



**IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN**

Not reportable

Case no: 1846/2021

In the matter between

HA KUHN

APPLICANT

and

ROAD ACCIDENT FUND

RESPONDENT

Neutral citation: HA Kuhn v Road Accident Fund

Coram: NEMAVHIDI, AJ

Heard: 06 November 2024

Delivered: 07 February 2025

Summary: A physical disability which impacts on the capacity to earn an income does not, on its own reduce the patrimony of an injured person. There must be proof that the reduction in the income earning capacity will result in an actual loss of income.

ORDER

1. Plaintiff's claim for loss of past and future loss of income is dismissed.
2. Defendant is ordered to pay Plaintiff an amount of R161 340.00 in respect of past hospital and medical expenses.
3. The Defendant is ordered to pay the Plaintiff an amount of R529 072.00 (five hundred and twenty-nine thousand rand and seventy two hundred rand as set out hereunder:
 - 3.1 R500 000.00 in respect of general damages;
 - 3.2 R161 340.00 in respect of past hospital and medical expenses.

Subtotal:	R661 340.00
Minus 20% merits apportionment:	R132 268.00
Total to be paid:	R529 072.00

JUDGMENT

- [1] Plaintiff was involved in a collision on 15 February 2019 during which he sustained injuries.
- [2] On 10 February 2023 Defendant was ordered to pay 80% of Plaintiff's proven or agreed damages as a result of the collision.
- [3] The parties agreed as follows:
 - (a) Defendant shall pay an amount of R500 000.00 (pre-apportionment) $R500\,000.00 - 20\% = R400\,000.00$ in respect of general damages;
 - (b) Defendant shall provide an undertaking limited to 80% as envisaged in section 17(4) of the Road Accident Fund Act 56 of 1996;

- [4] The Court is called upon to adjudicate only the Plaintiff's claims for:
- (a) Loss of earnings/earning capacity; and
 - (b) Past hospital/medical expenses.
- [5] Plaintiff's wife is the principal member of the medical aid fund. Plaintiff's wife signed a cession in terms of which she ceded all her claims in respect of this matter to the Plaintiff.
- [6] The financial consultant of the medical aid fund proved that the Plaintiff's claim for the past medical expenses amounted to R161 340.00.
- [7] The basis of the Defendant not to pay the claim for past medical expenses is to be found in an internal directive of the RAF to reject all claims for past medical expenses where the medical aid funds have paid same.
- [8] This directive was set aside by the High Court, Pretoria. RAF applied for leave to appeal to the Supreme Court of Appeal and the Constitutional Court. Both these applications were unsuccessful. This history of this case was set out by Van Zyl J of this Court in *Berend Lebogang Vincent v RAF, Free State High Court*; Saflii 01 February 2024.
- [9] Plaintiff claims that he lost income because of his loss or diminished capacity or capability to earn the income. Once it is established that he has a diminished capacity, a loss of income is then proved.
- [10] The evidence of an orthopaedic surgeon, Dr Vlok, is that Plaintiff suffered an acute discus rupture of his cervical spine with fusion surgery thereafter. The collision contributed to 70% of the current state of Plaintiff's cervical spine. He explained that the resultant physical restriction is making it impossible for him to return to and to do the work he was doing prior to the accident.
- [11] Plaintiff did his work without restrictions from then until the collision in 2019. Dr Vlok stated that there was no need for the occupation therapist's report as it wouldn't take the matter any further.
- [12] Plaintiff was 66 years of age at the time of the collision. He had worked for 34 years for Ludick Bouers and after they were liquidated he operated his own roofing business. He testified that he could no longer climb onto roofs with a ladder, he

could not operate a saw anymore and could not do the measurements. He is now forced to pay a sub-contractor 60% of his profit.

- [13] He is 72 years of age and would have worked until 75 years of age because roofing work brings his only income. He is not a recipient of Sassa grant.
- [14] Mr. du Plessis testified that Plaintiff's income dropped from R129 000.00 to R64 000.00 after the collision. Mr. du Plessis factored into the equation the Plaintiff's cancer (in remission) and the effect of Covid on his business income.
- [15] The calculation of Munro Actuaries of Plaintiff's loss of income stands uncontested at R838 335.00. There is no reason why the amount should deviate from the normal contingencies of 5% - 15% as set out in *Hardwick v RAF [2019] LNQD 21 LP* decided on 04/06/2019 in paragraphs' 22 and 25 of the decision.
- [16] The Plaintiff has accepted the Defendant's actuarial calculation of 5% and 15% of past and future loss, respectively, have become accepted as normal contingencies. See: *RAF v Kerridge 2019(2) SA 233 SCA*.
- [17] The Defendant asserts that the medical history of the Plaintiff indicates that he was involved in a building accident where he fell from the roof of a building in 2006 and injured his back. He underwent a two-level fusion C3/C4 and C5/C7 as confirmed by Plaintiff's orthopaedic surgeon during his evidence in Court.
- [18] Plaintiff testified that Dr Lewis conducted two procedures on his back to loosen nerves in his back.
- [19] Those three procedures/operations to Plaintiff's back and neck were done pre-accident.
- [20] Plaintiff was diagnosed with lymphoma cancer two years pre-accident. Plaintiff could not recall whether at the time of the accident he was already in remission.
- [21] Plaintiff suffers from hypertension, for which he is on treatment.
- [22] Plaintiff further injured himself during 2021 when he used an angle grinder and accidentally cut his own leg as a result the of the reduced grip on his right hand. This necessitated Plaintiff to undergo further neck and arm surgery in 2021.
- [23] Plaintiff had a severe loss of neck movement, weakness of the right arm and loss

of sensation in both arms.

- [24] Defendant argues that the non-appointment of an occupational therapist denied the Court to inter alia evaluate the functional effects of an accident related to the injuries sustained by the Plaintiff.
- [25] Plaintiff's current occupational performances and limitations, residual work capacity, the impact on his amenities and limitations, and to make recommendations regarding the areas of occupation, assistive devices and assistance would have been included in the Occupational Therapist who would have measured that of a normal uninjured person that would be close in age of the Plaintiff.
- [26] Plaintiff conceded that he is still able to do quotations for installations of new roofs. He utilizes the same sub-contractor as he did pre-accident and conceded that he can still inspect the project without having to climb on the roof – he is provided photographs and or videos on which he is able to comment.
- [27] The Orthopaedic Surgeon commented that Plaintiff's age, pre-existing medical conditions and injuries (irrespective of the accident and injuries in question) do not invite him to do the physical work himself.
- [28] However Plaintiff's job has not changed as he started using his sub-contractor pre-accident and had not been climbing roofs since he fell off the roof. It is clear that the Plaintiff was and is still managing his own business.
- [29] The Chartered Accountant (CA) compiled the financial statements for five years pre-accident and four and half years post-accident.
- [31] Plaintiff's evidence is that the business is still generating income as he needs to put food on the table.
- [32] The Plaintiff's CA calculated the Plaintiff's average net income pre and post-accident in annexure C and F, and continues to calculate a historic loss for the Plaintiff in annexure G.
- [33] The historic loss of earnings is affected by business expenses increasing over the years and therefore do not create an accurate picture of how and why the income of Plaintiff has increased or decreased.

[34] The profitability or loss of the business is determined to a large extent by external factors unrelated to the injuries sustained by Plaintiff.

[35] Annexure F includes expenses which increased from pre-accident years and which are not accident related, these include inter alia:

- a) Legal costs pre-accident: R4 500.00 over the whole period;
- b) Legal costs post-accident: R31 973.00 over the whole period;
- c) Repairs/maintenance pre-accident: R76 306.00;
- d) Repairs/maintenance post-accident: R152 931.00 over the whole period;
- e) Licence fees and royalties' pre-accident over the whole period: R11 662.00
- f) Licence fees and royalties post-accident over the whole 4.5 years post-accident: R27 599.00.

[36] These non-accident related expenses had an effect of Plaintiff's income for every year.

The gross profit margin pre-accident in 2015 to 2019 is as follows:

- (i) 2015: 25,38%
- (ii) 2016: 29.38%
- (iii) 2017: 29,25%
- (iv) 2018: 28,42%
- (v) 2019: 26,72%

The gross profit margin post-accident in 2020 to 2023 is as follows:

- (i) 2020: 30,37%
- (ii) 2021: 23,54%
- (iii) 2022: 25,41%
- (iv) 2023: 32,18%

The gross profit margin was the highest during the post-accident period. The profit

margin was lower in 2021 because of the Covid 19 pandemic which affected all businesses.

- [37] Plaintiff's Actuary calculated future loss of earning as if no income was received from September 2023 to date hereof. However, Plaintiff testified that he is still earning an income.
- [38] In the event Plaintiff stops working before he turns 75, he can mitigate his loss of earnings by applying for a state old age grant.

RULING OF THE COURT

- [39] In *Scheepers v Road Accident Fund (893/2021) [2023] ZAFSHC 248 (20 June 2023)* Naidoo J held as follows:

[14] *It is trite that the Plaintiff bears the onus to prove on a balance of probabilities that the injuries he sustained have reduced his earning capacity which will result in the actual loss. See Rudman v RAF 2003 (2) SA 234 SCA ; RAF v Kerridge 2019 (2) SA 233 SCA."*

The Court in Kerridge said at para 25:

"Indeed, a physical disability which impacts on the capacity to earn an income does not, on its own reduce the patrimony of an injured person. There must be proof that the reduction in the income earning capacity will result in an actual loss of income..."

Put differently, there must be proof that the disability gives rise to patrimonial loss. The latter of course is dependent on the nature of the work that the Plaintiff had done prior to the accident or would have done had the accident giving rise to the disability, not occurred.

- [40] The Plaintiff must discharge the onus on him to prove the loss. I am not satisfied that the Plaintiff has shown that the accident or his injuries have caused a loss of earnings capacity or will cause a loss of earnings in the future to the extent that he claims.
- [41] There is no evidence as to the probability that had it not been for the accident in question and having regard to his pre-accident injuries and medical conditions, that the Plaintiff would have been able to work up to the age of 75 years.

- [42] The purpose of a claim such as this is to compensate the Plaintiff for loss that he has suffered or will suffer and not to make an award that amounts to a largesse.

PAST MEDICAL AND HOSPITAL EXPENSES:

- [43] Plaintiff's wife signed a cession in terms of which she ceded all her claims in respect of this matter to the Plaintiff. The financial consultant of the medical aid fund clearly set out the basis and proved that Plaintiff's claim for the past expenses amount to R161 340.00.

- [44] In *Bereng v Road Accident Fund 2218/2022 [2024] ZAFSHC 25* Van Zyl J gave a history of the matter where in *Discovery Health (Pty) Ltd v Road Accident Fund and Another (2022/016179) [2022] ZAGPPHC 766 (26 October 2022)* in terms whereof the following order was made:

42.1 "The directive issued by the Acting Chief Officer of the first respondent is declared unlawful."

This directive was given to all Regional Managers of the RAF to reject medical expenses claimed by the medical aid which had already paid for their members proven hospital and medical expenses for treatment of injuries caused by the motor vehicle accidents.

- [45] On 31 March 2023 the Supreme Court of Appeal under case number 135/2023 dismissed the application for leave to appeal by Discovery Health.
- [46] On 18 October 2023 under case number CCT106/23 the Constitutional Court dismissed the application for leave to appeal against the main judgment.
- [47] Van Zyl J consequently ordered that Defendant is consequently ordered to pay the Plaintiff's agreed or proven hospital and medical aid expenses.
- [48] Consequently, the following orders are made:
- (1) Plaintiff's claim for loss of past and future loss of income is dismissed.
 - (2) Defendant is ordered to pay Plaintiff an amount of R161 340.00 in respect of past hospital and medical expenses.

The Defendant is ordered to pay Plaintiff an amount of R529 072.00 (five hundred and twenty-nine thousand rand and seventy two hundred rand) as set out hereunder:

(1) R500 000.00 in respect of general damages.

(2) R161 340.00 in respect of past hospital and medical expenses

Subtotal: R661 340.00

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NEMAVHIDI, AJ

Appearances

For the Plaintiff

Adv L Pohl Sc

Instructed by:

HL Buchner Honey Attorneys

BLOEMFONTEIN

For the Defendant

Mrs Gouws

Instructed by:

State Attorney

BLOEMFONTEIN