

SOUTH AFRICA / JUDGMENT

Bruwer and Others v Road Accident Fund (574/2015) [2017] ZAFSHC 162 (21 September 2017) [2017] ZAFSHC 162

COURT

Free State High Court, Bloemfontein

BEFORE

Pike

CASE / FILE NUMBER

574/2015

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IN

THE HIGH COURT OF SOUTH AFRICA,

FREE

STATE DIVISION, BLOEMFONTEIN

Case

number: 574/2015

In

the matter between:

P.
C. B. N.O.
1st
Plaintiff
T.
K.
2nd
Plaintiff
B.
K.
3rd
Plaintiff
and

ROAD
ACCIDENT
FUND
Defendant
HEARD

ON: 30
AUGUST 2017

JUDGMENT

BY: PIKE, AJ

DELIVERED ON: 21 SEPTEMBER 2017

- [1] This is an action for damages due to past and future loss of support.
- [2] The First, Second and Third Plaintiff, together with the first Plaintiff's spouse, B. K. (hereinafter referred to as "the deceased"), who was also the biological mother of the Second and Third Plaintiff, were involved in a motor vehicle accident on 28 October 2010. The deceased passed away on 29 November 2010 as a direct result of injuries sustained during the said motor vehicle accident.
- [3] The claim was lodged against the Defendant in terms of section 17(1) of the Road Accident Fund Act 56/1996.
- [4] The Defendant filed a Notice of Appearance to Defend and subsequently filed its Plea, denying both liability and quantum of damages suffered.
- [5] The First Plaintiff, P. S. K., passed away during the latter part of 2015 and a Notice of Substitution in terms of Rule 15(2) of the Uniform Rules of Court was filed whereby First Plaintiff was substituted for P. C. B., in his capacity as executor in the estate of the late P. S. K., as if he had been a party from the commencement of the action.
- [6] During July 2016 the Defendant filed a Notice of Offer of Settlement, which settlement offer was accepted by the Plaintiffs in terms of Rule 34(6) of the Uniform Rules of Court in respect of the merits of the Plaintiffs' claim on the basis that the Defendant is liable for payment of the Plaintiffs' full (100%) proven or agreed damages.
- [7] What therefore remains for consideration now are the questions of what amounts of damages have the Plaintiffs suffered respectively.
- [8] In determining what damages should be ordered when a breadwinner is killed the basic merger employed is the difference between the position of the dependent as a result of the loss of support, and the position the dependent reasonably expected to have been in had the deceased not died. Legal Insurance Company Limited v Botes 1963

(1) SA 608 (A).

[9] In their amended Particulars of Claim the Plaintiffs claim as follows as a result of loss of support brought about by the deceased death:

1. First Plaintiff - R507 900-00
2. Second Plaintiff - R111 700-00
3. Third Plaintiff - R74 500-00

[10] It is also necessary to first set out the dates of birth of the Plaintiffs respectively:

1. The date of birth of the late First Plaintiff, P. S. K. - [...] 1950.
2. The date of birth of the Second Plaintiff, T. K. - [...] 1991.
3. The date of birth of Third Plaintiff, B. K. - [...] 1992.

[11] In his opening address on behalf of the Plaintiffs, Mr Pohl submitted that as the First Plaintiff, P. S. K., died after *litis contestatio*, and as a Notice of Substitution was duly filed, any amounts claimed on behalf the estate of the late P. S. K. will devolve on his estate. I accept this as it is trite law.

[12] Mr Pohl further submitted that the Defendant accepted the actuarial report by Munro Actuaries, dated 28 August 2017, as well as the factual basis of the report, which was duly handed in as Exhibit “A”. This was confirmed by Mr Thompson on behalf of the Defendant.

[13] Mr Pohl also handed in the First and Final Liquidation and Distribution Account in the Estate Late B. K. as Exhibit “B”

as the acceptance of the said account was also confirmed by Mr Thompson.

[14] As the actuarial report contains the factual basis of the said claim the Plaintiff did not call any witnesses and closed its case.

[15] The Plaintiff had discovered the actuarial report by Munro Actuaries in accordance with Rule 36(9)(a) and (b). The actuarial report which was handed in, was an amended report to the report annexed to the discovery notice. However the Defendant admitted the full contents of the said amended report.

[16] Furthermore in terms of the minutes of the Pre-Trial Conference held by the parties before the trial in terms of Rule 37, paragraph 11 of the minutes states that all documents which have been duly discovered and which are to be utilised at the trial will, without further proof, serve as evidence of what they purport to be without admitting the correctness of the contents thereof. As previously mentioned the Defendant admitted the factual basis of the said report.

[17] After closing of the Plaintiff's case the Defendant also closed its case without calling any witnesses or leading any evidence.

[18] In addressing the court Mr Pohl submitted that as the Defendant did not file any actuarial report and as the Defendant admitted the Plaintiffs actuarial report, the Defendant had admitted the factual basis of the claim of the first Plaintiff who is now deceased.

This matter concerns the past loss of support of the Plaintiffs as there are no basis for a future loss of support. P. S. K. was a pensioner and the deceased was the breadwinner of all three Plaintiffs' past loss of support, which was conceded by Defendant's counsel. The First Plaintiff, the late P. S. K., remarried before he died, but his second wife was unemployed and therefore dependent upon him. The Second Plaintiff, Trudie, was a student and dependent until the end of 2012. The Third Plaintiff, Belinda, was dependent until the end of May 2012 whereafter she started working. Majority is of no concern

regarding dependency.

[19] I agree with Mr Pohl as the duty to support endures until a child becomes self-supporting. In *Bursey v Bursey* 1999

(3) SA 33 (SCA) Vivier JA said at 36D:

"The incidence or this duty [to maintain a child] in respect of each parent depends upon their relative means and the circumstances and the need of the child from time to time. The duty does not terminate when the child reaches a particular age but continues after majority."

[20] To determine the period within which a breadwinner would have maintained a dependant, three basic facts must be established:

1. What the combined life expectancy of the dependant and the deceased breadwinner would have been if it were not for the premature death of the latter;
2. How many of these years the breadwinner would have had an income; and
3. For what period of that time the breadwinner would have given a portion of such income to the dependant.

(See: *Lambrakis v Santam Limited* 2000

(3) SA 1098 (W) at 1114J – 1115B).

[21] Factors such as interest rate and inflation play a role in the determination of income. The calculated loss may be adjusted,

depending on the facts of each particular case, to take into account various contingencies such as disability, illness, unemployment

and/or variations in the levels of earnings from those assumed, the possibility of other dependants, remarriage of the surviving spouse and possibility of support from the new spouse et cetera.

[22] It is common cause that the deceased was born on 27 May 1957. The actuarial report contained the following: the calculation has been based on information provided by the attorney, which included a payslip of the deceased dated 14 May 2010 as well as the First and Final Liquidation and Distribution Account of the deceased. The late Plaintiff was in receipt of a pension at the date of the accident. Her pension is based on savings accumulated through one's career and not defined as remuneration. The actuaries have not included either the deceased or the late Plaintiff's pension benefits in the calculation. The actuaries also took into account the housing allowance, the ER medical aid contribution, annual bonuses and EE and ER pension contributions until retirement age of 65. The application of the RAF amendment act CAP will not have an impact on the claim. The actuaries have used the South African Life Tables to determine the issue of mortality and then assumed that the deceased would have worked up to the age of 65 years. The same retirement age was projected for the deceased and they assumed that a portion of family income would have been two shares to each adult and one share to each child whilst dependent.

[23] Mr Pohl further submitted that as per the Munro report the proceeds of the deceased insurance policy is excluded from consideration of the damages by virtue of the provisions of the Assessment of Damages Act 9/1969 ("the Act").

[24] Section 1 of the Act provides thus:

"(1) When in any action, the cause of which arose after the commencement of this act, damages are assessed for loss of support as a result of a person's death, no insurance money, pension or benefit which has been or will or may be paid as a result of the death, shall be taken into account.

(2) For the purpose of subsection 1

(i) "Benefit" means any payment by friendly society or trade union for the relief or maintenance of members dependants;

(ii) "Insurance money" includes a refund of premiums and any payment of interest on such premiums;

(iii) "Pension" includes a refund of contribution and any payment of interest on such contributions, and also payment of a gratuity or other lump sum by pension or provident fund or by an employer in respect of a person's employment."

[25] In accordance with *Mohan v RAF* 2008 (5) SA 305 KZN where Nicholson J found that there should be no deduction for the accelerated inheritance of the family home, I accepted that the immovable property to the value of R600 000-00, indicated in the First and Final Liquidation and Distribution Account, should not be deducted in assessing the quantum of damages.

- [26] It should be mentioned that the First and Final Liquidation and Distribution Account did not bear the endorsement stamp of the Master of the High Court. In an effort to clear this up Mr Pohl informed me, after receiving instructions from his attorneys, that this Liquidation and Distribution Account was filed with the claim documents and that no Second or Amended Liquidation and Distribution Account was filed at the Master's office. I accepted this.
- [27] It was also submitted that the Total Liabilities in the amount of R30 881.71, indicated in the First and Final Liquidation and Distribution Account, exceeded the amount of R25 909-29, being the Balance for Distribution. As the liabilities exceed the cash in the account, there is no deduction of the cash.
- [28] I find that neither the balance for distribution in the First and Final Liquidation and Distribution Account, being the amount of R25 909-29, nor the immovable property in the amount of R600 000-00, as well as the policy as referred to in the Claims On Behalf of the Estate in the amount of R56 791-00 can be taken into account in assessing the quantum of damages.
- [29] Regarding the contingencies as mentioned in the actuarial report, which is left for the court to determine, Mr Pohl contended that it is standard practice by the courts to never apply a contingency of higher than 5%. He also contended that the 5% should be applied from the capital value derived from the actuarial report in terms of the Plaintiffs as follows:
- The late First Plaintiff, P. S. K.: 95% of the amount of R548 000-00 which amounts to R520 600-00.
- The Second Plaintiff, T. K.: 95% of R83 900-00 which amounts to R79 705-00.
- The Third Plaintiff, B. K.: 95% of R55 900-00 which amounts to R53 105-00.
- [30] With reference to the calculation of a 5% contingency of the late First Plaintiff's claim amount, Mr Pohl referred me to the amended page of the Plaintiffs' Particulars of Claim and more specifically the claim on behalf of the late first Plaintiff in the amount of R507 900-00 admitting that the court cannot award an amount more than what has been claimed.
- [31] I have no reason on the facts before me to disagree with the method adopted by the expert report in calculating the Plaintiffs loss of support. After considering the submissions of Mr Pohl, which was conceded by Mr Thompson, it therefore seems to me only reasonable, just and equitable to accept a contingency of 5%.
- [32] In the result I make the following order:
1. Judgment is granted in favour of the First Plaintiff in the amount of R507 900-00.
 2. Payment of interest a tempore morae on the aforesaid amount calculated at a rate of 9% per annum from date of judgment to date of payment, if payment is not effected within 14 days of date of judgment.

3. Judgment is granted in favour of Second Plaintiff against the Defendant in the amount of R79 705-00.
4. Payment of interest a tempore morae on the aforesaid amount calculated at a rate of 9% per annum from date of judgment to date of payment, if payment is not effected within 14 days of date of judgment.
5. Judgment is granted in favour of the Third Plaintiff against the Defendant in the amount of R53 105-00.
6. Payment of interest a tempore morae on the aforesaid amount calculated at a rate of 9% per annum from date of judgment to date of payment, if payment is not effected within 14 days of date of judgment.
7. The Defendant is ordered to pay First, Second and Third Plaintiffs' costs, on a party and party scale, which shall include the attendance of the actuary, Ms Swann.

EA PIKE, AJ

On behalf of Plaintiff: Adv L Pohl

Instructed by:

Honey Attorneys

Bloemfontein

On behalf of Defendant: Adv Thompson

Instructed by:

Maduba Attorneys

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Prepared on 9 October 2026 · Esheria