THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 162/2014

In the matter between:

THE ROAD ACCIDENT FUND **Appellant**

and

ELIZABETH JEMMA SWEATMAN **Respondent**

Neutral Citation: *RAF v Sweatman* (162/2014) [2015] ZASCA 22 (20 March 2015)

Coram: Lewis, Maya and Zondi JJA and Dambuza and Mayat AJJA

Heard: 10 March 2015

Delivered: 20 March 2015

Summary: The effect of the amendment to the Road Accident Fund Act 56 of 1996 in 2008 in so far as the limitation on the liability of the Road Accident Fund for loss of income or support, suffered as a result of a motor vehicle collision, is concerned: correct approach is to determine the present value of the actual loss suffered, as actuarially calculated, taking into account all contingencies, including mortality, and then compare it with the annual loss (the limit or cap) as determined on the date of the accident.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (Griesel J sitting as court of first instance)

The appeal is dismissed with costs including those of two counsel.

JUDGMENT

Lewis JA (Maya and Zondi JJA and Dambuza and Mayat AJJA concurring)

[1] The sole issue to be determined in this appeal is the effect of the amendment to the Road Accident Fund Act 56 of 1996 in 2008 in so far as the limitation on the liability of the Road Accident Fund for loss of income or support, suffered as a result of a motor vehicle collision, is concerned. The Act was amended in 2005 (by Act 19 of 2005) but the relevant amendments came into operation only on 1 August 2008. Before the amendment a plaintiff (either as the person injured claiming for loss of income as a result of injuries sustained, or claiming damages for loss of support by a breadwinner fatally injured in a collision) could claim the full amount of damages proved from the Fund.

[2] Section 17, as amended, introduces various limitations on the Fund's liability. The one in issue in this matter is found in subsec 17(4). The relevant provisions are:

'17 Liability of Fund and agents

(1) The Fund or an agent shall-

. . . be obliged to compensate any person (the third party) for any loss or damage which the third party has suffered as a result of any bodily injury to himself or herself or the death of or any bodily injury to any other person, caused by or arising from the driving of a motor vehicle by any person at any place within the Republic, if the injury or death is due to the negligence or other wrongful act of the driver . . . .

. . .

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

. . .

(b) includes a claim for future loss of income or support, the amount payable by the Fund or the agent shall be paid by way of a lump sum or in instalments as agreed upon;

(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 [Rx] per year in the case of a claim for loss of income; and

ii [Rx] per year, in respect of each deceased breadwinner, in the case of a claim for loss of support.' (My emphasis.)

[3] In terms of subsec 17(4A)*(a)* the amounts referred to in subsections 17(4)(*c*)i and ii are determined by notice in the Government Gazette, and adjusted quarterly in order to counter the effect of inflation. Subsection 17(4)*(b)* provides that:

'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.'

[4] The respondent in this matter, Ms Elizabeth Sweatman, was severely injured when she was run over by a car in Tokai Road, Cape Town in July 2010. She was 15 years old at the time. Her mother instituted action in the Western Cape Division of the High Court on her behalf for damages against the Fund the following year. The amount claimed was some R7 million. When she attained majority Ms Sweatman was substituted as the plaintiff.

[5] The Fund and Ms Sweatman had agreed all aspects of the claim before the trial commenced, save for one which they asked the court to determine: that was the interpretation of s 17(4)*(c)*, read with 17(4A)*(b)* of the Act as amended. The parties led only the evidence of actuaries on the meaning of 'annual loss' in s 17(4)*(c)*, having agreed that the Fund was liable for 50 per cent of that amount. Griesel J in the Western Cape Division accepted the interpretation and the method of determining the 'cap' on damages advanced by the actuary, Mr Ian Morris, who supported Ms Sweatman's claim. He ordered the Fund to pay Ms Sweatman R3 358 529. The appeal by the Fund against the order is with the trial court's leave.

[6] This issue has been determined in different ways by various courts, and I shall deal with these decisions in due course. Mr Morris, who gave evidence for Ms Sweatman, explained the conventional method of determining future losses when establishing a claim for loss of income or support. The matter is not without difficulty, especially where one is dealing with an injury to a young person or the death of a young breadwinner. Nicholas JA put the problem as follows in *Southern Insurance Association Ltd v Bailey NO* 1984 (1) SA 98 (A) at 113F-114A:

'Any enquiry into damages for loss of earning capacity is of its nature speculative, because it involves a prediction as to the future, without the benefit of crystal balls, soothsayers, augurs or oracles. All that the court can do is to make an estimate, which is often a very rough estimate, of the present value of the loss.

It has open to it two possible approaches.

One is for the Judge to make a round estimate of an amount which seems to him to be fair and reasonable. That is entirely a matter of guesswork, a blind plunge into the unknown.

The other is to try to make an assessment, by way of mathematical calculations, on the basis of assumptions resting on the evidence. The validity of this approach depends of course upon the soundness of the assumptions, and these may vary from the strongly probable to the speculative.

It is manifest that either approach involves guesswork to a greater or lesser extent. But the Court cannot for this reason adopt a *non possumus* attitude and make no award. . . .'

[7] This court thus approved the use of actuarial calculations based on whatever evidence is available. In this matter, following the approach of actuaries over decades, Mr Morris used the assessments of industrial psychologists as to the career path likely to have been followed by Ms Sweatman, her probable remuneration, prospects of promotion, working lifespan, retirement and other factors that might have affected her income stream over the years. He then calculated the present estimated value of the future income that she would have earned, taking into account the net capitalization rate, which in turn has regard to the expected investment return. From the amount calculated he made deductions on the basis of future inflation rates, for taxation and likely changes in the rates of taxation, and, importantly, took into account accepted life tables reflecting mortality rates.

[8] The second step taken was to ascertain what difference the injury and disability arising from the collision made to Ms Sweatman: to determine the estimated present value of her future income stream in her injured and disabled state. Once that calculation had been done the two amounts were adjusted having regard to the contingencies of life: any factor that would influence her life and earning capacity – the hazards of life. The amount calculated in respect of the income stream in the injured state was then deducted from the amount she would have earned but for the injury, and that represented the estimated present value of Ms Sweatman's loss. The limitation introduced by the amendment was then compared with the actual loss: if the actual loss was less than the annual loss – the limit or cap – then the Fund would be liable for the actual loss. If it exceeded the limit then only the amount which was gazetted before the date of the accident (the annual loss) would be payable.

[9] The steps taken before the application of the cap were, as Griesel J pointed out, part of the conventional method of determining the estimated present value of the loss which the Fund, prior to 2008, would have been liable to pay in full. The actuary who gave evidence for the Fund, Mr A J Munro, said that that was the method he too had adopted until the Act was amended and effect had to be given to the limitation introduced by the amended s 17.

[10] However, the amendment had made Mr Munro rethink the approach to determining the actual loss, and he adopted a new approach to determining it, and applied the limitation – the cap – at a different point. The difference in approach of the respective actuaries – as to how to apply the cap – results in different sums being determined. Mr Munro's approach leads to substantially lower awards than does that of Mr Morris. In this matter, on the Fund's approach, Ms Sweatman's award would be R2 million less (before the apportionment) than she would obtain using the conventional method subject to the new limitation.

[11] Mr Morris's evidence was supported by Mr J Schwalb, an actuary who also testified for Ms Sweatman. He too follows the approach to the calculation of actual loss, and the application of the limit on that loss, advocated by Mr Morris.

[12] The Morris method, preferred by Griesel J, starts from the text of s 17(4)*(c)*. That provides that the annual loss must be compared with the actual loss (the estimated value of the loss), and the lesser sum awarded. The annual loss is that determined by notice in the *Government Gazette*. And the quantum of the annual loss, provides s 17(4A)*(b)*, is that 'set out in the last notice issued prior to the date on which the cause of action arose' – that is, the date of the accident. Accordingly, following the Morris method, if in each year after the accident the actual loss exceeds the annual loss determined at the date of the accident, the Fund is liable to pay only the lesser amount – the annual loss.

[13] Mr Munro, on the other hand, proceeded from a different premiss. He considered that in order to determine the estimated value of the loss, when calculating the injury-free career path and future income, and the income stream with the injury and disability, he had to take into account all contingencies other than mortality. After the annual loss (the cap amount) for each ensuing year was established (working on estimated inflated amounts), mortality rates would be applied. This would result in substantially lesser amounts being awarded to claimants. The approach advocated by him required working on an inflated cap for

the projected years of the claimant's life. Furthermore, Mr Munro considered that mortality rates are different from other contingencies, and ought not to be taken into account before establishing the actual loss. He also took the view that the actual loss should be discounted only after the annual loss had been established, thus introducing a further allowance for general contingencies.

[14] The rationale for this approach was that it was fairer: it brought about gender equality (mortality rates for women and men are different, women in general having longer life spans). And it also did not prejudice the very old or the very young accident victim. Thus the child and the adult approaching retirement would not be treated differently. But as pointed out by counsel for Ms Sweatman, the entire process of determining future loss is dependent on gender differentiation: women have longer life expectancies, and in general have higher claims for future loss of earnings than men do. The argument that the Morris method discriminates on the basis of age is equally artificial. There is inevitably a difference in the periods where income is lost when dealing with very young or older people. The periods of the loss must be different.

[15] Mr Munro introduces into the calculation of loss the notion of a 'cap year': that there is a different limit on the Fund's liability for each year in respect of which predictions are made. But nowhere does the Act suggest that the amount in the last notice published before the date of the accident must be adjusted each year to take into account the ravages of inflation. The quarterly adjustments will take care of problems with inflation for future claimants, but the limit for a particular claimant's loss is set at the date of the accident. A reading of s 17, even having regard to its purpose, does not lend itself to the interpretation that there is a different cap for each year after the accident.

[16] And, as Sutherland J said in *Sil & others v Road Accident Fund* 2013 (3) SA 402 (GSJ) paras 13 to 15, the purpose of the cap is to limit the sum to be paid. It is not intended to interfere in the calculation of the loss. He said: 'The artificially set

maxima exist to resolve the challenges to the [Fund] in funding demands made on it, not to prescribe a new methodology of calculating loss . . . .' He too found that contingencies had to be taken into account in determining the actual loss. He said (para 13):

'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'.

[17] Sutherland J referred in this regard to *Law Society of South Africa & others v Minister for Transport & another* 2011 (1) SA 400 (CC) para 86. There the constitutionality of the limitations on liability introduced by s 17 was raised. Moseneke DCJ, in finding that the reduction of compensation payable for loss of income or support did not amount to an arbitrary deprivation of property, said that the amendment 'properly advances the governmental purpose to make the Fund financially viable and sustainable and to render the compensation regime more transparent, predictable and equitable'.

[18] Mr Munro also did not explain satisfactorily why he treated mortality differently from all other contigencies, taking it into account only after the annual loss had been determined. As counsel for Ms Sweatman argued, there should be no distinction between the general hazards of life, and mortality. All have an impact on the income that a plaintiff would earn in an uninjured and injured state. The only real difference between mortality and other contingencies is that there is more evidence available in statistical form to show mortality rates.

[19] The court below in this matter considered that *Sil* was correct. In the same division, however, in *Jonosky v Road Accident Fund* 2013 (5) SA 356 (GSJ), the court accepted that the cap had to be inflated for each year of the calculation. The court did not, however, explain how this interpretation was justified by the plain

words in s 17. It also did not deal with an earlier decision (*Nhambe v Road Accident Fund*, unreported case 70721/2009, North Gauteng High Court) in the division, which adopted much the same approach that *Sil* did: the cap was set at the date of the accident. The decision of the court below in this matter has been followed in a subsequent matter in the Eastern Cape Division: *Bonesse v Road Accident Fund* 2014 JDR 0303 (ECP)).

[20] In my view, there is no cogent reason to depart from the conventional, tried and tested actuarial approach that this and other courts have accepted over decades. The Fund argued that that method was not set in stone. That is true. But since it proceeds from a logical basis and there is no apparent reason to change it, this court will not suggest any departure from it. Thus the trial court was correct in finding that Mr Morris's calculation of Ms Sweatman's loss, as capped, should be the basis of the award. To the extent that *Jonosky* takes a different stance, it is incorrect.

[21] The appeal is dismissed with costs including those of two counsel.

C H Lewis

Judge of Appeal

APPEARANCES

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