**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA**

**JUDGMENT**

**Reportable**

Case No: 324/2017

In the matter between:

**LEON ST LEGER BOUTTELL** **APPELLANT**

and

**ROAD ACCIDENT FUND** **RESPONDENT**

**Neutral citation:** *Bouttell v RAF* (324/2017) [2018] ZASCA 90 (31 May 2018)

**Coram:** Navsa, Majiedt and Mbha JJA and Plasket and Hughes AJJA

**Heard:** 14 May 2018

**Delivered:** 31 May 2018

**Summary:** Delict - Road Accident Fund - damages – claim for loss of earnings – prior to accident appellant contributed towards a retirement annuity fund – whether voluntary contributions towards such retirement annuity fund can be claimed as loss of earnings.

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**ORDER**

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**On appeal from:** Gauteng Division of the High Court, Pretoria (Holland-Müter AJ sitting as court of first instance):

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

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**JUDGMENT**

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**Hughes AJA (Navsa, Majiedt and Mbha JJA and Plasket AJA concurring):**

[1] Mr Leon St Leger Bouttell, the appellant, an electrical engineer by profession, was very successful in the electrical instrument and automation domain. Since March 2006 he started up and ran, as owner and general manager, two businesses, namely Exel Electrics & Instrumentation and Le Roux, Bouttell & Associates. He was thus in a position to dictate the manner and form of the monthly salary he drew. It appears from the expert reports filed that he earned dividends and salary in a total amount of approximately R4 million per year. From his gross income, he elected to make contributions equivalent to 15% of his gross earnings to a retirement annuity fund.

[2] On 25 July 2012 and along the Kathu/Deben road, in the district of Kathu, Mr Bouttell was involved in a motor vehicle collision. As a result of the collision he sustained bodily injuries for which he instituted a claim against the Road Accident Fund (the RAF), a statutory body established under the Road Accident Fund Act 56 of 1996 (the RAF Act) to administer the compensation system envisaged by national legislation. The RAF conceded liability on the merits in favour of Mr Bouttell and the trial on quantum was scheduled to proceed in the Gauteng Division of the High Court,

Pretoria. On the scheduled date the parties engaged in settlement negotiations and settled all heads of damages, save for that of future loss of earnings. In respect of future loss of earnings the parties presented argument to the court a quo based on the pleadings before the court, together with calculations of their respective actuaries, which they accepted to be correct. The High Court found that there is a distinction between contributions to an employer pension fund and voluntary contributions to a retirement annuity fund for purposes of calculating loss of earnings. In this regard it upheld the RAF's contentions that the contributions to a retirement annuity fund are not to be taken into account in a claim for loss of earnings. The issue in this appeal is whether the aforesaid conclusion is correct.

[3] Section 17(4) of the RAF Act imposes a cap on the limitation of claims for loss of income or loss of support. It reads as follows in respect of a claim for loss of income:

'17 Liability of the 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) –

…

*(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.'

[4] The amounts referred to in section 17(4)(*c*)(i) and (ii) of the RAF Act are adjusted quarterly and determined by notice in the Government Gazette in terms of sections 17(4A)(*a*) and 17(4)(*b*). Hence, the amount to be utilised in calculating the loss of earnings in 2012, being the year in which the collision occurred, is that which

was last published in the notice prior to the date on which the cause of action arose. This would be R196 636 per year as per the notice.

[5] In the court a quo Holland-Müter AJ accepted the correctness of the actuarial calculations of Gregory Whittaker of Algorithm Consultants, who conducted a calculation on behalf of the appellant, and that of Gerald Jacobson, for the RAF. Mr Whitaker calculated the appellant's future income, including his contributions to the retirement annuity, to be R6 578 936. Mr Jacobson calculated the appellant's future income, excluding the contributions to the retirement annuity, to be R3 539 448. The court a quo made an award for future loss of earnings in the amount of R3 539 448.

[6] Mr Marais, counsel for the appellant, contended that claimants such as the appellant, who voluntarily contributed to a retirement annuity fund were discriminated against in that they were placed at a disadvantage and prejudice by not being able to include their contributions to an annuity fund in a claim for loss of earnings. Such discrimination, he contended led to the RAF not adhering to its constitutional duty as envisaged by the Act, in compensating a claimant in full. This is so, because the retirement annuity fund contributions were not taken into account when calculating the compensation claimable for loss of earnings as were the pension fund contributions. In the circumstances, so the arguments goes, the appellant was being discriminated against and his rights in terms of sections 1(*a*), 7(1) and 9 of the Constitution of the Republic of South Africa 108 of 1996 were being violated.

[7] Mr Marais was at pains to point out that a retirement annuity fund and a pension fund were one and the same. I do not agree. I refer to the Income Tax Act 58 of 1962 (the Income Tax Act), where a retirement annuity fund is defined as 'any fund (other than a pension fund, provident fund or benefit fund) approved by the Commissioner'. This definition was fortified by the pronouncement made in *Commissioner for Inland Revenue v Milstein* 1942 TPD 279 at 287 where Millin J stated:

'… Annuities differ from other *investments* in that the capital sum invested is not returnable when the annuity ceases to be payable. Baron Watson's description of an annuity in *Foley v Fletcher* (5H. and N. 769, 117 R.R at p.978) is thus summarised in 17 Hailsham, sec.378, p.181: "An annuity is an income purchased with a sum of money or an asset which then ceases to exist, the principal having been converted into an annuity." The test, in

determining whether a series of annual payments amount to an annuity, is whether the principal continues to exist as a debt or is liquidated when the transaction takes place. If it is liquidated the payment constitutes an annuity.' [My emphasis]

The dictum was adopted by this court in *Kommissaris van Binnelandse Inkomste en 'n Ander v Hogan* 1993 (4) SA 150 (A). When one subscribes to a retirement annuity fund projections are often based on calculated future date of return, typically what one would expect from an investment.

[8] It is evident, as indicated above, that a retirement annuity fund is not a pension fund, but rather a form of investment. Contributions to an employer pension fund make up part of one's employment benefits, whilst contributions to a retirement annuity do not.

[9] This court, in *Dippenaar v Shield Insurance Co Ltd* 1979 (2) SA 904 (A), considered whether the pension deduction from the claimant's earnings and the contribution made by his employer toward a pension, arising from his contract of employment, could be excluded from his earnings, income or salary. Rumpff CJ at 917 to 920 examined the leading authority from the House of Lords of *Parry v Cleaver* (1969) 1 All ER 555. Relying on the dicta in *Parry* he upheld the lower court stating the following at 920D-E:

'When capacity to earn is sought to be proved by the plaintiff by means of a contract of employment, the monetary value of the contract can only be assessed when one looks at the contract as a whole. In this regard it is clear that, if in terms of such contract there is a compulsory deduction from salary plus a contribution by the employer in order to pay the employee money as sick leave or as a pension, it is the intention of the parties that that money shall be paid when it is due, in terms of the contract. In fact the "income" of the employee is in terms of the contract not confined to his salary… but includes also sick pay or pension when such pay or pension is due. If monetary value is sought to be put on the earning capacity based on this contract, every benefit received under the contract, such as a pension, must therefore be considered, as was done by the trial Court in the present case.'

[10] Quoting directly from the court a quo's judgment, Rumpff CJ, at 921A-B, associated himself with the view that one could not compare a pension to a benefit that is 'deemed to have been purchased'. Thus, if a claimant purchases a benefit, such

as a retirement annuity in the present case, and he does so voluntarily and unconnected to an employment contract, his contributions or payments in relation to such makes it an investment or purchase of a benefit that cannot be recovered from the RAF. The reasoning, in my view, is that a negligent third party cannot be liable to compensate a claimant who voluntarily opted to attain a benefit, irrespective of whether that third party was negligent. This is so because the voluntary purchase of the benefit does not cancel out the benefit when the delict is committed.

[11] In my view, the court a quo was correct when it concluded that 'provisions for the future', such as an investment cannot be taken into account when calculating future loss of earnings for the purpose of provisions of the RAF Act.

[12] I now turn to deal with the issue of discrimination raised by the appellant. The distinction between claimants whose employers contribute to their pension funds as part of their contracts of employment and those who do so voluntarily was categorised by Mr Marais as discrimination. That is not correct while the concepts of equity and discrimination are linked, discrimination concerns treating one person (or groups of persons) differently to another on the basis of inherent characteristics or attributes such as race, gender or the other grounds listed in s 9(3) of the Constitution. What is alleged here is a differentiation in treatment that is unrelated to any inherent characteristic or attribute having the potential to impair the dignity of a person. See *Harksen v Lane NO & others* 1998 (1) SA 300 (CC) paras 47 and 50; *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd & another* 2011 (4) SA 337 (CC) para 58. The right to equality may be implicated, but not the right to be free from unfair discrimination.

[13] Iain Currie and Johan de Waal in *The Bill of Rights Handbook* (5 ed) para 9.1 (at 230) state that '[a]t its most basic and abstract, the formal idea of equality is that people who are similarly situated in relevant ways should be treated similarly'. In this case, it cannot be said that a person like the appellant whose employer does not contribute to a pension fund for the employer as part of his or her remuneration is in a similar position to an employee whose employer does contribute to a pension fund for the employee as part of his or her remuneration. All employees are, however, treated

equally in the sense that in order to determine their future loss of earnings, a court considers the employment contract as a whole. Consequently, the discrimination argument must also fail.

[14] The general rule of costs following the result ought to apply in these circumstances.

[15] I make the following order:

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

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W Hughes

Acting Judge of Appeal

APPEARANCES

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| For the Appellant: | H B Marais SC |
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