IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

Case Number: 76781/2010

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/~~NO~~.

(2) OF INTEREST TO OTHER JUDGES: YES/~~NO~~.

(3) REVISED. ✓

7/12/15
DATE

SIGNATURE

In the matter between:

WERNER NEL	PLAINTIFF
And	
ROAD ACCIDENT FUND	DEFENDANT

JUDGMENT

Fabricius J,

1.

The only issue before me in this claim against the Fund is the claim for loss of income. I was provided with an actuarial calculation by I. Minnaar of Clemens, Murfin and Rolland dated 23 October 2015 which sets out the amounts to be awarded, depending on which argument of Counsel I accept. The actual amounts are not in issue.

2.

The parties have agreed that Plaintiff was 50% negligent in regard to the damages suffered by him. ***Section 17 (1) of Act 56 of 1996*** as amended by ***Act 19 of 2005***, and particularly s. 17 (4) (c) with effect from 1 August 2008, places a limitation on the amount of compensation payable by the Fund in respect of such a claim for loss of income.

3.

The point in law for my decision is whether the apportionment of liability with regard to the merits falls to be deducted before or after the application of the limit, (herein after 'the cap').

4.

In this context Plaintiff's argument proceeded as follows:

Plaintiff's damages must be quantified in the normal traditional way, inclusive of the apportionment of damages; and that the cap must be applied thereafter. The Defendant on the other hand, argued that the apportionment of damages with regard to the merits must be applied only after the cap has been applied, thereby further reducing his award.

5.

In this respect, s. 17 (4) (c) of the amended *Act* reads as follows: "Where a claim for compensation under subsection (1) - ....

(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 160 000 per year in the case of a claim for loss of income; and

ii. R 160 000 per year, in respect of each deceased breadwinner, in the case of a claim for loss of support."

In addition, s. 17 (4) (A) of the *Act* as amended stipulates as follows:

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."

c) The present cap so adjusted for inflation with effect from 31 January 2015 was R 227 810 per annum.

6.

From s. 17 (4) (c) it is clear and unambiguous that the cap applies to the actual loss. It is equally obvious that first the actual loss must be determined and the cap then applied thereafter. The question arises: what is the Plaintiff's actual loss? The term "actual loss" is not defined in the *Act* as amended. The Plaintiff contends that this constitutes his damages calculated in the normal traditional way after application of the relevant apportionment of damages for contributory negligence. That represents Plaintiff's actual loss, i. e. the damages to which the Plaintiff is entitled but for the cap. It is to this actual loss of the Plaintiff that the cap falls to be applied. See: Compare ***Swartbooi v RAF 2013 (1) SA 30 (WCC) at 36*** with reference to a different cap on compensation. "[23] If regard is had to the above, and most importantly, taking into account the provisions of s. 17, it is untenable that plaintiff's damages should be capped and limited to R 25 000 ... Regard should be had to the **actual loss** by the plaintiff, and in this instance she retains the right to be fully compensated for the damages suffered".

7.

The purpose of the cap is not to interfere with the traditional, normal way of calculating the actual loss (i. e. damages to which the Plaintiff is entitled), but to limit merely the sum to be paid by the Defendant.

See: ***SIL and Others v RAF 2013 (3) SA 402 (GSJ) at 405***: "[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."

It is apparent that in some cases the Plaintiff's actual loss may be higher than the cap; whilst in other cases it might be lower than the cap. Obviously when Plaintiff's actual loss is lower than the cap, the Plaintiff is entitled to no more than such actual damages (and cannot lay claim to the cap). The effect of the cap is simply to ensure that the Defendant never pays more than that prescribed amount (which is now per year). It does so by restricting the maximum compensation payable. The cap limits the exposure of the Defendant. It has nothing to do with the determination

of the Plaintiff's actual loss, i. e. the damages to which the Plaintiff is otherwise entitled.

See: ***SIL and Others supra***: "[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." SIL's case was expressly approved by the SCA in ***RAF v Sweatman [2015] 2 All SA 679 SCA.***

The cap guarantees that, no matter what the Plaintiff's actual loss might be, the Defendant will have to pay nothing more than the cap. It is a statutory limit on compensation introduced for policy reasons primarily of a budgetary nature.

See: ***Law Society of South Africa and Others v Minister for Transport and Another 2011 (1) SA 400 (CC) par [86] at 433*** (see also par. [80] at 431)

8.

The Defendant's approach is to say that the apportionment of damages must be applied to the cap itself, not to the damages actually suffered by the victim. In doing so, the Defendant seeks to reduce the cap still further. This is manifestly unfair to

the Plaintiff. It is also contrary to the principles of the apportionment of damages according to which the deduction for contributory negligence must be applied to the common law damages of the partly guilty claimant. ***Section 1 (1) (a) of Act 34 of 1956*** as amended stipulates: "1. Apportionment of liability in case of contributory negligence: (1) (a) Where any person suffers damage which is caused partly by his own fault and partly by the fault of any other person, a claim in respect of that damage shall not be defeated by reason of the fault of the claimant but the damages recoverable in respect thereof shall be reduced by the Court to such extent as the Court may deem just and equitable having regard to the degree in which the claimant was at fault in relation to the damage." Section 17 (4) deals with the compensation that is payable by the Defendant under and in terms of the Act and the apportionment of damages does not apply to compensation.

See: ***South African Railways and Harbours v South African Stevedores Services CO Ltd 1983 (1) SA 1066 (A) at 1087-9.***

9.

The result of the Defendant's argument is effectively to reduce the cap. That could hardly have been the intention of the Legislature.

10.

The *Act* as amended represents social legislation, see: ***Pithey v RAF 2014 (40 SA 112 (SCA) par. [18] at 120***, the purpose and objective of which is to provide the widest possible protection to victims of motor vehicle accidents such as the Plaintiff herein.

See: ***AETNA Insurance CO v Minister of Justice 1960 (3) SA 273 (A) at 286***; ***RAF v Abdool-Carrim and Others 2008 (3) SA 579 (SCA) par. [7] at 582***; and ***Engelbrecht v RAF and Another 2007 (6) SA 96 (CC) par [23] at 102***.

In accordance therewith, s. 17 (4) (c) of the *Act* as amended should be interpreted in favour of the Plaintiff. As was stated with reference thereto in ***Jonosky v RAF 2013 (5) SA 356 (GSJ) par. [11] at 359***. "In a situation, such as the present, where the legislature consciously recognised that a claimant will not be compensated in full

for a certain item of loss, I am of the view that the statutory provision should be interpreted widely and liberally. The subsection should be interpreted to cause the least invasion to the rights of a claimant who had suffered loss. Thus where an 'actual loss' suffered is substituted by a reduced 'statutory loss' a benevolent interpretation, which will result in the least restriction on an actual loss suffered, is appropriate." Furthermore, statutory provisions which interfere with elementary rights (such as with s. 17 (4) (c) is undeniably the case) should be interpreted to cause the least invasion of such rights.

See: ***Dadoo Ltd and Others v Krugersdorp Municipal Council 1920 AD 530 at 552.***

It follows that the Defendant's contention should be rejected.

11.

A similar argument was propounded by the Defendant with regard to the question of whether contingencies were to be applied before or after the cap, the Defendant

contending of course that it should be the latter; but the Defendant's contention in this regard was authoritatively rejected by the SCA.

See: ***RAF v Sweatman supra.***

The same applies here. In fact, the decision of the SCA in ***RAF v Sweatman*** effectively disposes of the comparable argument of the Defendant herein. It is inconceivable that a different approach than that adopted for the deduction of contingencies could be justified with regard to the deduction for contributory negligence.

12.

In the light of the foregoing, it was submitted that the approach of the Plaintiff is clearly to be preferred. Accordingly, this Court should award Plaintiff compensation under and in terms of the ***Act*** by applying the cap proscribed in ***s. 17 (4) (c) of Act 56 of 1996*** as amended after having applied the apportionment in order to determine Plaintiff's actual loss (and not the opposite way around as the Defendant would have it done).

13.

Finally, it may be observed that the approach contended for by the Plaintiff herein, entirely corresponds with the method adopted for dealing with the reduction of a claimant's damages to cater for compensation for occupational injuries. There the apportionment of damages is first deducted to arrive at such a claimant's common law damages before applying the amount received from the Compensation Commissioner and not the other way around as Defendant would have it done herein.

See: *Ngcobo v Santam Insurance Co Ltd 1994 (2) SA 478 (T)*; following ***Bonheim v South British Insurance Co 1962 (3) SA 259 (A)*** and ***Wille and Another v Yorkshire Insurance Co Ltd 1962 (1) SA 183 (N) at 187*** and approved in ***RAF v Maphiri 2004 (2) SA 258 (SCA).***

14.

Defendant's argument, apart from that already indicated above, was that Plaintiff's approach was novel and would put a further strain on the resources of the Fund.

15.

In reply Plaintiff's Counsel argued to the contrary, quite obviously. The approach was in line with a well-established method, applying conventional principles for example:

15.1 Do the actuarial compilation of loss of income including contingencies -;

15.2 Deduct the apportionment percentage -;

15.3 Apply the cap -;

15.4 Award the resultant amount.

16.

Using this method, the Defendant can never be liable for payment of an amount in respect of loss of income exceeding the cap. That was clearly the intention of the

Legislature (in order to ensure the financial viability and sustainability of the Defendant. See: ***Law Society of South Africa and Others v Minister for Transport, supra***. As the cap is the maximum prescribed in s. 17 (4) (c), being the law applicable in respect of claims for loss of income under ***Act 56 of 1996 (RAF Act)*** as amended, s. ***4 (1) (c) of Act 34 of 1956 (Apportionment of Damages Act)*** is completely satisfied. Applying the apportionment certainly does not (and cannot ever) increase the amount beyond the cap.

17.

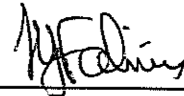
This method would also be in harmony with the approach adopted in ***RAF v Maphiri 2004 (2) SA 258 SCA at 264 par. 8.***

18.

I agree with Plaintiff's submissions and the reasoning. A Plaintiff's actual loss of income must first be determined, including an apportionment, and the cap must be applied thereafter. All the mentioned authorities point in that direction keeping in mind in particular, the purpose of the cap.

19.

The result is that scenario B of the actuarial calculations applies, and the amount for loss of income is R 4 862 730.



JUDGE H.J FABRICIUS

JUDGE OF THE GAUTENG HIGH COURT, PRETORIA DIVISION

Case number: 76781/10

Counsel for the Plaintiff: Adv B. P. Geach SC

Adv C. Jordaan

Instructed by: H. W. Theron Inc

Counsel for the Defendant: Adv G. Naude

Instructed by: Dyason Inc

Date of Hearing: 6 November 2015

Date of Judgment: 7 December 2015 at 10:00