THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 20006/2014
Not Reportable

In the matter between:

ETTIENNE TERBLANCHE **APPELLANT**

and

THE MINISTER OF SAFETY AND SECURITY **FIRST RESPONDENT**

INSPECTOR M I MOGALE **SECOND RESPONDENT**

Neutral citation: *Terblanche v The Minister of Safety and Security and another* (20006/2013) [2015] 48 ZASCA (27 March 2015)

Coram: Navsa ADP, Pillay, Saldulker JJA and Fourie, Mayat AJJA

Heard: **13 March 2015**

Delivered: **27 March 2015**

Summary: **Delict –** claim for loss of earning capacity – farmer with specialised skills – entitled to be compensated on the basis of the cost of substituted labour.

ORDER

On appeal from: Gauteng Division, Pretoria (Preller J with Phatudi and Mabuse JJ concurring sitting as court of appeal):

I The appeal against the order of the full court, Gauteng Division, Pretoria under case number A756/2008 dated 31 October 2013 is upheld, with costs.

II The order of the full court is set aside and substituted with the following order:

‘i) Die appèl ten aansien van die vordering vir toekomstige verlies aan inkomste word met koste gehandhaaf;

ii) Paragraaf 1 van die bevel van die hof a quo gedateer 21 Februarie 2008 word aangevul deur die invoeging van die volgende as paragraaf 1.4A

“Die bedrag van R 1 557 136.69 ten aansien van toekomstige verlies aan inkomste;’’

iii) Die appèl ten aansien van die vordering vir gelede verlies aan inkomste word van die hand gewys;

iv) Paragraaf 2 van die bevel van die hof a quo gedateer 21 Februarie 2008 word gewysig ten einde as volg te lees:

‘’Absolusie van die instansie word toegestaan ten aansien van die eiser se vordering vir skadevergoeding weens gelede verlies aan inkomste.”’

JUDGMENT

Mayat AJA (Navsa ADP, Pillay, Saldulker JJA and Fourie AJ concurring)

[1] The only issue in the present appeal is whether or not the appellant, Ettienne Terblanche ('Terblanche'), a farmer, had proved a claim for future loss of earning capacity against the Minister of Safety and Security and a police officer named Inspector M I Mogale (the first and second respondents respectively) before the trial court (Visser AJ) in the Gauteng Division, Pretoria. The trial court found that Mr Terblanche had not proved his loss of earning capacity and the full court (Preller J with Phatudi and Mabuse JJ concurring) upheld this finding. The present appeal is against the decision of the full court, with the special leave of this court.

[2] Terblanche's claim for damages against the respondents (conveniently referred to as 'the police') was premised upon injuries which he sustained on 20 July 2005 as a result of negligent conduct of the police. Pursuant to an agreement between the parties relating to the liability of the police to Terblanche and the quantum of certain other heads of damages claimed by Terblanche, the issue before the trial court was limited to determining the amount of Terblanche's claim for past loss of earnings and loss of earning capacity. In terms of paragraph 2 of its order, the trial court granted absolution from the instance in relation to Terblanche's claims for past and future loss of earnings. The claim for past loss of earnings was subsequently abandoned

and the ambit of the present appeal is accordingly limited to the issue of the quantum of Terblanche's future loss of earnings.

Pertinent evidentiary framework during the trial

[3] By way of background, it was not in dispute before the trial court that whilst Terblanche was in police custody, he incurred severe injuries to his head, neck and back, as a result of being tossed around in the back of a police van negligently driven by police officers over rough terrain at high speed. As regards his farming activities, Terblanche testified that he had started farming in 1988 and had derived his income solely from farming at the time he was injured. Thus, he had worked as a farmer for almost 20 years when the matter came before the trial court in 2007. As regards his qualifications for farming, Terblanche testified that he had completed a two-year diploma in agriculture and had also completed a mechanical diploma, specialising in diesel engines.

[4] Terblanche's farm had an extensive array of crops and he also farmed with livestock and wild game. By all accounts, on the basis of the evidence before the trial court, he was a 'hands-on farmer' before he was injured in the sense that he managed all aspects of the required functions on the farm, including numerous physical tasks. Thus, for example, his activities on the farm included mechanical work relating to tractors, vehicles and irrigation centre pivots, described as 'spilpunte' in the evidence. He explained in his evidence in this respect that he maintained and monitored two centre pivots on his farm: one with 14 towers for the purposes of crops on 100 hectares of farmland as well as a smaller one with ten towers for the purposes of crops on 74 hectares of farmland. In addition, he performed a range of other functions including monitoring the centre pivots, checking on related sprinklers, mending electronic fences, repairing micro-switches for sprinklers and measuring dipping fluids for different sized animals. He also indicated that he personally managed the repair of centre-pivots, which periodically (and unpredictably) broke down.

[5] Terblanche further testified that after his back was injured, he was no longer capable of continuing to do all the physical aspects of his farming work. Thus, for example, he could no longer remove and pick up the gearboxes of the centre pivots for the purposes of maintenance. He was also forced to adjust certain physical tasks, such as for example reducing the size of bags for fodder for animals from 50 kilogram bags to 12 kilogram bags.

[6] Terblanche testified that prior to the incident in this matter, apart from seasonal workers from time to time, he employed seven permanent labourers as well as a foreman, named Painter Kulela, who all lived on the farm. He indicated in his testimony that in light of his injuries, he envisaged employing an additional person to assist him with managing the farm, particularly in relation to the physical aspects of work he could no longer perform. He also testified that even with supervision, Mr Kulela did not have the ability to perform these aspects of the work. Similarly, he indicated that his other permanent employees were not suitable for the additional assistance he envisaged, simply by virtue of the fact that these employees already had assigned job functions.

[7] In a joint minute on record by orthopaedic surgeons appointed by both parties, it was not in dispute that Terblanche had suffered a severe injury to his back whilst he was in police custody. The medical experts also agreed that he was unfit for all physical aspects of farming activities previously carried out by him. In addition, they also agreed that despite his injuries, Terblanche was nevertheless still capable of managing his farm and supervising an additional employee, specifically for tasks he was no longer fit to perform.

[8] Dr Deodat Maré, an orthopaedic surgeon, who gave evidence for Terblanche, reported and testified that Terblanche should desist totally from being a ‘hands-on farmer’ as his back condition would progressively deteriorate. Thus, Dr Maré opined that Terblanche was only fit for sedentary, administrative or supervisory work in relation to physical tasks he had usually performed. On this basis, Dr Maré anticipated that it would be necessary for

Terblanche to employ a skilled person in the future such as a farm foreman to assist him with functions he was not capable of performing, post-injury.

[9] Ms Sonet Vos, an industrial psychologist retained on behalf of Terblanche, indicated in her testimony that future income of a farmer is generally difficult to predict as such income is dependent on a number of uncertain variables such as the climatic conditions and the fluctuating price of commodities such as wheat. Be that as it may, she agreed with Dr Maré that Terblanche would need to employ a farm foreman with technical and mechanical knowlege as soon as possible. In this way, she postulated that Terblanche could continue deriving an income in a supervisory capacity for the remainder of his days. Against this background, she suggested that monetary compensation to Terblanche could at the very least be premised upon the costs of employing a foreman at the Paterson salary scale of C5 (alternatively C3) until the age of 65 years. The actuaries retained by Terblanche then calculated the costs of employing a foreman at three levels. In the alternative, on the basis of the averment that Terblanche is entitled at least to the costs of substituted labour in the form of an artisan on the B2 Paterson level of earnings, Terblanche's loss was actuarially computed to be the sum of R1 557 136.99.

[10] An occupational therapist, Ms Dina Rocha, testified on behalf of the police that she had conducted certain physical tests on Terblanche, including strength tests as well as tests for his range of movement and agility. Significantly, whilst Ms Rocha confirmed in her testimony that she was not an expert in relation to farming, she nevertheless accepted the views of Terblanche's experts to the effect that he should not continue doing heavy, physical work on his farm. She further accepted on the basis of reports from the relevant experts that by continuing to work on the farm, Terblanche had accelerated the need for a future spinal fusion.

Findings of trial court

[11] Visser AJ found that Terblanche's existing employees could perform physical activities on his behalf. Thus, the trial court found that

notwithstanding his injuries, Terblanche could still manage his farm by delegating tasks to his existing employees. On this basis, the trial court accordingly held that Terblanche had not proved and quantified his future loss of income.

[12] A significant feature of the trial, which bears mentioning is the fact that Visser AJ saw fit to cross-examine, debate and canvass with all witnesses various topics throughout the course of the trial, apparently on the basis of the judge's personal knowledge and experience as well as his own opinions on expert evidence before him. In fact, the learned judge remarked on his own conduct in this regard at one stage during the trial by asserting that:

'. . .dit sê ek maar vir u reguit, ek lewer nou 'n bietjie getuienis. . . .'

Findings of full court

[13] As already indicated, the full court agreed with the trial court that Terblanche had not established on a balance of probabilities that he had sustained any loss of earning capacity for which he could expect to be compensated. The full bench consequently dismissed the previous appeal.

Loss of earning capacity

[14] The difficulty with claims of this nature is generally not so much the recognition that earning capacity constitutes an asset in a person's estate, but rather the quantification of the monetary value of loss of earning capacity by a trial court. Each case naturally depends on its own facts and circumstances as well as the evidence before the trial court concerned.

[15] As regards proof of Terblanche's loss, the trial court relied upon certain dicta in *Rudman v Road Accident Fund* 2003 (2) SA 234 (SCA) relating to a claim for loss of earning capacity by a mohair and game farmer, not dissimilar to Terblanche. This court found in the circumstances of that case that the injured Mr Rudman had not discharged the evidentiary onus of proving a diminution in the value of his patrimony. Similarly, Visser AJ also found that Terblanche had not discharged the onus on him. Significantly, the court in

Rudman's case recognized that for the purposes of establishing a claim for loss of earning capacity,

'[t]here must be proof that the reduction in earning capacity indeed gives rise to a pecuniary loss.'

It is pertinent in my view that the farmer in *Rudman* conducted his farming activities through a company, and the court found in the circumstances of that case, that the devaluation of his shares in this company was not established by the evidence. As such, his personal patrimony was not really at stake.

[16] In contrast, on the basis of the undisputed evidence in the present case, it was established before the trial court that Terblanche would sustain a pecuniary loss in his personal capacity if the additional, necessary labour was used to substitute certain aspects of his functions. Therefore, as this court has held in *President Insurance Company Ltd v Mathews* 1992 (1) All SA 179; SA 1992 (1) (A) at 5E-G:

'There is no reason in principle why, in an appropriate case, the cost of employing a substitute should not form the basis of a claim for damages arising from a plaintiff's inability to carry on his pre-collision trade or profession. See Luntz *Assessment of Damages for Personal Injury and Death* 2nd edition, 259. Thus a doctor who has been temporarily incapacitated and thereby prevented from conducting his practice could recover the cost of a *locum tenens*, assuming always the costs of employing such *locum tenens* would be less than the loss of income or profits he would otherwise have sustained. By adopting such course he is effectively mitigating his damages, as he is obliged to do.'

The principles enunciated in *Mathews* are accordingly clearly applicable in the present case and the dicta in *Rudman* are distinguishable.

[17] In these circumstances, it is my view that the actuarial computations made available to the trial court premised upon uncontroverted evidence, constituted the most appropriate basis for the trial court to quantify Terblanche's diminution of his patrimony. The different levels of actuarial computations, which were made available to the trial court, ranged from the computed loss in respect of a foreman with mechanical skills, at the highest level, to the computed loss for an artisan on the B2 Paterson scale, who had

the potential to be trained and supervised by Terblanche, at the lowest level. Whilst I accept that Terblanche did not establish a case for a mechanically skilled foreman (at the highest level), I have no difficulty in finding that he had established a case for the additional costs of an unskilled employee, who could potentially be trained over time. Counsel for both parties agreed in the context of the present appeal that on the basis of the available actuarial computations, substituted labour for an artisan for specified physical functions was fairly and equitably calculated to constitute the sum of R1 557 136.69.

Conclusion

[18] For the reasons given, the trial court as well as the full court erred in finding that Terblanche had not established a claim for loss of earning capacity. The appeal relating to Terblanche's claim for the diminution of his earning capacity must accordingly be upheld.

Costs

[19] Whilst Terblanche was represented by two counsel in this appeal, the costs of two counsel were not justified, nor motivated. Therefore, to the extent that Terblanche has been successful in the present appeal in relation to his main claim for loss of future earning capacity before the trial court, I propose granting a costs order in the normal course, not specifically providing for two counsel.

Order

[20] The following order is accordingly made:

I The appeal against the order of the full court, Gauteng Division, Pretoria under case number A756/2008 dated 31 October 2013 is upheld, with costs.

II The order of the full court is set aside and substituted with the following order:

'i) Die appèl ten aansien van die vordering vir toekomstige verlies aan inkomste word met koste gehandhaaf;

ii) Paragraaf 1 van die bevel van die hof a quo gedateer 21 Februarie 2008 word aangevul deur die invoeging van die volgende as paragraaf 1.4A

“Die bedrag van R1 557 136.69 ten aansien van toekomstige verlies aan inkomste;”

iii) Die appèl ten aansien van die vordering vir gelede verlies aan inkomste word van die hand gewys;

iv) Paragraaf 2 van die bevel van die hof a quo gedateer 21 Februarie 2008 word gewysig ten einde as volg te lees:

‘’Absolusie van die instansie word toegestaan ten aansien van die eiser se vordering vir skadevergoeding weens gelede verlies aan inkomste.”’

_____

H Mayat

Acting Judge of Appeal

Appearances

For the Appellant:	J O Williams SC
	L W De Beer
	Instructed by:
	Vezi De Beer, Pretoria
	Honey, Bloemfontein
For the Respondent:	D E Meyer
	Instructed by:
	The State Attorney, Pretoria
	The State Attorney, Bloemfontein