THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 50/11

In the matter between

ROAD ACCIDENT FUND **Appellant**

and

PHILILE ROSELINE ZULU **First Respondent**

MANDLAKAYISE MTEMBENI KA-AMBROSE ZULU **Second Respondent**

SIPHELE MLAMULU MACPHERSON ZULU **Third Respondent**

Neutral citation: *RAF v ZULU* (50/11) [2011] ZASCA 223 (30 November 2011)

Coram: HEHER, MHLANTLA and SERITI JJA

Heard: 3 November 2011

Delivered: 30 November 2011

Summary: Motor vehicle collision ─ death of breadwinner ─ dependants' claim against RAF ─ quantum of damages.

ORDER

On appeal from: KwaZulu-Natal High Court, Durban (Griffiths J sitting as court of first instance):

1 The appeal is upheld with costs.

2 The order of the court below is set aside and replaced with an order in the following terms:

'There shall be judgment for the plaintiffs as follows:

(a) First plaintiff, payment of the sum of R13 556 539;

(b) Third plaintiff, payment of the sum of R566 867.'

3 The cross-appeal is dismissed with costs.

JUDGMENT

MHLANTLA JA (HEHER and SERITI JJA concurring):

[1] This is an appeal with leave of the KwaZulu-Natal High Court, Durban (Griffiths J) against the quantum of an award of damages made in favour of the first and third respondents in an amount of R19 227 337 for loss of support. The claim on behalf of the second respondent had been settled between the parties, and is accordingly not relevant for purposes of this appeal. Prof Mthembeni MacPherson Zulu was fatally injured in a motor vehicle collision on 18 October 1997. During his lifetime, he was married to Mrs Philile Roseline Zulu, the first respondent in this matter and they had two children, the second and third respondents respectively.

[2] Before identifying the issues, it will be apposite for a better understanding of the case to set out a brief background of Prof Zulu. It is not in dispute that he was a man who had achieved much and had enormous potential to achieve more. The main features of his illustrious career are as follows:

(a) Prof Zulu commenced his career as a lecturer at the University of Zululand in 1975.

(b) In 1988 he obtained a PhD from the State University of New York in Inorganic Chemistry. In 1989 he was awarded the prestigious Zappert Award by the American Chemical Society for the best PhD.

(c) In 1993, he was awarded the prestigious Humboldt Award and studied in Germany as an Alexander van Humboldt Fellow at the University of Stuttgart for eight months.

(d) On 1 September 1997, he was promoted to the position of senior professor in the Department of Chemistry. He was also the head of that department as well as Vice-Dean of the Faculty of Science and Agriculture. Shortly before his death, he had applied for a post of Dean of Science at Vista University, Johannesburg. Prof Zulu earned a good salary and had considerable security of employment. He was passionate about his work and had a keen interest in the education and upliftment of the students.

(e) Prof Zulu was an internationally acclaimed scientist and leading academic. He worked very closely with Prof O'Brien of the University of Manchester, United Kingdom, who has since been involved in the corporate world in his field of inorganic chemistry and has achieved great wealth. Prof Zulu was a key participant in an international project known as the Royal Society Evaluation Report, between a number of South

African and UK universities. The progress of the project was delayed by at least ten months due to his death.

(f) He sat on numerous academic and scientific boards and committees. He represented South Africa on the International Council of Scientific Unions Board and on the International Union for Pure and Applied Chemistry (IUPAC). He also represented the country at international conferences.

[3] Prof Zulu was a member of the Zulu royal family and was recognized as a leader by his peers in academia, other professions and in business. Some of his colleagues, namely Prof Magi, Prof Revaprasadu, Prof Sibaya and Mr Mapisa testified that Prof Zulu, due to his exceptional attributes and abilities, was destined for the top post at the university and possibly in the private sector. They described him as a man who had the drive to succeed and ability to motivate. He had great charisma, the ability to network and work with people. None had any doubt that he would have been appointed as Vice-Chancellor of any university in the country.

[4] Prof Zulu had close connections with influential persons in government ─ one of whom was Dr Ben Ngubane, a former Minister of Arts, Culture, Science and Technology. Prof Zulu was committed to the upliftment of persons who had been disadvantaged by apartheid and the transformation of society. He died at the age of 49 years and during the era of Broad Based Black Economic Empowerment (BEE). Both expert witnesses agreed that he aspired and had the potential to enter the corporate track at a senior executive level, particularly having regard to the BEE policies in place at the time of his untimely death and thereafter. Sadly his life was cut short as a result of this tragic incident. At the time

of his death he had not sought full time employment outside the academic field. I will hereafter refer to Prof Zulu as the deceased.

[5] Against that background the respondents instituted action in the KwaZulu-Natal High Court, Durban against the Road Accident Fund, a statutory insurer and appellant in this matter, for damages arising out of the death of the first respondent's husband and the father of the second and third respondents. In an earlier hearing on the merits, Olsen AJ held that the respondents were entitled to 100 per cent of the proven damages.

[6] The issue relating to the determination of quantum came before Griffiths J. The court below was required to determine the salary the deceased would have earned between his 49th and 65th year. This amount would be used as a base line for the calculation of maintenance for the respondents and thus determine quantum. The extent of the damages to be awarded to the respondents was in dispute between the parties. Both parties adduced evidence and called witnesses including industrial psychologists to provide expert assistance to the court in making the assessment required.

[7] At the end of the trial, the learned judge placed considerable emphasis on the evidence of Dr Ben Ngubane and Dr Richard Holmes, an industrial psychologist. The judge, however, took the view that he was not prepared to accede to the approach of Dr Holmes that the deceased would have left the university by 2002. The judge adopted a conservative approach and held that it was more probable that the deceased would have left academia by 2005 and progress to a Chief Executive Officer position by 2010. He applied a contingency deduction of ten per cent and awarded the first respondent damages in an amount of R18 630 992 and

the third respondent damages in the amount of R614 604. As I mentioned at the beginning of this judgment the appellant now appeals against this finding, in particular the extent of the award, with the leave of the court below.

[8] The issue on appeal and conditional cross-appeal is whether it was established that the deceased would have exercised the choice to move to the corporate track if and when the opportunity presented itself. Aligned to this question is the nature of the discretion exercised by the trial court.

[9] On appeal before us counsel for the respondents submitted that the discretion exercised by the trial court should be treated as one in a strict sense. I shall assume, without deciding the matter, that this was a strict discretion. However that is not the end of the enquiry. I have to determine whether the court below exercised that discretion judiciously and properly. In *Southern Insurance Association Ltd v Bailey NO*,[1] Nicholas JA enunciated the proper approach of an appeal court in appeals against awards of damages as follows:

'It is well settled that this Court does not interfere with awards of damages made by a trial Court unless there is "a substantial variation" or "a striking disparity" between the award of the trial Court and what this Court considers ought to have been awarded; or the trial Court did not give due effect to all the factors which properly entered into the assessment; or the trial Court made an error in principle, or misdirected itself in a material respect.'

[10] It has to be borne in mind that an enquiry into damages for loss of earning capacity is of its nature speculative. The court below had to determine the issues on predictions based on facts. It is evident that the

[1] *Southern Insurance Association Ltd v Bailey NO* 1984 (1) SA 98 (A) at 109H. See also *Road Accident Fund v Guedes* 2006 (5) SA 583 (SCA) para 8.

deceased was an academic. There is no evidence that any employment offer outside the academic field had ever been made to him. On the contrary, he is likely to have ascended to the highest academic rank in one of the South African universities. Against that background the deceased clearly had the ability and credentials to fill a position in the parastatal or corporate world. The question to be answered is whether the deceased would have exercised the choice when the opportunity arose when regard is had to the evidence and his background. There is no evidence to support this contention save the opinion of Dr Ngubane and Dr Holmes. It is therefore necessary to evaluate their evidence.

[11] Dr Ben Ngubane when he testified described the deceased as an intelligent and competent person. He and the deceased formed part of an elite group of prominent black persons in KwaZulu-Natal who engaged with business people in Richards Bay. He consulted on a part time basis for corporations like Richards Bay Minerals, Foskor, Billiton etc. Dr Ngubane was of the view that the deceased would have joined the corporate sector as a senior executive as early as 2000 as there were many opportunities for persons of his caliber. In my view, Dr Ngubane's evidence was based on personal experiences and on the general pressure on very able academics to take up parastatal and corporate employment. He did not testify to any job offer made to the deceased. His opinion can thus not be regarded as certainty in so far as the deceased is concerned, more particularly, in view of his academic background.

[12] Dr Holmes had adopted a conservative approach in his expert notice. He had stated that the deceased, given his academic, research, leadership and management skills would have moved into fields related to his profession. In his opinion, the deceased would probably have been

offered the position of CEO or President at a parastatal institution like the National Research Foundation or the Council for Scientific and Industrial Research by not later than 2008.

[13] During the trial, Dr Holmes was in court when Dr Ngubane testified. He changed his opinion during his testimony and stated that the deceased would have moved out of academia by 2002 to join the corporate world as a senior executive. He further stated that the deceased would have attained the rank of CEO by 2005 where he would have remained until retirement. Dr Holmes admitted that his opinion had largely been influenced by Dr Ngubane's testimony.

[14] I have already alluded to the fact that the learned judge in the court below relied heavily on the evidence of Dr Holmes, an expert witness. A useful guide to the approach of expert evidence is found in *Michael v Linksfield Park Clinic (Pty) Ltd* [2] where the court stated:

'. . . what is required in the evaluation of such evidence is to determine whether and to what extent their opinions advanced are founded on logical reasoning.'

At paras 39 and 40, the court further stated:

'[I]t would be wrong to decide a case by simple preference where there are conflicting views on either side, both capable of logical support. Only where expert opinion cannot be logically supported at all will it fail to provide "the benchmark by reference to which the defendant's conduct falls to be assessed."

Finally, it must be borne in mind that expert scientific witnesses do tend to assess likelihood in terms of scientific certainty . . . This essential difference between the scientific and the judicial measure of proof was aptly highlighted by the House of Lords in the Scottish case of *Dingley v The Chief Constable, Strathclyde Police* 200 SC (HL) 77 and the warning given at 89D-E that

"(o)ne cannot entirely discount the risk that by immersing himself in every detail and by looking deeply into the minds of the experts, a Judge may be seduced into a

[2] *Michael v Linksfield Park Clinic (Pty) Ltd* 2001 (3) SA 1188 (SCA) para 36.

position where he applies to the expert evidence the standards which the expert himself will apply to the question whether a particular thesis has been proved or disproved – instead of assessing, as a Judge must do, where the balance of probabilities lies on a review of the whole of the evidence".'

[15] In my judgment, Dr Holmes, as an expert witness, had a limited role in the proceedings. His duty was to advise the court on the availability of employment positions. He is not qualified to predict and state as a fact that the deceased, whom he had never met, would with certainty have moved to the corporate world. His expert notice did not provide for this conclusion. It is the court's duty to assess the evidence and decide the probabilities.

[16] Before us counsel for the appellant conceded that a possibility did exist that the deceased would have entered the corporate world around 2005. He however submitted that it was more probable that the deceased would have remained in the academic field when regard is had to his academic background. He argued that the court below misdirected itself when it wholly based the deceased's future income after 2005 on his entry to the corporate world without applying any contingencies reflecting a possibility of the deceased remaining in academia.

[17] I agree with this submission. The court below, after accepting Dr Holmes and Dr Ngubane's evidence, only adjusted the dates. The judge treated the deceased's entry to the corporate world from 2005 as a certainty. He did not diminish the probability by any percentage. This was despite the lack of evidence and certainty in that regard. It has to be borne in mind that the deceased was academically inclined. He was a research scientist and served on boards linked with education. He was committed

to the upliftment of communities and children in the field of science. He undertook initiatives to promote and provide scientific and laboratory services. He clearly was not an avaricious person motivated by wealth. In my view, it cannot be said with certainty that the deceased would have been appointed as a senior executive or CEO in the corporate sector. A chance exists that the deceased, due to his academic background, could have remained at the university. There was no evidence which could have raised the probability of employment in the corporate sector to the level of certainty.

[18] In my view, the learned judge did not give due effect to all the relevant factors in the assessment of the deceased's earnings. The judge should have treated the period after 2005 differently and take into account the probability ─ however slight ─ that the deceased could have remained in academia and reflect that in the assumptions and final award. In the result, the award made by the trial court reflects a striking disparity to the amount which this court would have awarded. We are accordingly at large to interfere with the award and consider the issue of quantum afresh.

[19] I now proceed to deal with the pertinent issue, that is, the determination of the salary the deceased would have earned. The conditional cross-appeal relates to this aspect. In *Burger v Union National South British Insurance Co*[3] Colman J stated:

'. . . it is recognised as proper in an appropriate case, to have regard to relevant events which may occur, or relevant conditions which may arise in the future. Even when it cannot be said to have been proved, on a preponderance of probability, that they will occur or arise, justice may require that what is called a contingency allowance be made for a possibility of that kind. . . . The contingency is allowed for by including in

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[3] *Burger v Union National South British Insurance Co* 1975 (4) SA 72 (W) at 75D-F.

the damages a figure representing a percentage of that which would have been included if amputation had been a certainty.'

[20] Before us counsel for the respondent submitted that the court below should have accepted Dr Holmes' evidence that the deceased would as a certainty have moved to the corporate world from July 2002 instead of 2005. In this regard counsel urged us to apply the figures in the actuarial report dated 21 June 2010 when determining quantum, effectively increasing the award made by the trial court.

[21] This submission is without merit. The evidence established that the deceased was an academic, primarily within the field of research and more concerned about the upliftment of students. There is no admissible evidence that he ever contemplated leaving the university for greener pastures in the immediate future. There is only hearsay evidence from the deceased's widow which was presented by Dr Holmes and which is not acceptable. The views of Dr Holmes are highly speculative. The evidence disclosed that the policies regarding transformation opportunities were strong. These would be available for persons of the deceased's caliber. Indeed pressure was put on these persons to assume leadership positions in business and government as there was a shortage of suitable candidates of that caliber. In the court a quo there was insufficient evidence with regard to the deceased's desire to leave the university despite the existence or emergence of these BEE opportunities. On the contrary the evidence revealed that the deceased remained passionate within his vocation until his untimely death.

[22] It appears that the judge may have been swayed by the evidence of Dr Holmes who saw the deceased as a person who would have moved to

the corporate world as a certainty. This perception is not unwarranted. The problem is that he saw the move to corporate as a real possibility despite the lack of evidence in that regard. In my view a contingency deduction should be applied to reflect a possibility of the deceased remaining in academia. Counsel for the appellant submitted that the court should apply a contingency of 66 per cent on the deceased remaining at the university. I do not agree with this submission. It has to be accepted that due to his proven competence, the deceased would have continued on an upwardly mobile career path. In my view a 40 per cent contingency would accurately reflect the balance of the evidence. Put another way, there was a 40 per cent prospect that the deceased would have remained in academia, and a 60 per cent chance that he would have moved into the corporate sector from 2005 and earned a salary appropriate to the post of a senior executive and thereafter assume promotion to CEO level.

[23] In the result, a proper approach would be to determine the deceased's future earning capacity taking into account the contingency deductions set out in para 22 above as follows:

(a) that the deceased would have assumed promotion to Vice-Chancellor in 2000 and remained at the university until 2005.

(b) that he would thereafter have entered the corporate sector as an executive; and

(c) that he would have been appointed as CEO in 2010, where he would have remained until his retirement age.

[24] The parties were agreed that should the court require new calculations, the actuary, Mr Morris of Wells Faber-Human Morris who had performed the calculation would be available to recalculate the deceased's earnings. He has accordingly adjusted the computation of the

deceased's earnings in accordance with the directives given by this court on 4 November 2011. The court is grateful for the exercise and the prompt response thereto. In that report, the actuary arrived at a figure of R13 556 539 for the first respondent and R566 867 for the third respondent. In the result the award made by the trial court has to be reduced by an amount of approximately R5 million. Its order in that regard must be set aside. It follows that the cross-appeal has to fail.

[25] This brings me to the question of costs. The decisive fact is that the appellant had to come to this court to have the order of the court below set aside and the quantum of damages reduced. In my view, it has had substantial success on appeal. It is accordingly entitled to its costs of appeal.

[26] The following order is made:

1 The appeal is upheld with costs.

2 The order of the court below is set aside and replaced with an order in the following terms:

'There shall be judgment for the plaintiffs as follows:

(a) First plaintiff, payment of the sum of R13 556 539;

(b) Third plaintiff, payment of the sum of R566 867.'

3 The cross-appeal is dismissed with costs.

N Z MHLANTLA

JUDGE OF APPEAL

APPEARANCE:

For Appellant: K J Kemp SC
Livingston Leandy Incorporated, Durban
McIntyre & van der Post, Bloemfontein

For Respondent: M Pillener SC
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