] In the Oberholzer case the Court ruled that the proper approach to quantifying Oberholzer's loss would be to consider what the profitability of the business would have been had Oberholzer not been injured and to compare that with what the profitability has been since his injury. If the company's profitability would have been greater, then Oberholzer suffered a loss.

[27] In the Ronaasen case the Court accepted that the patient, Juan, could prove his damages by showing what the take home pay and the amount of profit generated by the close corporation, which was conducted by Juan before the accident, was an indication of what Juan could have earned if he had not conducted his business through the medium of a close corporation.

[28] In the Sandler case the Court stated the following:

“When these matters are taken into consideration together with plaintiff’s statement that his business became disorganised, the extracts from the books showing a diminution in volume of business, a smaller rate of profit and no sales of cars at all while appellant was in hospital, I think that amounts to reasonably sufficient proof that appellant’s absence caused some loss to the business. It is doubt exceedingly difficult to value the damage in terms of money but that does not relieve the Court of the duty of doing so upon the evidence placed before it.”

[29] In the Miles case the Court, after considering the facts of the matter, held that it is appropriate to use the performance including the turnover, and the profitability of the close corporation through which Miles conducted his business, as a yardstick to determine the plaintiff’s personal loss of income and earning capacity.

[30] In my view the quantification of the loss of income is an exercise to determine whether there has been a diminution in the value of the estate of the injured party. Ordinarily, the injured party’s salary constitutes prima facie proof of the make-up of the injured party’s estate. This, however, is not always the case as the salary is not always indicative of the make-up of the injured party’s estate and this is something that is determined on the facts of each case. Thus, unless the circumstances of the case make it inappropriate to rely on the injured party’s salary to determine his or her loss of income, the principles as stated in the Rudman case apply. The onus rests on the injured party to persuade the Court that it would be inappropriate to determine his or her loss of income with reference

to his or her salary before the Court can deviate from the principles set out in the Rudman case and this he or she must do on a balance of probabilities.

[31] The Court a quo, after briefly discussing the Rudman and Miles cases came to the conclusion that as with the Miles case, the respondent’s case is distinguishable on the facts of the Rudman case. The Court a quo appears to have come to the conclusion that the following were the similarities between the Miles case and the respondent’s case, namely that:

“...the mechanism of crediting the plaintiff in the books of account of the CC with a salary, is something which the plaintiff normally does upon the advice of his accountants in order to achieve the legitimate object of minimising the overall amount of income tax, which is payable by both the plaintiff and the CC. The fortunes of the CC in that matter were quite clearly inextricably bound up with the wellbeing of the CC, as well as the time and effort expended by the plaintiff in the business of the CC. The performance of the CC depended vitally on the efficiency with which the plaintiff conducted and managed this business.”

[32] In addition the Court a quo, in distinguishing the Rudman case, stated:

“In my view Rudman is also distinguishable from the matter under consideration, because the business involved in Rudman was the operation of a game farm. The CC’s business in this instance involves the providing of a service. There is no question of valuable underlying assets, such as a game farm. I therefore agree that the so-called Rudman-principle should not be applied in the matter under consideration.”

[33] The basis upon which the Court a quo distinguished the Rudman case is, with respect, not supported by the evidence for the following

reasons:

33.1. Firstly, there was no evidence to suggest that the mechanism of crediting the respondent in the books of account of BPW with a salary was something which the respondent did upon the advice of his accountants in order to achieve the legitimate object of minimising the overall amount of income tax payable by the respondent and BPW. The evidence was that the respondent and Russ Bee would determine their salaries on the basis of what was affordable to BPW and what they required to live off.

33.2 Secondly, there was no evidence to suggest that the fortunes of BPW were clearly inextricably bound up with the well-being of the respondent as well as the time and effort expended by the respondent in the business of BPW. The evidence in this matter demonstrates that BPW continued to function for a year without the respondent. BPW was in fact able to pay the respondent an amount equivalent to the payment received by Russ Bee. Although there was a decline in the performance of BPW, this is not a case where one could say that the fortunes of BPW were inextricably bound up with the well-being as well as the time and effort expended by the respondent.

33.3 Thirdly, there was no evidence to suggest that the performance of BPW depended vitally on the efficiency with which the respondent

conducted and managed the business. The evidence was that the respondent’s salary was not determined by the work that the

respondent did or the amount of sales attributable to him. In fact the work was outsourced. The respondent’s responsibility was to manage the day to day operations of the Cape Town office, to submit quotes and to oversee the work of the subcontractors. In addition, unlike in the Miles case where the evidence demonstrated that injuries sustained by Miles resulted in the reduced number of appointments which in turn resulted in reduced income, the evidence in this matter did not establish what it is that the respondent did which would have resulted in the reduced income of BPW in the respondent’s absence.

33.4 Lastly, there was no evidence regarding the assets of BPW. In any event, I cannot see the relevance of the valuable underlying assets in the quantification of the respondent’s loss of earnings.

- [34] I am in agreement with Mr Potgieter that the facts of this case are distinguishable from the Miles case and some of the distinguishing facts are dealt with in the preceding paragraph. Miles held 99% members interest in a close corporation, Guy Miles Brokerage CC whereas the respondent holds a 50% members interest in BPW. Miles, in effect conducted his personal brokerage business under the auspices of the close corporation whereas the respondent is not the sole decision-maker in BPW.
- [35] The facts of this matter are also distinguishable from the Oberholzer case. In the Oberholzer case the Court found that the main reason for the growth of the business was Oberholzer who was qualified to make the patterns and that through his endeavours the business secured lucrative contracts. Oberholzer also attended to the maintenance of the factory and the machinery. The evidence in this matter was that BPW renders the services through sub-contractors. There was also no evidence that the success of BPW depends on the contracts secured by the respondent.
- [36] The facts of this matter are also distinguishable from the Ronaasen case. In the Ronaasen case the following:
- “The evidence in this case is that, whether or not Juan’s disability caused loss to the close corporation, it certainly caused loss to him. The chief purpose of the evidence about the close corporation’s failure to maintain its profit levels after the collision was not to establish the closed corporation’s loss and then to ascribe it to Juan, ... The purpose of the respondent’s evidence was to establish the measure of Juan’s pre-accident earning ability. Juan was the driving force behind the one-man closed corporation which operated the sports shop. The amount of his take home pay and the amount of profit generated by the close corporation (not need for the purchase of further stock) was an indication of what he could have earned if he operated the business, not through the medium of a close corporation, but as a sole proprietorship for his own account.”*
- [37] In the case of the respondent, and unlike in the Ronaasen case, the evidence about BPW’s failure to maintain its profit levels after the collision was not to establish the measure of the respondent’s pre-accident earning ability. On the contrary, BPW’s failure to maintain its profit levels after the collision was to establish BPW’s loss and then to ascribe it to the respondent. Thus the respondent fell into the trap, which the Rudman case warned against, of attributing the income of BPW to the respondent.
- [38] The Sandler case also cannot assist the respondent. In the Sander case the evidence established that at the time that the plaintiff was in hospital there were no car sales which then resulted in the diminution in volume of business, a smaller rate of profit. There was no evidence of that nature in this matter.
- [39] There is no closed list of facts on the basis of which the principle in the Rudman case can be distinguished, and each case must be determined based on its own facts. I could not find any facts to distinguish the Rudman case.

- [40] The respondent received his salary, or drawings or profit for the period that he was recuperating at home. The Court treated this amount as ex gratia payments. The Court a quo also treated a portion of the respondent's salary, or drawings or profits in excess of what was considered to be his contribution to BPW as ex gratia payments. This was despite the fact that the evidence had established that the respondent's entitlement to the payments is as a result of his 50% member's interest in BPW. Thus the Court a quo treated the respondent not as a proprietor, but as an ordinary employee of BPW. In my view, there was no legal basis to exclude such payments.
- [41] The Court a quo also came to the conclusion that the respondent should be paid out for early retirement. This is despite the fact that he is not an ordinary employee of BPW, but a member who holds a 50% member's interest.
- [42] It was argued on behalf of the appellant that the early retirement of the respondent did not detract from his entitlement to receive a 50% of the profits of BPW. Indeed, I cannot find any legal basis why the early retirement of the respondent would result in him being deprived of the 50% profit of BPW in which he holds a 50% member's interest.
- [43] For the reasons set out above, I am of the view that the Court a quo, with respect, misdirected itself in awarding past and future loss of earnings. The result is that the appeal should succeed.
- [44] The appellant has been successful and I cannot find any reason why the costs should not follow the cause.
- [45] In the result I propose the following order:

The appeal is upheld with costs. The award of damages in the sum of R4 049 614.00 in respect of past loss of earnings and R7 532 400.00 in respect of future loss of earnings is set aside.

NUKU, J

I agree, and it is so ordered:

HLOPHE, JP

STEYN, J

20/9/16: Hlophe, JP et Steyn, J et Nuku, J

Case No: 07/2016

Nuku, J - [Hlophe, JP: Agrees and it is so ordered; Steyn, J: Agrees]

[1] (7410/2009)

[2013] ZAKZPHC 41 (14 June 2013)

[2] Raath v Nel, 2015 (5) SA 273 (SCA)

[3] Dippenaar v Shield Insurance Co Ltd, 1979 (2) SA 904 (A) at 917 B-D

[4] Rudman case, para [11] at 241 H- 242 A

[5] Rudman case, para [13] at 243 A-B

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