

SOUTH AFRICA / JUDGMENT

Sil and Others v Road Accident Fund (2011/18773) [2012] ZAGPJHC 117; 2013 (3) SA 402 (GSJ) (11 June 2012) [2012] ZAGPJHC 117

COURT

South Gauteng High Court, Johannesburg

BEFORE

R Sutherland

CASE / FILE NUMBER

2011/18773

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REPORTABLE

SOUTH GAUTENG HIGH COURT,
JOHANNESBURG

CASE

NO 2011/18773

DATE:11/06/2012

IN THE MATTER
BETWEEN:

SIL, DOROTA ELZBIETA
.....FIRST
PLAINTIFF
SIL, CAROLINE
BRZDEK.....
SECOND PLAINTIFF
SIL, PAULINE BREZDEK
.....THIRD
PLAINTIFF
AND
ROAD ACCIDENT
FUND.....
DEFENDANT

JUDGMENT

PER SUTHERLAND J:

INTRODUCTION

[1] Mirosław Andrej Brzdek was killed as a result of a motor car collision. He left a widow and two daughters, the three plaintiffs.

[2] The defendant admits liability to compensate the plaintiffs. The only sum agreed upon is R15,000 for funeral expenses. The claim for loss of support remains to be decided. The parties are agreed the deceased's earnings topped the maximum sum prescribed in Section 17(4) (c) (ii) of the Road Accident Fund Act, 56 of 1996. The relevant portion of Section 17 (4) reads:

“(4) Where a claim for compensation under subsection (1) -

(a)

(b)

(c) includes a claim for loss of income or support, the annual loss, irrespective of the actual loss, shall be proportionately calculated to an amount not exceeding-

(i) [R 178642] per year in the case of a claim for loss of income; and

(ii) [R178642] per year, in respect of each deceased breadwinner, in

the case of a claim for loss of support.

(4A) (a) The Fund shall, by notice in the Gazette, adjust the amounts referred to in subsection (4) (c) quarterly, in order to counter the effect of inflation.

(b) In respect of any claim for loss of income or support the amounts adjusted in terms of paragraph (a) shall be the amounts set out in the last notice issued prior to the date on which the cause of action arose.”

(The prescribed sum for the purposes of this matter is R178,642.00)

[3] The controversies are limited to two questions.

The first question is one of fact: What is the sum to be used to calculate the deceased's prospective earnings?

The second question is one of law: are the contingencies appropriate to be factored into the damages calculation to be taken into account to adjust the sum before the capping is applied or are they to be applied to the sum arrived at after the capping is applied?

THE EARNINGS OF THE DECEASED

[4] What the deceased did for a living and what he earned is to a considerable degree a matter of conjecture. The evidence of his widow that he was a travelling salesman of engineering tools, her bank account which he used to deposit money he earned, and a few perfunctory records consisting of some tax papers, invoice books, supplier statements and a supplier catalogue, that she found after his death, are all there is to go on.

[5] The first plaintiff's evidence is uncontested and no reason exists to doubt her veracity. The deceased did not operate a bank account, he used her savings account. His business was conducted on the trot, and he had no office other than his home and his car. She testified that he was the sole earner of income for the family since 2002, when she ceased to work. With reference to her bank statements from 2005 onwards it could be demonstrated that there were regular deposits of relatively small sums totalling from about R35,000 to over R100,000 per month, varying with the seasons. All of this income was contributed by the deceased. In addition to these sums, the deceased took cash and, as a rule, large sums of cash were kept at home in a safe. The extent of the

cash inflow is unknown. An analysis of the bank records shows an annual income of about R1million per year. Moreover, the lifestyle of the family reflected that income on this scale indeed was received. They lived in Linden, a solidly middle class suburb of Johannesburg.

The children were educated at Roedean School, a leading private school. They drive luxury motor cars. They holidayed well. The

children are both, a present, university students, one abroad in Poland.

[6] This picture is contradicted by the state of the deceased's tax affairs. From the records available, he last declared an income in the financial year 2006 of R224 000. In the succeeding years he declared a nil income. There is no evidence of any Value Added Tax registration. He called his business A & M Afpol CC, but no evidence is tendered of a registration. In my view it can be comfortably concluded that the deceased adopted the stance that paying tax was an imprudent deployment of his wealth and he could put it to far better use than could the Fiscus. The consequence of that inference is that the tax returns were bogus and worthless. They are not a safe guide to his true income.

[7] It was a difference of opinion between the parties about what data to use that resulted in the two actuaries being given wholly different baseline figure upon which to calculate future losses. The plaintiff's actuary used the widow's bank account data and the defendant's actuary took the last tax data from 2006 to perform calculations. The defendant's rationale was that such data was the only reliable information as there was no corroboration of the source of the inflows into to the widow's bank account. The defendant's anxiety about the matter is not misplaced, and the evasion of tax by the deceased certainly leaves a sour taste on the mouth. However, it is up to the revenue authorities to pursue their remedies against the estate if they so choose, and the exercise in which this Court is engaged does not require or permit a judgmental exercise about the deceased's conduct. The upshot is that the tax data is not worth anything, and in the absence of a sound reason to think otherwise, it must be

accepted that the first plaintiff is truthful in declaring that the income flow into her savings account was derived from the

deceased's earnings.

- [8] The Plaintiff's actuary's calculations are therefore to be preferred for the reasons alluded to above; ie based on an income as reflected in the bank statements deposits, rather than the tax returns. Those figures are set out in the order below.

WHEN ARE CONTINGENCIES TO BE TAKEN INTO ACCOUNT: BEFORE OR AFTER THE CAPPING?

- [9] The parties agreed that if I decide that contingencies are to be taken into account before the capping is applied, the capped amount is, axiomatically, not to be reduced. If the capped sum is subject to reductions for contingencies, then I must determine what they should be and calculate a lesser sum.

- [10] The answer to this question is a function of a proper interpretation of Section 17(4)(c). The relevant phrase, distilled from the superfluous provisions, reads:

"Where a claim for compensation includes a claim for loss of income or support, the annual loss, irrespective of the actual loss, shall be proportionately calculated to an amount not exceeding RX"

- [11] In my view, the subsection means that:

First, an amount, styled the 'annual loss,' is to be calculated;

Second, that amount is re-calculated having regard to the maximum sum, RX.

This re-calculated 'annual loss' may not exceed the prescribed maximum sum.

Therefore, if the initial 'annual loss' so calculated:

is higher than the prescribed sum, the maximum notional 'annual loss' is that maximum sum;

but, if the initial 'annual loss' is less than the prescribed sum, the notional 'annual loss' is that lesser sum.

- [12] Where do the contingencies come in? One may, I suppose, speak, loosely, of a 'gross loss' as a pre-contingency figure and a 'net loss' as a post contingency figure.

- [13] An 'annual loss' cannot be the equivalent of the 'annual income' because the projected annual income is merely a part of the exercise in calculating the actual loss. In projecting a future actual loss, the exercise contemplates the chances of not achieving the projected rate of earnings by factoring in predictable risks. Those risks are expressed as the given contingencies. There is no other place in the calculation process where, sensibly, the contingencies could be usefully intruded into a calculation of loss; that is to say the net loss or more appropriately the 'actual loss'. The important point to guard against is employing phraseology that is likely to obscure the critical point that the word 'loss' ought to be

reserved for what is indeed suffered, and used to allude to what is to be paid by way of compensation.

[14] It seems to me, therefore, that because the purpose of the cap is to limit merely the sum to be paid, and its purpose is not to interfere in the calculation of the loss, the contingencies are part of the exercise in calculating actual loss, and must therefore have already been dealt with before the capping is applied to calculating the amount of compensation.

[15] The artificially set maxima exist to resolve the challenges to the defendant in funding the demands made on it, not to prescribe a new methodology of calculating loss. The Section has been addressed in *Law Society of SA v Minister of Transport* 2011 (1) SA 40 (CC) at [81], where it was held:

[86] ... that the scheme, including the reduction of compensation recoverable for loss of income or support, properly advances the governmental purpose to make the Fund financially viable and sustainable and to render the compensation regime more transparent, predictable and equitable.”

Thus, the policy choice which informed the introduction of the amendments to Section 17, which invented the capping, should not be given significance beyond its limited designs. The practice of calculating contingencies as it has existed for decades need not be disturbed. Were a disturbance to be the intention, an express provision would have been expected.

[15] Moreover, to the extent that the sub-section consciously recognises that a person who has suffered loss is not to be compensated in full, it stands to reason that a restrictive interpretation is appropriate. In *Dadoo v Krugersdorp Municipal Council* 1920 AD 530 at 552, Innes CJ held that:

“It is a wholesome rule of our law which requires a strict construction to be placed upon statutory provisions which interfere with elementary rights. And it should be applied, not only in interpreting a doubtful phrase, but in ascertaining the intent of the law, as a whole.”

That approach would be consistent with the object of the RAF Act which is to meet the needs of the victims, within the scope of the Act.

COSTS

[16] It was argued that owing to the conduct of the defendant in obdurately opposing the claim on the issues relating to the death and to the liability of the defendant, a punitive costs order was appropriate. The defendant conceded merits the day before the set down date for trial. The plaintiff was put to the effort and cost of preparation in respect of issues that were unarguable. In my view, peeving as that may be, I am not persuaded that the purpose for which punitive costs orders are to be awarded would include the complained of conduct.

RESULT

[17] Accordingly I make an order that the defendant shall pay:

1 the first plaintiff 2 259 666 for loss of support;

the first plaintiff R15 000 for funeral expenses:

the second plaintiff R134 044 for loss of support;

the third plaintiffs R375 241 for loss of support;

the three plaintiffs:

Interest on the respective amounts a tempore morae at the prescribed rate, from 14 days after the delivery of this judgment;

The costs of suit

ROLAND SUTHERLAND

Judge of the South Gauteng High Court, Johannesburg

Hearing : 8 June 2012

Delivered : 11 June 2012 /For Plaintiffs ...

For Plaintiffs : Adv B Ancer SC

Instructed by : Norman Berger & Partners

Reference : Mr Millar

For Defendant : Adv A Kitching

Instructed by : Nurick & Mayat

Reference : B Langa

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