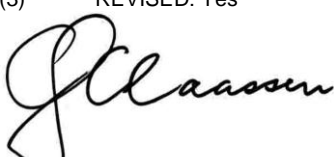


**IN THE SOUTH GAUTENG HIGH COURT OF SOUTH AFRICA  
(JOHANNESBURG)**

Case No: 2010/01220

<b>DELETE WHICHEVER IS NOT APPLICABLE</b>	
(1)	REPORTABLE: YES
(2)	OF INTEREST TO OTHER JUDGES: YES
(3)	REVISED: Yes
	<u>14 June 2013</u> DATE
SIGNATURE	

In the matter between:

**NEVILLE RONALD JONOSKY**

Plaintiff

And

**ROAD ACCIDENT FUND**

Defendant

**JUDGMENT**

**C. J. CLAASSEN J:**

[1] The plaintiff is an adult male born on 13 April 1960. At the age of 49 years and on 6 May 2009 he was involved in a motor vehicle collision. His claim against the Road Accident Fund in terms of Act 56 of 1996 (“the Act”) is all but settled save in one legal respect. I am called upon in this judgment to resolve such remaining issue.

[2] The issue concerns the proper interpretation and application of the amended section 17(4) of the Act. The relevant portions of this section read as follows:

“17(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) 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.

(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.**” (Emphasis added)

[3] I have been told from the bar that the interpretation of section 17(4)(c) in regard to the highlighted portions above, has not yet been the subject of any previous judicial interpretation.

[4] In the present case the dispute is about what the correct amount is for the plaintiff’s past and future loss of earnings. The question to be resolved pertains to the methodology to be adopted when applying the limit, or as is commonly known, the annual “cap”, set out in section 17(4)(c). The actuaries employed by the respective parties differ in regard to their interpretation of how this cap is to be applied in calculating the plaintiff’s future loss of earnings. This difference of approach results in the plaintiff’s actuary calculating the future loss of earnings at an amount of R2 631 300.00 whereas the defendant’s actuary calculates the amount at R2 231 570.00 i.e. a difference amounting to R399 730.00.

[5] In a nutshell, the different approaches in determining the aforesaid section can be explained as follows:

1. The plaintiff’s actuary interprets the section as permitting the plaintiff’s annual capped loss of earnings to be adjusted for every future year after the date upon which the cause of action arose, with a factor representing:
  - i. for the past loss of earnings: the actual annual increase in inflation; and

- ii. for the future years up to the date upon which the plaintiff will retire, a projected rate of increase in inflation.

2. The defendant's actuary interprets the sub-section as:

- i. permitting one adjustment for inflation in the year that the loss was sustained; and
- ii. thereafter multiplying such amount for the remaining future years up to the date of the plaintiff's retirement. The rationale is that inflationary increases for the future are subject to fluctuations and, as such, inexact and at best speculative.

[6] Plaintiff's counsel submits that the plain/grammatical meaning of the relevant sub-section makes it clear that a limited loss must be adjusted to counter the effect of inflation and in so doing, it will give effect to the clear intention of the Legislature.

[7] The defendant's counsel submits that the clear intention of the Legislature is set out in the second half of section 17(4A)(b) to the effect that the adjustment to the loss of income "shall be the amount set out in the last notice issued prior to the date on which the cause of action arose", meaning that such adjustment takes place once only on the date of the accident when the then applicable capped loss of income is used and thereafter multiplied for the future years until date of retirement.

### **INTERPRETATION**

[8] Section 3 of the Act states categorically:

"The object of the Fund shall be the payment of compensation in accordance with the Act for loss of damage wrongfully caused by the driving of motor vehicles."

- [9] The Act and its predecessors have been the subject of several cases where certain sections have been expansively, and others restrictively, interpreted. Those judgments which held that the victim of a motor vehicle collision should be afforded the widest possible protection all allude to the fact that the protection is necessary due to the claimant's inability to obtain redress from a common law wrongdoer because the latter might be indigent. This conclusion also results from the fact that section 21 of the present Act as well as its predecessors suspends the claimant's common law delictual claim and substitutes it with a statutory claim against the Fund.<sup>1</sup> Those judgments upholding a restrictive interpretation of the Act applied it to sections where the Act and its predecessors lay down formalistic requirements to be complied with by the claimant to enforce rights under the Act.<sup>2</sup>
- [10] I respectfully agree with Sutherland J in **Sil and Others v Road Accident Fund** 2013 (3) SA 402 (GSJ) where he interprets section 17(4)(c) in an expansive manner in order to hold that contingencies are to be applied to the calculation of actual future loss of earnings before applying the capped limitation. He came to this conclusion relying on the well-known principle laid down in **Dadoo v Krugersdorp Municipal Council** 1920 AD 530 at 552 where Innes CJ held that it was a wholesome rule of our law that statutory provisions which interfere with elementary rights should be interpreted to cause the least invasion of such rights. Sutherland J found that to apply the contingencies only after the capped limitation had reduced the quantum of future loss of earnings, would, in effect, further reduce the claimant's compensation for loss of future earning capacity. It was therefore found that the normal method of calculating future loss of earnings should not be disturbed and that the capped limitation should only be applied after the future loss of earnings had been calculated which calculation had already incorporated all the contingencies.

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<sup>1</sup> See **Rose's Car Hire (Pty) Ltd v Grant** 1948 (2) SA 466 (A)

<sup>2</sup> See **Chauke v Santam** 1997 (1) SA 178 (A) and **MMF v Radebe** 1996 (2) SA 145 (A)

- [11] In the present case the interpretation contended for by the plaintiff's counsel will result in a larger amount of damages being awarded to the plaintiff in respect of future loss of earnings whereas the interpretation contended for by the defendant's counsel will result in a lesser amount of damages being awarded under such item. 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 sub-section 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.
- [12] I cannot agree with the interpretation advanced about section 17(4A)(b) by defendant's counsel. This sub-section contemplates the adjustment to the amounts stipulated in section 17(4)(c) in respect of a claim for loss of income and/or a loss of support as at the date when the loss occurred, being the date of the accident. The sub-section does not purport to deal with adjustments after the date on which the cause of action arose. Where a calculation of future loss of income is made at a point in time, say three years after the accident occurred, then the adjustments for the past loss of earnings, as between the date of the accident and the date upon which the calculation is made, will be calculated in accordance with the statutory adjustments as gazetted for each of the intervening years. Each year between the date of the collision and the date upon which a calculation for loss of earnings has to be made will, in accordance with the gazetted amounts, be calculated exactly.
- [13] However, what is to be done with regard to the calculation of the "annual loss" suffered by the claimant after the date upon which the calculation is being made? The solution seems to me that reliance should be placed on the normal actuarial calculations of future loss of earnings which, in the past, have always taken into consideration a projected future inflation rate for each year up to the date of

retirement. In my view, there is no need to disturb that methodology when calculating future loss of earnings. There has always been a speculative “looking into a crystal ball” to come up with a projected annual inflation rate during the future years up to retirement. I see nothing sinister in relying on the professionalism of actuaries to calculate future inflation rates in respect of those years, as they have always done. In any event, the positive and negative effects of the usual contingies applied to these futuristic calculations ameliorate the inexactitude and speculation caused by the fluctuation of inflation *in futuro*.

[14] In my view, the purpose of sub-section (b) of section 17(4) is to fix the starting point at which the gazetted adjustments are to be incorporated in the calculation of loss of earnings. The subsection contemplates that the adjustment applicable as at the date of the accident will normally be less than the adjustment applicable as at the date when the calculation is made. This must be so because of the inherent delay between the accident date and the calculation date arising from the statutory 2 years’ delay and notice period before summons may be issued. The effect of the subsection is to prevent the use of a larger adjustment amount, applicable as at the date of calculation, being used for calculating the past loss of income during the intervening period between the date of the accident and the date upon which the calculation is made. If it were otherwise, there would be an incentive for claimants to wait as long as possible before coming to court to calculate loss of earnings in order to benefit from the adjustment amount in force at such later date, which, in comparison to the adjustment amount as at the date of the accident, would normally be a larger amount and therefore more beneficial to the claimant. The purpose of the subsection is therefore intended to setting a starting date for utilising adjustment amounts when calculating loss of earnings after the accident and for no other prupose.

[15] If it is accepted that the gazetted amounts will increase every year due to inflation, then there is no reason to suspect that the Legislature intended such inflation rates to suddenly stop increasing at the date upon which the calculation

is being made. It defies simple logic to disregard the reality that inflation rates on the whole generally rise as time goes by up to the time of the retirement date. To hold otherwise would read into the sub-section an absurdity.

- [16] By way of an example, one can contemplate a situation where future loss of earnings is being claimed for a minor, say, at the age of ten years. If the minor is expected to have a remaining working life beginning at the age of twenty lasting up to the age of sixty five, it would mean that a calculation has to be made for future loss of earnings during a forty five year period of time. It is a generally accepted fact that devaluation erodes the value of money as time goes by. If the actuary is prohibited from including in his calculation for that forty five year period of time any future inflationary increases, it would mean that the devaluation of money over forty five years would cause whatever amount is awarded to become valueless in real money terms by the end of the forty five year period. In my view, it would be absurd to suggest that the Legislature contemplated such a result. It flies in the face of the entire object of the Act to compensate claimants who suffered loss of future income due to injuries sustained in motor vehicle collisions.

### **CONCLUSION**

- [17] In light of the aforesaid arguments I am of the view that the proper interpretation of section 17(4)(c) is the one contended for by the plaintiff. In calculating the future loss of earnings beyond the date upon which such calculation is made, an actuary is duty-bound to incorporate a projected future inflation rate on an annual basis. That being my conclusion, it follows that the amount to be awarded to the plaintiff in respect of his future loss of income is R2 631 300.00.

- [18] I make the following order:

1. The defendant is to pay the plaintiff the amount of R2 631 300.00 in respect of the plaintiff's future loss of income.

2. The parties are given leave to approach me in chambers with a draft order incorporating the aforesaid award and all the other terms of their agreement for purposes of making it a final court order.

DATED THE 14<sup>th</sup> DAY OF JUNE 2013 IN JOHANNESBURG



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**C. J. CLAASSEN**  
**JUDGE OF THE HIGH COURT**

Counsel for the Plaintiff: Adv M. Coetzer

Counsel for the Defendant: Adv A. I. Cajee

Attorney for the Plaintiff: Wim Krynauw Attorneys

Attorney for the Defendant: Mayat, Nurick and Associates Inc

Argument took place on: 16 May 2013