

SOUTH AFRICA / JUDGMENT

Ferreira v Road Accident Fund (1710/2011) [2013] ZAECHGHC 85 (11 July 2013) [2013] ZAECHGHC 85

COURT

Eastern Cape High Court, Grahamstown

BEFORE

J.M. Roberson

CASE / FILE NUMBER

1710/2011

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IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE, GRAHAMSTOWN)

CASE NO. 1710/2011

Date heard: 13,14,15 and 16 May 2013

Date delivered: 11 July 2013

In the matter between

MANDY LEE FERREIRA PLAINTIFF

and

ROAD ACCIDENT FUND DEFENDANT

JUDGMENT

ROBERSON J:-

- [1] This is a dependants' claim. The plaintiff is the widow of the late Marius Ferreira (the deceased), who died in a motor vehicle accident on 25 March 2008. The plaintiff sues in her personal capacity and in her capacity as mother and natural guardian of the two minor children born of her marriage to the deceased. On 7 August 2012 this court ordered by agreement that the defendant is liable for the proved or agreed damages following the death of the deceased. The trial proceeded on the issue of quantum.

[2] The plaintiff was born on 21 July 1974, and her two daughters, Mia and Meg, were born on 17 September 2003 and 20 August 2005 respectively. At the time of his death, the deceased was 35 years old. The family resided in Queenstown, and the plaintiff continues to reside there with her children. She is a qualified teacher and the owner of an Educare playschool, which opened in January 2008.

[3] The following was agreed:

3.1. The plaintiff's income for the past four financial years and the method used by the actuary to determine her contribution to the family income for the purpose of maintenance and support of the family.

3.2. The nett accrued loss of the plaintiff and the children, which included a 5% contingency deduction.

3.3. The income figures used by the actuary in his calculations of the deceased's future earnings (assuming retirement at age 65) and the value of the loss of support.

3.4 The income figures used by the actuary in calculating the plaintiff's future income, based on two scenarios.

3.5 Each child would have been dependent on the deceased until 31 December of the year in which she turned 21 years of age.

[4] The following issues remained for

determination:

4.1. The deceased's earning capacity and the contingency deductions to be applied.

In respect of the plaintiff's earnings and/or earning capacity:

4.2.1 The contingency deductions to be applied, namely the remarriage contingency deduction and a general contingency deduction; and

4.2.2 Plaintiff's retirement age had the deceased not died.

THE DECEASED'S EARNING CAPACITY

[5] This issue centered mainly on whether or not the deceased would have accepted an offer of employment made in January 2008, which he had not formally accepted at the time of his death. A further important factor pertaining to this issue was the prospect of the deceased at a later stage joining his father, Solomon Ferreira (Ferreira), in his engineering business, and eventually taking over the business.

[6] The deceased matriculated in 1991. It was accepted that he was not academically inclined. After completing military service, he enrolled at the Port Elizabeth Technikon in order to study for a diploma in agricultural management, but did not complete the course. During the practical training portion of his studies, he worked on a farm and thereafter stayed on as

general farm manager. In 2000, the year he married the plaintiff, he was approached by Elliot Brothers Auctioneers and joined them as a stock agent. Thereafter he started his own business in the stock trade, and after two or three years started his own business as a building contractor. His income for the 2008 financial year was R154 521 before tax.

- [7] On 25 January 2008, he received a written offer of employment from a chartered accountant and businessman of Queenstown, Mr. Barend Sahd, who testified on behalf of the plaintiff. In addition to his professional practice, Sahd has extensive business interests, held in various close corporations. Amongst those interests is a property portfolio, valued at about R150 million, consisting mainly of commercial properties in Queenstown and Port Elizabeth, which are let to various tenants. Prior to his death in November 2007, Sahd's brother Richard had borne the responsibility of arranging and supervising maintenance work on the various buildings, which was outsourced to contractors. After Richard Sahd's death, Sahd was too busy in his practice to supervise the ongoing maintenance work. He decided to look for someone with a general knowledge of building and maintenance. He remembered that some months earlier the deceased and Ferreira, who was one of Sahd's clients, had visited him and asked him to consider giving work to the deceased. At the time, Sahd had no objection to the request and referred them to his brother. This recollection prompted him to approach the deceased for the position he had in mind. He had heard that certain work which had been done by the deceased was of a satisfactory standard.
- [8] Sahd discussed his proposal with the deceased prior to the written offer of employment. The deceased wanted to discuss the proposal with his family and also said that he needed to complete certain building contracts, but otherwise seemed happy with the proposal. Sahd told him that he could not leave the offer open-ended. The written offer of employment was then made, in the name of Kingfisher Doors CC (KFD), part of Sahd's group. The offer included the following: a basic salary of R30 000 per month, medical aid, a light delivery vehicle for business use and limited private use, and a cellphone for business use and limited private use. The deceased would have been expected to work after hours in the event of an emergency. The deceased was requested to advise if he accepted the offer by no later than 31 January 2008, and whether he could start work on 1 February or 1 March 2008. Some time between 25 and 31 January 2008 the deceased informed Sahd that he could not start on either of those dates, because he had to complete the contracts. Sahd respected his point of view because it demonstrated a sense of responsibility, but told the deceased that he

could not wait indefinitely. If six months had passed without an answer from the deceased, Sahd would have considered an alternative

plan. Sahd however had the impression that there was a "done deal". The deceased did not revert to Sahd prior to his death. Knowing the family as he did, Sahd would have expected the deceased to have let him know if he decided not to accept the offer. After the death of the deceased, Sahd utilised the services of one Visagie for the maintenance work. Visagie is not an employee but works exclusively for Sahd's group. Sahd has to supervise Visagie to a certain extent. His work is of a high standard but he is cautious and is not expected to show initiative. Sahd had hoped that

the deceased would have taken over the entire maintenance portfolio and that is why he would have been paid more than is paid to Visagie.

[9] Ferreira testified. He is the founder and 50% member of Dikeni CC trading as Queenstown Engineering (QE). He is 69 years old but has no immediate plans to retire. His wife is 67 years old and runs a take-away business which she will continue to do for the foreseeable future. Ferreira's father was a farmer and retired at about age 70 years. From its inception in 1979 QE has grown into a successful business, with 28 employees, and Ferreira makes a comfortable living from it. He also provides substantial financial support to the plaintiff, including payment of the children's school fees, vehicle and building maintenance, and petrol. According to QE's financial statements for the 2012 tax year the carrying value of property, plant and equipment was

R977 890, and Ferreira said that the value was much greater. Financial statements for the 2007 to 2012 tax years reflected a fair degree of fluctuation from year to year, sometimes up and sometimes down.

[10] Ferreira and the deceased, who was his only son, often discussed the prospect of the deceased joining the business and eventually taking it over. The takeover would have been a gradual process. The deceased would have initially been an employee but later would have become a member. The business has a lot of clients from the area, most of whom the deceased knew, and his participation in the business would have been a benefit. If the deceased had not accepted KFD's offer, he would have moved to QE, once a former third member had been bought out.

[11] Ferreira and the deceased discussed KFD's offer of employment. The deceased expressed interest and said he would consider it carefully. His building contracts often caused him to be away from home. After he died, Ferreira went to the sites of the contracts on which the deceased had been working, and found that the work would have been completed within three or four weeks. According to Ferreira, if the deceased had accepted KFD's employment offer, the experience gained in that employment would have stood him in good stead in the business of QE.

[12] The plaintiff testified that she had no doubt that the deceased would have accepted KFD's offer. She supported his decision to accept the offer. There were many advantages to such employment: he would have earned more and would not have been away from home so much. According to the plaintiff, it was always expected that the deceased would eventually join QE. When he did so would have depended on his employment situation with KFD.

[13] It was not in dispute that the deceased was a devoted husband, father and son, energetic, hard-working, honest, loyal, generous and well-regarded in the community. He spoke Afrikaans, isiXhosa and English. He was respectful towards older persons and was kind and considerate towards his staff. The quality of his building work was good.

[14] Dr. Richard Holmes, an industrial psychologist, prepared a report and testified with regard to the deceased's future employment path, had the accident not happened. He was of the opinion that although the deceased would have achieved greater success in his building business, KFD's offer would have meant financial security, particularly when the plaintiff needed to concentrate on the development of the playschool. A further influential factor was the opportunity to spend more time at home with the two children. Given the family's connection to Queenstown it was unlikely that the deceased would have sought work elsewhere. Acceptance of KFD's offer would have been the most logical and sensible route to follow, in the short to medium term. According to Holmes, Sahd viewed the deceased's employment with the group as a long term prospect. If the deceased had not joined QE,

it was likely he would have remained in KFD's employment until retirement age. Holmes assumed the retirement age at between 60 and 65 years, although KFD does not have a rigid policy regarding the retirement age of its employees, and an employee's personal circumstances together with the group's requirements are taken into account in deciding when an employee should retire.

[15] Holmes was of the view that the position with KFD was at the Paterson C4/Peromnes 8 level, with an annual income package of between R368 000 and R489 580 in the Eastern Cape. Given the deceased's qualities and Sahd's expectations of him, it was more likely his income would have been at the upper end of this range. KFD paid annual increments of approximately 8%. Holmes disagreed with the opinion of the defendant's expert, industrial psychologist Dr. Peter Whitehead, that the KFD position was on the Paterson B4/5 level and that the salary offered was not market related. He said that job evaluation systems are all-encompassing and that one does not only pay for skills but also for drive and initiative, and that is why the deceased was offered that salary.

[16] In Holmes' opinion, the deceased would have joined QE in the medium to long term, and not later than 2016. Such a decision would not have been for financial reasons. In view of the strong family unit, it was unlikely that QE would have passed into other hands. The close relationship between father and son and the plaintiff would have augured well for the continuation of the successful business. The deceased's earnings would initially have been similar to what he was earning at KFD and thereafter would have been the same as those of Ferreira. In assessing the deceased's age of retirement from QE, regard was to be had to the fact that Ferreira, at 69, was still actively managing the business.

[17] Whitehead's sources of information were the plaintiff, Holmes' report, the actuary's report, and financial statements of the deceased, the plaintiff and Ferreira. He had insufficient time to consult further sources and trusted the information Holmes had gathered from collateral sources.

[18] Whitehead was not as optimistic as Holmes with regard to acceptance of the KFD offer, and was of the opinion there was a 50% chance the deceased would have accepted the offer. He said the longer the time between offer and acceptance, the likelihood of acceptance

decreased. In his experience people sometimes inform a prospective employer the day before they are due to start work that they are no longer interested in the position. He eventually agreed that the KFD position was a C level position. If the deceased had lost his employment at KFD, Whitehead assessed his employment level in the open labour market at Paterson B4/5, but conceded that after years of employment experience he would have been more qualified and would have risen to a higher level. He agreed there was no reason why the deceased would have lost his employment at KFD, as compared to any other employee.

- [19] Whitehead was of the view that there was a 40% - 50% possibility that the deceased would have moved to QE. He took into account that when the deceased died, Ferreira was already 65 years old and the deceased had not yet joined the business. Even if Ferreira had invited the deceased to join him, Whitehead said that the deceased might have decided not to accept the invitation, and would not have left KFD if he would not have earned the same income at QE. He did agree that a decision to join QE would not have been a financial one because the business is a family legacy and there was a good father/son relationship.

DISCUSSION

- [20] As already mentioned, the parties agreed on the actuary's figures with regard to the deceased's earning capacity. The figures were based on the income the deceased would have earned had he taken up the KFD employment offer. According to the actuary it was impossible to predict what additional income the deceased would have earned if he had joined and eventually taken

over Ferreira's interest in QE, and was of the view that the best approach was by way of a contingency addition. Argument centred on the probability of the deceased accepting the KFD offer, his prospects at QE, and the deductions to be made for contingencies.

- [21] In my view, there was a strong probability that the deceased would have accepted the KFD offer. He had already during 2007 of his own accord (with his father) approached Sahd for some form of employment. This approach in itself suggests to me a need for employment stability. When the KFD offer was made, it would have satisfied a number of concerns including financial security (the package was a lot more than he was earning from his building contract work and was fixed employment), and he would be able to spend more time with his family. The plaintiff encouraged him to accept the offer. Although Sahd said he would not wait indefinitely, it appeared that he would have waited for several months before considering an alternative arrangement. Sahd is an experienced businessman and I gained the impression he would demand a high standard from employees. If he considered the deceased to be a suitable person to be offered the position, it is probable that he would have been prepared to wait for him. This probability is evidenced by the fact that he agreed to the deceased's request to complete his building contracts, and he was impressed by the deceased's sense of responsibility towards his existing commitments. According to Ferreira, at the time of the deceased's death, the contracts would have been completed within three or four weeks, and in my view it is probable that Sahd would have waited for such further

period. Given the deceased's qualities, he would have been a responsible and capable employee and the employment would

have been secure.

- [22] In view of all these factors favouring acceptance of the KFD offer, the uncertainty of this stage of the deceased's future employment was not significant and would not in my view warrant a contingency deduction significantly more than the so-called normal contingency of 15%.
- [23] In my view, it is also probable that the deceased would eventually have joined Ferreira in QE. The tenor of the evidence of the plaintiff and Ferreira was that it was almost accepted that he would end up there, and the only uncertainty was when it would happen.
- [24] In considering general contingencies, both positive and negative contingencies should be taken into account. As was said in *Southern Insurance Association v Bailey* NO 1984 (1) SA 98 (AD) at 117 B:

"It is, however, erroneous to regard the fortunes of life as being always adverse: they may be favourable."

- [25] Positive contingencies referred to on behalf of the plaintiff were: (i) the likelihood that the deceased would have worked beyond the age of 65; (ii) his strong work ethic; and (iii) the actuary's assumption was conservative in that it did not take into account the probability that the deceased would have joined QE and not only would have earned a similar income as he did at KFD, but also would have eventually attained Ferreira's 50% interest in QE. One cannot disregard the fact that QE is a family business and, as Holmes said, the deceased's decision to join QE would not have been financially driven. However, it is a successful business which has grown over the years. Moreover, the deceased knew QE's customers and was well-liked in the community, and his popularity and work ethic may well have caused the business to be even more successful. A further factor was that the experience he gained at KFD would have benefited the business.
- [26] In all these circumstances, having regard to the negative and positive contingencies, I am of the view that the 40% contingency deduction suggested by the defendant is unduly high and that the 20% deduction suggested by the plaintiff is fair and reasonable. As far as the children are concerned, it follows that the 30% contingency deduction for each child suggested by the defendant is too high, and I am of the view that the 15% deduction suggested by the plaintiff is also fair and reasonable.

PLAINTIFF'S RETIREMENT AGE AND REMARRIAGE PROSPECTS

- [27] There were two scenarios posed concerning the plaintiff's retirement age had the deceased not died: the first was a retirement age of 65 years and the second was a retirement age of 65 years but with reduced earnings from age 45 years, as a result of the plaintiff taking a supervisory role in the playschool and employing another teacher.

- [28] The plaintiff testified that she never envisaged the school as a one woman operation. She had given herself five to eight years to get the playschool up and running and then hopefully at age 40 years, would have taken a back seat oversight role and employed a second teacher. She wanted to spend more time with her children. The deceased supported her in this plan.
- [29] The school is run from the plaintiff's property and the deceased performed all the necessary building work. When she opened the school, six children were enrolled. Now she has twenty-four children, although the number fluctuates. She is allowed a maximum of thirty children. Besides herself, there is another teacher, and she employs three assistants. The school is a thriving business and has done as well as it would have had the deceased not died.
- [30] At present she receives a lot of financial assistance from her family and parents-in-law, without which she would not manage to maintain herself and her children properly. Since the deceased died, she has had no romantic relationships, and does not see herself remarrying. She said that the deceased was "the love of my life". She does not socialise and devotes herself to giving her daughters a proper grounding in life. Ferreira confirmed that the plaintiff was not involved in a romantic relationship and was focused on the children.
- [31] With regard to the plaintiff's future working life, it was submitted on her behalf that the evidence supported the second scenario, namely that she would have taken a supervisory role at age 45 and have incurred the expense of another teacher. I agree with this submission. By that time, the deceased would most probably have been financially comfortable and able to provide the further support she required, now that she was earning less. I accept her evidence that it was important for her to have time to devote to her children. It was submitted on behalf of the defendant that the plaintiff was better off now than she would have been had her plan to take a supervisory role materialised. I do not agree with this submission. As was submitted on behalf of the plaintiff, one must have regard to the career she would have had, and the support she would have received from the deceased, had the deceased not died.
- [32] The plaintiff's business has grown into a successful and thriving one in a relatively short time. I think this is an important factor to take into account in deciding on a contingency deduction for her future earnings. The success of her business speaks to her determination, commitment, and capability, and I see no reason why the so-called normal contingency deduction of 15% should not be applied. Both parties suggested a 10% contingency deduction in respect of each child.
- [33] With regard to the contingency deduction for remarriage, a number of factors may be taken into account, such as age, the presence of young children, character, appearance, duration and happiness of the marriage with the deceased, the existence or absence of relationships since the death of the deceased, the plaintiff's views on remarriage, and remarriage statistics. A further factor in the present matter in my view is the particularly close relationship the plaintiff has with her in-laws.

[34] The contingency suggested on behalf of the plaintiff was 10% – 20% and on behalf of the defendant was 20% – 34%. Having regard to the various factors that may be taken into account and the evidence in relation to these factors, I would assess a 20% deduction as appropriate.

FIGURES AND CALCULATIONS

[35] It is convenient to set out the figures and calculations in the format very helpfully provided by both Counsel, following the format of the actuary. I repeat that the net accrued loss was agreed and the prospective loss was based on agreed basic figures, to which I shall apply the contingencies which I have found to be appropriate.

Plaintiff Mia Meg Total

R R R R

Accrued loss 393 736 355 391 355 391 1 104 518

Prospective loss

Gross loss 2 577 564 685 140 795 589

Contingency deduction

(20% and 15% respectively) 515 513 102 771 119 338

Net loss 2 062 051 582 369 676 251

Plus plaintiff's income -266 327 63 351 64 552

(15% and 10% respectively) 39 949 6 335 6 455

Net value 226 378 57 016 58 097

Prospective value deceased

And plaintiff income 1 835 673 639 385 734 348

Less remarriage deduction

(20%) 367 134

Net prospective loss 1 468 539 639 385 734 348

Total net loss 1 862 275 994 776 1 089 739 3 946 790

(accrued and prospective)

COSTS

[36] The plaintiff requested the qualifying expenses of Holmes to include his reasonable attendance at court for the duration of the trial, excluding argument. It was submitted on behalf of the defendant that the allowance of those expenses should be left for the decision

of the taxing officer. Having regard to the prescribed powers of the taxing officer, the authorities to which I was referred, as well as what was said in *Transnet Ltd t/a Metrorail and Another v Witter* [2008] ZASCA 95; 2008 (6) SA 549 (SCA) at para [20], I am of the view that it would be more appropriate for the issue of those expenses to be decided by the taxing officer.

ORDER

[37] The defendant is ordered to pay to the plaintiff:

37.1 In her personal capacity the sum of R1 862 275.

37.2 In her capacity as mother and natural guardian of Mia Ferreira the sum of R994 776.

37.3 In her capacity as mother and natural guardian of Meg Ferreira the sum of R1 089 739.

37.4 Interest on the above sums at the rate of 15,5% per annum from 14 days after date of judgment to date of payment.

37.5 The plaintiff's costs of suit together with interest thereon at the rate of 15,5% per annum from 14 days after date of allocatur to date of payment, such costs to include the qualifying expenses of Dr. Richard Holmes and the actuary, Mr. Gerard Jacobson.

J.M. ROBERSON

JUDGE OF THE HIGH COURT

Appearances

Plaintiff: Adv J.J. Nepgen, instructed by Netteltons, Grahamstown

Defendant: Adv H.J. van der Linde SC, instructed by N.N. Dullabh & Co, Grahamstown

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