

SOUTH AFRICA / JUDGMENT

Kriek v Road Accident Fund (529/2019) [2020] ZAFSHC 42 (5 March 2020)

[2020] ZAFSHC 42**COURT**

Free State High Court, Bloemfontein

BEFORE

Daffue

CASE / FILE NUMBER

529/2019

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Policy**IN**

**THE HIGH COURT OF SOUTH AFRICA,
FREE
STATE DIVISION, BLOEMFONTEIN**

Reportable:

YES

Of

Interest to other Judges: YES

Circulate

to Magistrates:

NO

Case

No. 529/2019

In

the matter between:

KRIEK

YVETTE

Plaintiff

and

ROAD

ACCIDENT FUND

Defendant

CORAM: DAFFUE, ADJP
HEARD

ON: 4 & 5 FEBRUARY 2020

JUDGMENT

BY: DAFFUE, ADJP

DELIVERED ON: 5 MARCH 2020

I

INTRODUCTION

- [1] The court is called upon to adjudicate the claim of a young woman against the Road Accident Fund (“the RAF”) in respect of her alleged past and future loss of maintenance following upon the death of her fiancé, Mr Jaco Van Eetveld (“the deceased”).
- [2] The deceased, a passenger in a motor vehicle that left the road between Petrusburg and Bloemfontein on 28 April 2018 and collided with a tree, died as a result of fatal injuries sustained. The RAF conceded liability, i.e. the collision, the driver’s negligence and the deceased’s resultant death.

II THE PLAINTIFF

- [3] Plaintiff is Ms Yvette Kriek, a major female who resided at Lime Acres, Northern Cape Province at the time of the deceased’s death. She was 33 years old when the deceased passed away and celebrated her 35th birthday a few days ago. She has recently relocated to Black Rock, a small village in the Northern Cape. She is not

officially employed at present, but refurbishes furniture and household utensils in order to try and make a living. At the

time of the death of the deceased she was employed at the swimming pool in Lime Acres during the summer months where she earned an income of between R5 000 and R6 000 per month. Plaintiff was represented at the trial by Adv PJJ Zietsman.

III ISSUES IN DISPUTE

- [4] Having made several admissions in the plea as well as in its reply to plaintiff’s rule 37(4) questionnaire, the RAF has put in issue the following only:

- 4.1 the deceased’s duty to support the plaintiff;
- 4.2 RAF’s obligation to pay the amount claimed or any other amount;
- 4.3 the quantum of plaintiff’s claim for loss of maintenance.

- [5] During the hearing it became evident that Adv J Ferreira, the RAF's counsel, would eventually submit during closing argument that plaintiff's claim should be dismissed as she failed to allege in her particulars of claim an agreement to maintenance.

In order to appreciate the adjudication of an application for amendment to be dealt with later herein, it is apposite to quote

paragraph 6 of the particulars of claim as it reads:

"6.1 Prior to and at the time of the accident the Plaintiff and deceased were engaged to one another and lived together as life partners for a period of seven years;

6.2 During his lifetime the deceased and Plaintiff were jointly obliged to maintain one another, which they did;

6.3 The Plaintiff was thus partly dependent upon the deceased for maintenance;

6.4 As the direct result of the deceased's death the Plaintiff was deprived of such maintenance as contributed by the deceased." (emphasis added to highlight the allegations pertaining to (1) cohabitation, (2) an obligation to maintain, (3) actual compliance with the obligation and

(4) deprivation of maintenance due to the death of the deceased).

- [6] The RAF did not file an exception on the ground that no cause of action was pleaded, but responded in its plea with a general denial.

Plaintiff does not rely on the deceased's statutory obligation to maintain her during his lifetime and the only inference to be drawn from the allegations, read in context, is her reliance on an agreement between the life partners. Furthermore, plaintiff's case ex facie the paragraph is clear: the parties did in fact maintain one another and she was deprived of maintenance as a result of the deceased's

death. Obviously, she still had to present credible evidence and show that the law protects her right to maintenance in order to succeed. This will be considered in the next paragraphs. I shall firstly deal with the evidence and thereafter with the authorities.

IV THE EVIDENCE

- [7] The plaintiff testified in support of her claim whereafter her case was closed. Her testimony was largely uncontested. In fact, it was to a great extent corroborated by Mrs and Ms Van Eetveld, respectively the deceased's mother and sister, who testified for the RAF.

- [8] The following material undisputed facts have been established:

8.1 Plaintiff entered into a marriage relationship with a certain Mr Ellis soon after she matriculated. At that stage she was 19 or 20 years old. Two children were born from this marriage, to wit R[...] born on 11 May 2004 and S[...] on 27 June 2006. The two children are now 15 and 13 years old respectively. The bonds of marriage were terminated in August 2008.

8.2 Although Mr Ellis paid maintenance for the children and still continues to pay maintenance, although not regularly, plaintiff found herself in dire financial straits after the divorce. During the marriage she worked at a restaurant and after S[....]'s birth she started employment with a jewellery house.

8.3 After the divorce she moved into people's garage where she stayed with her two children as she could not afford any other accommodation. After a while she requested her parents to take care of the children which they did. A few months later she also relocated to Danielskuil where her parents resided. She was employed for a while in her mother's shop, earning a salary of R1 800.00 per month.

8.4 On 23 November 2011 plaintiff met the deceased in Lime Acres where he was employed with the De Beers Mining Company as an IT technician. De Beers was later taken over by Petra Diamonds for whom the deceased worked until his demise.

8.5 During about February/March 2012 plaintiff and the two children moved into the deceased's house provided by his employer. Later on they relocated to a larger house as the deceased qualified for such a house.

8.6 The deceased took her, and from time to time also the children, on vacation to places such as Ballito, Amanzimtoti and Margate on the Kwazulu-Natal coast.

8.7 She eventually obtained employment as a lifeguard at the local swimming pool where she worked during the summer from September to March, earning between R5 000 and R6 000 per month. The deceased took out cellphone contracts for her and the children which he paid for. He also paid for internet connection, the gardener and the domestic servant. Ex facie the deceased's admitted salary advices, expenses relating to housing and water and electricity were deducted from his gross salary. The monthly grocery account for which the deceased was responsible varied between R5 000 and R6 000. Plaintiff contributed an amount of R1 500 per month to the deceased to assist with the financial obligations of the couple. Later on, the deceased also subscribed to DStv for the children. He even paid for R[....]'s school clothing, the children's clothing as well as for a school tour.

8.8 The children referred to the deceased as their father and the deceased regarded them as his sons. The deceased and the children participated in several activities together such as paintball, computer games and rugby.

8.9 On 4 December 2013 the deceased bought an engagement ring for plaintiff at Arthur Kaplan in Bloemfontein. He sought and received permission from both his mother as well as plaintiff's parents to get engaged.

8.10 They visited the deceased's mother in Kimberley on a monthly basis on which occasions they slept in the flat on her property, sharing the double bed. As mentioned, they have been staying together as life partners from the beginning of 2012 until the deceased passed away in 2018.

8.11 In 2014 plaintiff, the deceased, his mother and sisters went overseas, visiting Ireland, Scotland and London. She believed that the deceased was paying her expenses which turned out to be incorrect as Mrs Van Eetveld testified that she had paid for all of them. Fact of the matter is that plaintiff did not pay a cent towards the vacation. Mrs Van Eetveld's generosity towards plaintiff is further proof that plaintiff was accepted as part of the family.

8.12 Plaintiff and deceased often discussed getting married although the deceased indicated that he would have preferred to travel first and get married later. It is also apparent that financial constraints and their inability to pay for a proper wedding reception prevented them from getting married.

8.13 The deceased died intestate, the consequences being that plaintiff was not entitled to any inheritance. Mrs Van Eetveld, who was the sole heir, donated most of the furniture in the communal home which she inherited to plaintiff.

8.14 Plaintiff stayed in the communal home until July 2019 when she moved to Black Rock. Just before she left Lime Acres, she met a boyfriend as confirmed in cross-examination. This person has obtained employment at a mine in Kathu and it is apparent that they see each other from time to time, although they are not living together. There is also no indication that she is supported by this person. She is now again living in a garage at the back of the owners' residence. During cross-examination plaintiff confirmed that she was employed during her relationship with the deceased, that the deceased insisted that she work, that she earned an income and that she received maintenance for her two children. She however made it clear that the maintenance for the children was used to support the children.

8.15 The RAF admitted in response to plaintiff's rule 37(4) questionnaire that (1) she duly complied with her statutory obligations in lodging her claim, (2) the deceased was employed as an IT-network technician with Finch Diamond Mine (Pty) Ltd at the time of his demise as is apparent from the employer's certificate issued by the mine and the salary advices for January, February, March, April and May 2018,

(3) the deceased was born on 10 July 1984.

8.16 Before plaintiff's case was closed it was recorded that the RAF accepted the correctness of the calculations by Munro forensic actuaries contained in their report, although the parties agreed that the contingencies to be applied would be argued during closing argument. It was also agreed that the court might possibly be requested to refer the matter back to the actuaries to make calculations on another scenario.

[9] In a strange and an unexpected turn of events Ms Ferreira called the deceased's mother and sister, Mrs and Ms Van Eetveld, to testify on behalf of the RAF. Both ladies allegedly deposed to affidavits in support of plaintiff's claim. These affidavits form part of the claim lodged with the RAF and the plaintiff's bundle of documents placed before the court. It must be emphasised that Mr Zietsman did not try to rely on the affidavits and the court was also not asked to admit same as part of the evidential material in support of plaintiff's case. Both

ladies denied during their evidence that they had deposed to the affidavits attached to plaintiff's claim documents. Notwithstanding their denial, they agreed with the contents of the affidavits which read exactly the same, save as indicated in paragraph 10 hereunder. The following allegations contained in these affidavits are not in dispute:

9.1 the deceased was fatally injured close to Petrusburg on 28 April 2018;

9.2 the deceased and plaintiff, residing in the town of Lime Acres, were involved in a cohabiting relationship for a period of 7 years. Plaintiff worked during the summer months on a temporary basis as a lifesaver at the local swimming pool;

9.3 the deceased was an IT technician at Petra Diamonds, the registered name of the company being Finch Diamond Mine (Pty) Ltd as is apparent from the admitted employer certificate and salary advices;

9.4 the deceased did not have children or any other dependents.

[10] The following allegations in the affidavits were placed in dispute:

10.1 the parties did not get engaged in 2015, but actually two years earlier, to wit in 2013, as plaintiff also testified;

10.2 they planned to get married soon;

10.3 plaintiff was a housewife who looked after the household;

10.4 the deceased was the breadwinner and financially maintained the plaintiff.

V AUTHORITIES PERTAINING TO THE DUTY TO SUPPORT

[11] Both parties relied on the judgment of the Supreme Court of Appeal in *Paixão*.^[1] This is indeed the locus classicus in matters similar to the present factual matrix. In a unanimous judgment Cachalia, JA referred to old authorities as well as the more recent judgment of Mahomed, CJ in *Amod*^[2] and stated as follows^[3]:

“And, given the sui generis character of the remedy (the dependants’ action for ‘family members’ of the deceased), there seems to be no proper reason to restrict it only to family or blood relationships when social changes no longer require this.”

[12] The appellant's claim in *Paixão* rested on two legs as recorded by the SCA^[4], to wit: “first, that an express or tacit agreement existed between the appellants and the deceased which created a binding obligation upon him to maintain and support them, and second, that the nature of the relationship, being akin to a family relationship, was such that it is deserving of the law's protection.”

The court confirmed the well-recognised principle that a “tacit agreement is inferred from the surrounding circumstances and conduct of the parties” and “it is for the court to decide whether a contract probably came into existence.”^[5]

[13] Having considered the judgment of the Constitutional Court in *Volks*, [6] Cachalia, JA concluded as follows: [7]

“Volks, therefore, does not stand in the way of the appellants’ submission that the common law may be developed to extend the

dependants’ action generally to unmarried parties in heterosexual relationships or to any other relationships – the

question left open in *Du Plessis v Road Accident Fund*.”

[14] Cachalia, JA made it clear that he did not intend to demean the value or importance that our society places on marriage as an institution, [8] but it is a simple fact of life that millions of South Africans live together without entering into formal marriages. Furthermore, relying on statistical data, the learned Justice of Appeal continued that “South Africans have lower rates of marriage and higher rates of extra-marital child-bearing than found in most countries. [9] He concluded that “(l)ife partnerships have therefore increasingly received legislative and judicial recognition reflecting the changing *boni mores*” [10] and referred with approval to the judgment in *Verheem v Road Accident Fund*, [11] confirming that the facts in the two cases were remarkably similar. In *Verheem* [12] the court extended the scope of the dependants’ action to cohabiting partners in a heterosexual permanent life partnership.

Consequently, Cachalia, JA finally held [13]: “The proper question to ask is whether the facts establish a legally enforceable duty of support arising out of a relationship akin to marriage. Evidence that the parties intended to marry may be relevant to determining whether a duty to support exists, as in this case. But it does not mean that there must be an agreement to marry before the duty is established. And once a dependent establishes the duty, the law ought to protect it.”

[15] In *Brenda Jacobs v Road Accident Fund* the plaintiff and a certain Mr Stevens (the deceased) stayed together for a period of 6 years whilst he was still married to his wife. Mr Stevens maintained the plaintiff and her minor children. She was not working during the relevant period. [14] The learned Judge accepted that cohabitation outside a formal marriage is now widely practised and that the relationship of the parties in that matter was similar to a family relationship arising from a legally recognised marriage. Therefore, plaintiff as an unmarried person in a heterosexual relationship has a dependent’s action in respect of loss of maintenance, she should be afforded protection and “... she should not be discriminated upon as section 9 of our Constitution affords her that protection.” [15] Finally, the learned Judge concluded that “...having regard to the *boni mores* and albeit that our society continues to value the sanctity of marriage, the reality is that some parties find themselves living

together intending to get married and attracting reciprocal duties of support but having a legal bar to get married. This was precisely the case in point with the plaintiff and the deceased in question.”[16]

- [16] In Verheem[17] the court held that the plaintiff had the necessary locus standi to claim loss of maintenance and summarised the facts as follows: (1) the parties started living together in 1990 until the deceased passed away in July 2003; (2) together they had two daughters; (3) the deceased brought up the plaintiff’s daughter together with their own daughters as his own and never differentiated between them;
- (4) everybody considered the plaintiff and the deceased as husband and wife; (5) in terms of the agreement between the parties the plaintiff would look after the household and the deceased would be the sole breadwinner; (6) the parties didn’t have enough money for a decent wedding although they wanted to get married; (7) the parties’ behaviour confirms (or at least such inference could be drawn) that the agreement between them as to their duties had been established; (8) the parties were in a permanent life partnership;
- (9) the deceased’s duty of support towards plaintiff was not merely an undertaking, but a binding contract in that the deceased clearly did so with the intention of being legally bound and being part of this permanent life partnership and he acted accordingly and
- (10) the parties and the three daughters were a close-knit, stable family.

[17] In casu the uncontroverted evidence shows a remarkable resemblance with the facts in Verheem and to an extent even with those in Paixão. It is conceded that the deceased and plaintiff did not have children together, but the deceased regarded plaintiff’s children as his own.

[18] Ms Ferreira forcefully argued the RAF’s case based on the facts and principles set out in Cawood v Road Accident Fund.[18] No duty of support was found in this case based on the admissible and acceptable evidence presented to the court. Khumalo, J found that the plaintiff, claiming loss of maintenance where she and the deceased have allegedly been living together although unmarried, was an unreliable witness and that no credible inference could be drawn from the allegations made by her pertaining to the nature of their relationship. It is clear from the judgment that the learned Judge made a negative

inference insofar as the plaintiff’s mother, other relatives and friends were not called to confirm the plaintiff’s version pertaining to the forthcoming wedding and that she was allegedly maintained by the deceased and/or even that they were staying together as husband and wife.[19] The judgment is clearly distinguishable insofar as the court made credibility findings against the plaintiff. There was not the faintest suggestion on behalf of Ms Ferreira that the plaintiff in casu, Ms Kriek, was an unreliable witness.

VI THE APPLICATION FOR AMENDMENT AND EVALUATION OF THE EVIDENCE

[19] After the defendant closed its case, Mr Zietsman applied for amendment of the particulars of claim, relying on a notice of intention to amend which reads as follows:

“1. By insertion of paragraph 6.5 which reads as follows:

6.5 The deceased was under a legally enforceable duty of support towards the plaintiff, whom the deceased had explicitly, alternatively, tacitly undertaken to support with the intention of being legally bound by such undertaking and the deceased; and

the plaintiff undertook reciprocal duties of support in respect of each other, which are worthy of protection by way of an action for loss of support.”

The RAF opposed the application for amendment.

[20] Mr Zietsman submitted that it might not even be necessary to apply for a formal amendment as he had done on the basis that the matter was fully canvassed during the evidence and paragraph 6 of the particulars of claim is sufficiently wide in ambit to include an agreement between the parties to support each other. Ms Ferreira, on the other hand, submitted that plaintiff failed to plead the existence of a binding agreement to maintain, either in writing or orally, expressly or tacitly, and therefore no proper cause of action had been pleaded. I pointed out to her that the appropriate step to have been taken by the RAF in such an instance would have been to file an exception which the RAF did not do. She also submitted that if the amendment is granted, the RAF would be prejudiced insofar as it would not be allowed an opportunity to re-open its case to lead further evidence, but failed to indicate what possible evidence could be led. There is no merit in this submission if the totality of the evidence is considered. I am satisfied that although no written agreement was entered into between the plaintiff and the deceased pertaining to their reciprocal duties to maintain each other, the uncontested facts testified to by plaintiff and corroborated in many aspects by Mrs and Ms Van Eetveld serve as proof of a tacit agreement to support each other.

[21] A court is not bound by the pleadings if a particular issue was fully canvassed during the trial.[20] It may pronounce on matters not raised in the pleadings on condition that “the absence of such an averment in the pleadings would not necessarily be fatal if the point was fully canvassed in evidence. This means fully canvassed by both sides in the sense that the Court was expected to pronounce upon it as an issue.”[21]

[22] I am satisfied that the issue was pleaded in the original particulars of claim although perhaps not as precisely as one would have expected, but furthermore, it was fully ventilated by the parties, especially during the cross-examination of plaintiff by Ms Ferreira. Both Mrs and Ms Van Eetveld could not enlighten the court as to whether they were aware that an agreement was actually entered into, either expressly or tacitly, but their evidence is such that instead of controverting plaintiff’s evidence, it actually confirmed it.

[23] Most of the evidence tendered by plaintiff is direct evidence which was not challenged in any material respects. This does not mean that because her evidence was not contradicted, it must be accepted as the truth. It might have been so improbable that she could not succeed.[22] This is certainly not the case and her evidence is accepted as the truth. She did not testify that she and the deceased sat down one day and recorded the terms that would govern their relationship, specifically regarding financial contributions to be made towards each other or the joint household, if at all. Ms Ferreira submitted that no binding agreement to support was pleaded or proven and therefore, plaintiff's case stood to be dismissed with costs, or at best, absolution from the instance should be granted with costs. I do not agree. However, the court is entitled to deal with this issue based on circumstantial evidence and the probabilities. I am satisfied that, bearing in mind the proven facts, the more plausible inference[23] to be drawn from them is that a tacit agreement came into being between plaintiff and the deceased pertaining to their reciprocal duties of maintenance to each other. The application for amendment is granted. I am satisfied that plaintiff has proven her case in respect of the deceased's duty of support on a balance of probabilities.

VII GENERAL AND REMARRIAGE CONTINGENCIES

[24] The only issue remaining is whether plaintiff is entitled to the amount claimed, and if not, to which amount. The parties did not agree on the contingencies to be applied. Plaintiff's actuaries prepared an amended report to include calculations based on contingencies as instructed by her legal team. Mr Zietsman handed this report in by agreement before closing arguments. The actuaries calculated past and future loss of support before contingencies to be R384 600 and R3 812 300 respectively. Unlike the previous report, the latest report provides for contingencies, i.e. the normal or general contingencies of 5 and 15% in respect of past and future loss respectively, as well as a remarriage contingency of 40%. The resultant effect is a decrease in the capital value of the loss of maintenance to R2 309 643.00 as calculated in paragraph 4.5 of the report. Mr Zietsman submitted that the court should accept the contingencies applied by the actuaries as reasonable and award the amount calculated. Ms Ferreira, whilst insisting that plaintiff has not proved a right to maintenance, submitted that if the court finds against the RAF in that regard, the remarriage contingency should be increased to 44% which would be in line with Mr Robert Koch's Quantum Yearbook of 2018.

[25] The court should as far as possible stay away from a "blind plunge into the unknown" or to entirely rely on "guess work" when awarding damages.[24] Nicholas, JA went further in Bailey NO and stated the following:[25]

"Where the method of actuarial computation is adopted, it does not mean that the trial judge is 'tied down by inexorable actuarial calculations'. He has 'a large discretion toward what he considers right,' per Holmes JA in Legal Assurance Co Ltd v Botes 1963 (1) SA 608 (A) at 614F. One of the elements in exercising that discretion is the making of a discount for 'contingencies' or the 'vicissitudes

of life.’ These include such matters as the possibility that the plaintiff may in the result have less than a ‘normal’ expectation of life; and that he may experience periods of unemployment by reason of incapacity due to illness or accident, or to labour unrest or general economic conditions. The amount of any discount may vary, depending upon the circumstances of the case. See *Van der Plaats v South African Mutual Fire and General Insurance Co Ltd* 1980 (3) SA 105 (A) at 114-5. The rate of the discount cannot of course be assessed on any logical basis: the assessment must be largely arbitrary and must depend upon the trial Judge’s impression of the case.” (emphasis added)

This case concerned the claim of a father on behalf of his daughter who was two years old when severely injured. General contingencies or “vicissitudes of life” were considered.

[26] In *RAF v Guedes*[26] the trite principle pertaining to the award of compensation was restated as follows:

“[8] It is trite that a person is entitled to be compensated to the extent that the person's patrimony has been diminished in consequence of another's negligence. Such damages include loss of future earning capacity (see for example President Insurance Co Ltd v Mathews). The calculation of the quantum of a future amount, such as loss of earning capacity, is not, as I have already indicated, a matter of exact mathematical calculation. By its nature, such an enquiry is speculative and a court can therefore only make an estimate of the present value of the loss that is often a very rough estimate (see, for example, Southern Insurance Association Ltd v Bailey NO). The court necessarily exercises a wide discretion when it assesses the quantum of damages due to loss of earning capacity and has a large discretion to award what it considers right. Courts have adopted the approach that, in order to assist in such a calculation, an actuarial computation is a useful basis for establishing the quantum of damages. Even then, the trial Court has a wide discretion to award what it believes is just (see, for example, the Bailey case and Van der Plaats v South African Mutual Fire and General Insurance Co Ltd).” (emphasis added)

[27] The authorities quoted in the preceding paragraphs dealt with so-called general contingencies. Two further examples would suffice. In *Bonesse v Road Accident Fund*[27] Pickering, J considered the general principles applicable to contingencies and the dicta in *Bailey NO*. The learned Judge concluded as follows pertaining to the contingencies to be applied in respect of the claim of a 13 year old girl:

“Mr Van der Linde submitted, with reference to Bobabe v President Insurance Co Ltd 1990 (4A4) QOD 43 (W) that given that Carly was 13 years old at the time of the accident it would be appropriate to apply a contingency factor of 30% to her future loss of earnings. Mr Frost however, submitted that a contingency deduction of 20% should be applied. He referred in this regard to Koch: Quantum Year Book 2014 at page 114 where the learned author states that it has become customary for the court to apply a so-called sliding scale to contingencies – ‘i.e. 25% for a child, 20% for a youth and 10% in middle age.’

It would appear that although contingency factors which have been applied in cases involving youths and/or children range from 15% to 40% the courts have generally been inclined to apply a contingency figure of 20% in respect of youthful plaintiffs in their teenage years.

Having regard to all the circumstances of this matter including Carly's age I am of the view that a contingency factor of 25% should be applied."

[28] In *Ndokweni v Road Accident Fund*[28] Pickering J, having regard to the particular facts, held that there was no good reason to depart from the normal deduction of 15% in respect of contingencies for future loss.

[29] Ex facie the reported judgments it has been accepted for more than a century in this country that an allowance must be made for the possibility of remarriage.[29] In *Hulley v Cox*,[30] Innes, CJ, writing for a unanimous court, held that although dependants are entitled to be compensated for pecuniary loss as a result of reduced income and a restricted provision for the supply of what they have been accustomed to, the object is to compensate them for material loss, not to improve their material prospects, and therefore "it follows that allowance must be made for such factors as the possibility of remarriage."

[30] Four decades after *Hulley* the Appeal Court (as it was known) stated the following in *Peri-Urban Areas Health Board v Munarin*: [31] "Marriage prospects are relevant because marriage would reinstate her right of support. The propriety of taking such prospects into account was recognised by this Court in *Hulley v Cox* ..."

[31] The dictum quoted in the previous paragraph was doubted by Rabie, CJ, writing for a unanimous bench in *Constantia Versekeringsmaatskappy Bpk v Victor NO*, [32] but it was not necessary to revisit *Peri-Urban* or *Hulley* insofar as the court dealt with a minor's claim following upon the wrongful killing of his father. It held that, contrary to the long-standing approach in this country to have regard to the widow's possible remarriage when calculating compensation to be awarded to her, there was no principle in our law requiring the minor's claim to be reduced or extinguished in the event of his adoption after his father's death. [33]

[32] The prospects of a plaintiff's remarriage were considered by the full bench of the Gauteng High Court, Pretoria in *Oosthuizen*. [34] It confirmed the following:

"In South Africa the contingency of remarriage is usually taken into account. If the purpose of an award for damages for loss of support is borne in mind the possibility of the plaintiff remarrying is a very real consideration."

The possibility of a young widow remarrying shortly after the death of her husband and receiving damages for loss of support calculated over a period of 40 years is completely unrealistic. Allowing for the contingency is obviously realistic." (emphasis added)

[33] The full bench remarked that none of the judgments referred to “require that a trial court assess the likelihood of the plaintiff remarrying on the strength of her physical appearance...”and “(i)f it is the law that this be done I agree with the respondent that this would be offensive and should not be part of the law.”[35]

This dictum is certainly persuasive, but with all due respect, the viewpoint that the appearance of a plaintiff should not be considered did not form part of the ratio decidendi of the court. In my view there can be nothing offensive for a presiding officer to have regard to inter alia the attractiveness, social skills and personality of a plaintiff who claims loss of maintenance based on the death of her/his spouse or life partner when considering the probability of remarriage. I firmly believe the probability of entering into a marital

relationship or life-long cohabitation is greater in the case of a well-groomed, attractive person with a pleasant personality who has not deliberately elected to remain single and it is irrelevant whether the person is male or female, heterosexual or a member of the LGBT community, to wit lesbian, gay, bisexual or transgender.

[34] In casu I have to consider the claim of an attractive young lady in her prime, but I want to emphasise that my approach would be the same if the plaintiff was not a heterosexual female. I recognise my constitutional obligations and responsibilities as a presiding

officer and a citizen of this country. This judgment is most definitely not intended to discriminate in defiance of any of the provisions of the Bill of Rights. I am also fully aware that my approach is subjective insofar as my views in respect of the appearance or personality of a person may differ vastly from other colleagues, especially in our multi-racial society, and I accept that it may well be, like judging a witness on demeanour, a “tricky horse to ride.”[36] My approach, to wit the assessment made on my impression of the case, is in line with the well-known dictum in Bailey quoted above.

[35] In *Legal Insurance Company Ltd v Botes*[37] the former Appeal Court differed from the approach adopted by the court a quo relating to the respondent’s disfigurement and her chances of remarriage. She had suffered from cancer, causing her one breast to be removed surgically, although she was cured at the time of the trial. Holmes, JA considered “whether a layman’s dread of its recurrence (the cancer) might well inhibit a suitor’s thoughts of marriage” and held as follows:

“Reviewing the foregoing considerations, and bearing in mind the respondent's grave and slighting disfigurement (even if it can be concealed by the dressmakers' art) and weighing these against the trial Court's observations as to the respondent's appearance and disposition, I come to the melancholy but realistic appraisal that her prospects of remarriage are very substantially less than the trial Court's gallant assessment. Accordingly, this Court is entitled and obliged to interfere..... The allowance for this prospect cannot be arrived at mathematically. It will be borne in mind later when summarising and giving effect to the various findings.”

[36] Professor L Steynberg[38] wrote an interesting and well-researched article on contingency deductions in respect of remarriage or as she prefers, re-partnering,

in which she compared South African and Australian Law. Bearing in mind the increase in cohabitation relationships of people who prefer not to marry, I shall from now on in this judgment interchangeably refer to remarriage or re-partnering.

[37] Steynberg is severely critical of the manner in which South African courts have quantified re-partnering as a possibility. The author relied on research by Davel and indicated which factors have been taken into consideration by the courts on occasion.[39] It is not necessary to quote all factors as some are referred to in this judgment. The following criticism of some judgments deserves mentioning:

“Milns v Protea Assurance Co Ltd is one of the best examples in South African case law of the unfair result that contingency deductions can have if they are not

judiciously applied. The widow was young and she and the deceased did not have children.” The author continued and referred to the fact that the presiding judge found that “she is a very presentable young lady with no attachments and ... (I) rate her chances of remarriage as high.” Over and above a general contingency deduction of 22%, the court subtracted a further 70% from the plaintiff’s claim as a remarriage contingency and this, according to the author, sent out a clear message to the particular widow that “she should remarry as soon as possible in order to survive and that she should also marry a man with the same or better substance as the deceased.”[40]

[38] Steynberg continued as follows[41], referring to three further judgments, the first being Appellate Division authority:

“In Shield Insurance v Booysen Trollip, JA distinguished between the position of the widow in this case and that of the widow in Milns, where the first-mentioned was slightly older and had three children as well as an illegitimate child. Based on these facts he confirmed the finding of the trial court that ‘only’ a fifty percent deduction was necessary under the circumstances.....

Also in Burns v National Employers General Insurance Co Ltd the court found that the widow’s claim for loss of support had to be reduced by twenty percent for general contingencies, which inter alia included the probability of divorce. Thereafter her claim was reduced by a further forty percent in lieu of the probability of remarriage.

Trimmel v Williams provides another example of a particularly high deduction for remarriage amounting to approximately seventy percent. The court based this deduction on the following grounds: The claimant was a widow with capital; provision had already been made for the children; she was young and beautiful and there was a probability that she would remarry. Once again there was an oversight in that no mention was made of the financial position of the second husband.”

The full citations of the four cases referred to are recorded in a footnote.[42]

- [39] Steynberg distinguished between general and special contingencies and conceded that re-partnering has to be categorised as a special contingency, but noted that the following two guidelines should be applied: “(1) Evidence must be presented to validate re-partnering as a specific contingency and (2) the percentage deduction for re-partnering must be in proportion to the probability of its occurrence.”[43]
- [40] Steynberg mentioned that in three Australian jurisdictions the legislature had promulgated legislation forbidding the use of re-partnering as a contingency deduction in a claim for loss of maintenance, but apart from these jurisdictions, differences of opinion are found amongst Australian judges as contained in some majority and minority judgments. The author quoted the following dictum of the majority in *De Sales v Ingrilli*[44] with approval:

“Re-partnering is merely another of the many possible vicissitudes of life, namely that the claimant may enter an economically beneficial or detrimental relationship after the trial. It is therefore to be given no more weight than any of the other vicissitudes that go to make up the general discount. The ‘standard’ adjustment should not be increased to re-introduce the ‘remarriage’ discount by the back door.”

The author concluded that the uncertainty and the unpredictability in South African law can be addressed if the ‘more moderate position’ of the latest Australian case law is followed and I quote:

“In terms of this ‘moderate’ position re-partnering should be regarded as a general contingency if it has not taken place at the time of quantification. As part of the general adjustment for contingencies, the possibility of re-partnering will only increase the general adjustment if evidence is presented that increases the possibility of re-partnering occurring above the possibility of any of the other general contingencies occurring. The adjustment for general contingencies should at average be below twenty per cent. Re-partnering will only be regarded as a specific contingency if it has already taken place at the time of quantification.”

- [41] I respectfully disagree with Steynberg’s conclusions. Even if we do away with a separate contingency, something which should not happen bearing in mind a well-established and sound practice, there is no reason why a cap of 20%, which is completely arbitrary and unsubstantiated, should be placed on future contingencies. The reality expressed by the full bench in *Oosthuizen*[45] should not be ignored. It would be absurd and unfair to award damages for loss of maintenance to a young person for a period of thirty years or even more without fully appreciating the probability that such person may obtain support from a new partner at some stage during his/her lifetime.
- [42] I was also referred to *Esterhuizen and others v RAF*,[46] a judgment by Tolmay, J. Having considered *Botes and Snyders*, the learned Judge stated that reliance “on a woman’s appearance and nature reveal a rather out-dated and offensive approach towards women” as such considerations are “not in accordance with the constitutional values of dignity and equality enshrined in our Constitution.”[47]

I am not prepared to accept that complimenting a plaintiff can be regarded as offensive towards her or females in general. The same applies to males. If one considers the comments in Botes supra about the plaintiff's disfigurement, it may be taken one step further. It should be common sense that if the survivor of two spouses involved in a horrific motor vehicle collision would claim damages for loss of maintenance following upon the death of the deceased spouse in circumstances where the survivor – male or female – is a paraplegic with severe permanent facial and bodily scars, his/her prospects of remarriage would be much less than someone who did not sustain any injuries at all.

[43] The learned judge concluded as follows in Esterhuizen:

“[14] To determine the plaintiff's prospects of remarriage and the possibility of financial support is to gaze into the proverbial

crystal ball. I take into consideration all the aspects alluded to in her evidence. I take note of the fact that the care of the children might make it more difficult for her to focus on her own life and will probably impact on her social life. She is relatively young, and I think one can accept that a younger woman might be more inclined to remarry, not based on appearance or desirability but rather based on the fact that one might be more inclined when you are younger to take another chance at marriage.”

In my view it is wrong to ignore attractiveness, but differentiate or even discriminate based on age. I accept that a relatively young person's prospects of entering into another marriage or permanent cohabitation might in principle be better than that of an older person, but many older persons are still vibrant, attractive and expecting to live life to its fullest. Often, older persons also desire to become involved in new permanent relationships instead of being alone during the latter part of their lives. Cases must be decided on their peculiar facts, whilst acknowledging that each enquiry is speculative in nature. In Esterhuizen the plaintiff testified that she did not want to get married again as she wanted to focus on her children. It remains difficult to gaze into the proverbial crystal ball as the court held, but the plaintiff's outspoken wish probably played a role in determining a low contingency. The plaintiff was 35 years old with 3 children and a 27% remarriage contingency was applied.

[44] Mr Zietsman admitted that he was responsible for the instruction to the actuaries to prepare an amended report in order to apply contingencies, and especially the 40% remarriage contingency. When he did so, he was unaware of the judgment in *L D v Road Accident Fund*. [48] In this case Millar, AJ dealt with such contingencies and in the process criticised the well-known author and actuary, Mr Robert Koch, for relying on outdated statistics.[49] Relying on Australian authority quoted in the article by Steynberg discussed earlier herein, the learned Judge stated the following:[50]

“The ‘vicissitudes of life’ take account of the prospects of remarriage – no matter the reason therefore and thus, absent special circumstances, incorporate a more just provision for the contingency than the arbitrary statistical deduction of a further contingency.”

I do not agree with this statement for the reasons mentioned when I criticised Prof Steynberg's conclusions above and further

reasons to be advanced hereunder. It is not correct to hold that the 'vicissitudes of life' accepted for over a century as general contingencies in claims for future loss should include the prospects of remarriage or re-partnering. However, I agree with the learned Judge's criticism of Mr Koch's reliance on old statistics, but in the absence of recent statistics or acceptable evidence to the contrary, I see no reason why the statistics applicable to white people should be ignored in toto in casu as the plaintiff is a member of that group. The reference to 'the arbitrary statistical deduction of a further contingency' is rather unfortunate if it is acknowledged that no award pertaining to future loss can be based on an exact mathematical examination, but rather a speculative evaluation of the facts in each case.

[45] Millar, AJ did not find circumstances that warranted the deduction of a higher (or further) contingency based on the possibility of the plaintiff's remarriage and accepted the parties' agreement pertaining to general contingencies of 5% and 15% in respect of past and future loss respectively. In considering the specific facts of the case, there might have been merit in not awarding a higher general contingency, or a further special contingency based on the prospects of remarriage. The uncontested evidence of the plaintiff in LD revealed[51] that she was a business woman, initially had been reluctant to get married due to her family background, declined the proposals of the father of her child to get married, but eventually married the deceased in that case when she was already 37 years old. Although she conceded a possibility that she may remarry, it was pointed out that it had taken her 17 year to find the deceased and 5 years after his death she was still not involved in a new relationship. She also did not want to get involved with someone again. It is apparent from the facts just mentioned that there is absolutely no resemblance with those in casu. Although Mr Zietsman directed my attention to the particular judgment and the learned Judge's conclusions, he did not submit that I should disregard the prospects of remarriage and/or remarriage contingencies, either the 40% as applied by the actuaries as instructed by him, or any other figure to be arrived at in my discretion. He submitted that 40% should be the upper limit.

[46] I have taken note of Mr Koch's Quantum Yearbook 2020, which is the latest edition.[52] The differentiation between the various population groups in this country must be questioned. Since the statistics were obtained, people in this country have entered into marital and cohabitation agreements across cultural borders and many people prefer not to get married anymore. Unlike in the days when the data was collected, people are now openly engaged in relationships other than heterosexual relationships and also across the cultural divide. Having said this, I am prepared to take judicial cognizance of the fact that the majority of white people get married early in their adulthood, and even considering the high divorce rate, they more frequently than not take a second chance at marriage or re-partnering to borrow from Steynberg. Koch alleges in this regard, based on the old data which I already indicated cannot be accepted without more: "Very high remarriage rates are a peculiarly

white phenomenon.” The author indicates a remarriage deduction to be made in the case of a 33 year old white female to be 47% and 42% when she has reached the age of 35. In my view, and as Koch confirms, there is no reason to differentiate between male and female dependents.

- [47] In evaluating contingencies I have considered positive and negative factors, i.e. the favourable and adverse factors. The 15% general contingency is not in issue. In my view factors such as the deceased's

less than normal life expectancy (was it not for his untimely death), periods of unemployment that he might have experienced due to factors such as illness, incapacity or general economic conditions must be taken into consideration in this regard.

- [48] The remarriage or re-partnering contingency should also be adjudicated by taking into consideration positive and negative factors. I accept the established principle in Munarin[53] that it is not required of a spouse/partner to mitigate the loss of maintenance by incurring the duty of supporting her/himself, but in modern life there are certain aspects relevant pertaining to the remarriage contingency. Plaintiff's chances to improve her financial position if she would relocate to a bigger town or city, bearing in mind her experience as a receptionist at a restaurant and salesperson at a jewellery shop and another business, cannot be ignored. Her hobby, which she turned into a small business, may also yield higher income if she is sufficiently dedicated. In saying this, I do not place a duty on plaintiff to relocate and get employment in order to support herself. Unfortunately, there remains a possibility that she may have less than a normal life expectancy and would not require maintenance for the full period assumed by the actuaries. On the other hand, due to high unemployment and the economic downturn in this country, she may become even worse off than at present. I most certainly do not rely on plaintiff's appearance and relatively young age only. She has two children, aged 15 and 13 respectively. I accept that persons without dependents, such as minor children, have a better chance to become involved in a new permanent romantic relationship. The adage that someone carries 'baggage' is often heard in this regard. This diminishes plaintiff's chances of entering into marriage or permanent cohabitation. I also accept that even if plaintiff would become involved in a marriage or a permanent life partnership, the new husband or partner might not have the same earning capabilities as the deceased or may not even be in a position to financially support her at all. Love is often 'blind.' Furthermore, such relationship may not endure for any considerable period. Therefore, her prospects of remarriage or re-partnering must be weighed against the possibility that she may in any event not be maintained as fully as the deceased did. No doubt, the deceased earned a substantial income, bearing in mind his age and the fact that the parties lived in a rural area where the cost of living is less than in the city.

- [49] As I was about to deliver this judgment I came across a judgment of Binns-Ward, J delivered as recently as 28 February 2020.[54] In that case a 15% contingency for future loss of maintenance was accepted based on inter alia the following uncontested and credible

evidence of the plaintiff: (1) she has not formed a romantic relationship with anyone in almost five years since the death of her husband; (2) although she could not exclude the possibility of remarrying, it was not regarded as a priority; (3) all her free time and emotional energy were dedicated to her three sons; (4) she and her deceased husband became romantically involved when they were at school together and they got married when she was 21 years old and (5) she never had any romantic relationship with any other person other than her late husband. Consequently the court was not persuaded that plaintiff's prospects of remarrying "should weigh especially in making provision for a contingency deduction in respect of the actuarially quantified extent of her loss." It concluded that such prospects should be "taken into account as part of the basket of general contingencies." [55]

[50] Again, as I mentioned when discussing LD *supra*, the facts in BB vs RAF differ materially from the facts in *casu*. Insofar as these judgments convey, as a general proposition, that a special remarriage or re-partnering contingency should not be applied, I respectfully disagree therewith in light of the well-established principles.

[51] It cannot be disregarded that there is always a danger of over-compensation. No exact mathematical calculation is possible as any enquiry in this regard is in nature speculative as stated in Guedes. [56] It is completely unrealistic to think that plaintiff, who married shortly after leaving school, became involved in a life partnership

with the deceased within three years after her divorce and started a new relationship a year after the death of the deceased, will remain single for the remainder of her life. I must point out that Ms Ferreira did not challenge plaintiff during cross-examination to provide more detail of the relationship and the seriousness thereof. The object of the award to be made is to compensate plaintiff for her material loss, not to improve her material prospects. [57] She should not be placed in a better financial position following the deceased's untimely death than would be the case if he did not die. Notwithstanding all aspects having been said and considered, it still remains difficult to arrive at a result fair to both parties. However, I find solace in the acceptance that no judge is a prophet or soothsayer.

[52] Ms Ferreira misinterpreted the amended actuarial report. It is unnecessary to deal with this any further, bearing in mind the admissions referred to above, save to mention that she did not take cognisance of the fact that the actuaries calculated plaintiff's loss based on the usual apportionment applicable to family earnings, i.e. 2 shares to each adult/spouse/partner as is apparent from paragraph 5.2 of the amended report. It is clear that the actuaries were fully aware of the manner in which the plaintiff's claim should be calculated, considering the admitted income potential of the deceased.

[53] I am prepared to accept general contingencies for past and future loss of income based on the percentages of 5% and 15% respectively, this being the norm and for the reasons mentioned above. There is no reason to depart therefrom. I am in agreement with the plaintiff pertaining to the contingency percentage to be applied in respect of her prospects of remarriage or re-partnering. In my view it would be inappropriate to apply a contingency

percentage of 44% as suggested by Ms Ferreira which would be in line with the tables presented by Mr Koch in his Quantum Yearbook 2020. I already criticized the validity of the figures relied upon by the author. In the absence of any other statistics or concrete evidence, I am called upon to adjudicate the matter based on plaintiff's evidence and my views as expressed herein in order to try and achieve fairness to both parties.

VIII CONCLUSIONS

[54] In conclusion I hold that:

54.1 plaintiff and the deceased stayed together as life partners akin to a husband and wife relationship for nearly seven years and that they, together with plaintiff's two children from a previous relationship, operated as a family unit and was regarded as such by all and sundry;

54.2 the parties tacitly agreed to reciprocally maintain each other and in fact did so;

54.3 even though the parties did not have an express and definite plan to marry soon, they would remain in cohabitation as life partners;

54.4 the deceased accepted the duty to maintain plaintiff as he in fact did for nearly seven years;

54.5 general contingencies of 5% and 15% in respect of past and future loss of maintenance and a remarriage or re-partnering contingency of 40% should be applied;

54.6 as a result of the deceased's untimely death, plaintiff suffered damages in the form of past and future loss of maintenance in the amount of R2 309 643.00.

IX THE ORDERS

[55] The following orders are made:

1. The defendant is liable for payment to the plaintiff in the amount of R2 309 643.00 (two million three hundred and nine thousand and six hundred and forty three Rand) in full and final settlement, as set out hereunder:

1.1 R365 370.00 in respect of past loss of maintenance;

1.2 R1 944 273.00 in respect of future loss of maintenance; resulting from a motor vehicle collision that occurred on 28 April 2018.

2. The defendant shall pay the plaintiff's taxed or agreed party and party costs on the High Court scale, until date of this order, including but not limited to the costs set out hereunder:

2.1 the costs attendant upon the obtaining of payment of the amounts referred to in this order;

2.2 the reasonable preparation / qualifying / accommodation / travelling and full reservation fees and expenses (if any) of the following experts:

2.2.1 Munro Actuaries.

2.3 counsel's costs of preparing for and attending to pre-trials and costs associated with necessary consultations with the plaintiff, the plaintiff's attorneys and the plaintiff's witnesses (if any) and the plaintiff's experts;

2.4 the attorneys' costs of preparing for and attending to pre-trials and costs associated with necessary consultations with the plaintiff, the plaintiff's witnesses (if any) and the plaintiff's experts;

2.5 the travelling costs (if any) occasioned by the plaintiff and the plaintiff's witnesses to attend to necessary consultations with her attorney.

3. Payment shall be made as follows:

3.1 payment of the capital amount shall be made without set-off or deduction, within 180 (one hundred and eighty) calendar days from date of the granting of this order, directly into the trust account of the plaintiff's attorneys of record by means of electronic transfer, the details of which are the following:

Honey Attorneys

- Trust Account

Bank

- Nedbank, Maitland Street, Bfn

Branch Code

- 11023400

Account No.

- [...]

Reference

- HL Buchner/J03932;

3.2 payment of the taxed or agreed costs shall be made within 14 (fourteen) days of taxation, and shall likewise be effected into the trust account of the plaintiff's attorney;

3.3 interest shall accrue in respect of the capital of the claim from 14 (fourteen) days after this order notwithstanding the period of grace afforded to the defendant;

3.4 should payment not be made in respect of any of the aforesaid amounts on or before the stipulated dates, interest shall accrue at 10.25% per annum.

4. In the event that costs are not agreed, the plaintiff agrees as follows:

4.1 she shall serve a notice of taxation on the defendant's attorney of record; and

4.2 shall allow the defendant fourteen (14) court days to make payment of the taxed costs.

J P DAFFUE, ADJP

On behalf of plaintiff : Adv PJJ Zietsman

Instructed by

: Honey Attorneys

BLOEMFONTEIN

On behalf of defendant : Adv J Ferreira

Instructed by

: Maduba Attorneys

[1] Paixão v Road Accident Fund 2012 (6) SA 377 (SCA)

[2] Amod v Multilateral Motor Vehicle Accident Fund (Commission for Gender Equality intervening) 1999 (4) SA 1319 (SCA)

[3] Paixão para 15

[4] Ibid para 17

[5] Ibid para 18

[6] Volks NO vs Robinson and Others 2005 (5) BCLR 466 (CC) dealing with the Maintenance of Surviving Spouses Act, 27 of 1990

[7] Paixão para 27

[8] Ibid para 40

[9] Ibid paras 31 & 32

[10] Ibid para 34

[11] 2012 (2) SA 409 (GNP)

[12] Ibid para 12

[13] Paixão para 39

[14] An unreported judgment by Collis, J in the Gauteng Division, Pretoria under case number 21427/2017 delivered on 23 November 2018

at para 5

[15] Ibid para 21

[16] Ibid para 22

[17] Loc cit para 12

- [18] (46482/2014) [2016] ZAGPPHC 461 (28 April 2016)
- [19] See paras 26, 27, 28, 32 & 33
- [20] South British Insurance Co Ltd v Unicorn Shipping Lines (Pty) Ltd 1976 (1) SA 708 (A)
- [21] Ibid 713 G
- [22] Shenker Bros v Bester 1952 (3) SA 664 (A) at 670E-G
- [23] The test in civil proceedings has been stated authoritatively in AA Onderlinge Assuransie-Assossiaie Bpk v De Beer 1982 (2) SA 603 (A) at 614G - 615B
- [24] Southern Insurance Association Ltd v Bailey NO 1984 (1) SA 98 (A) at 113H [25] Ibid 116G – 117A; also Botha & ‘n Ander v Santam Beperk (5B4) QOD 39 (TPD) at 45 and further; and RAF v Kerridge 2019 (2) SA 233 (SCA) para 44
- [24] Southern Insurance Association Ltd v Bailey NO 1984 (1) SA 98 (A) at 113H
- [25] Ibid 116G – 117A; also Botha & ‘n Ander v Santam Beperk (5B4) QOD 39 (TPD) at 45 and further; and RAF v Kerridge 2019 (2) SA 233 (SCA) para 44
- [26] 2006 (5) SA 583 (SCA) para 8 and Kerridge para 42
- [27] 2014 (7A3) QOD 1 (ECP) at p 18
- [28] 2014 (7A4) QOD 9 (ECP) p 13, the learned judge having referred to numerous judgments including Zarrabi v Road Accident Fund 2006 (5B4) QOD 231 (T) and Mngani v Road Accident Fund 2011 (6B4) QOD 41 (ECM)
- [29] Kennedy v Port Elizabeth Harbour Board (1886) EDC 311, a judgment referred to in Constantia Versekeringsmaatskappy Bpk v Victor NO 1986 (1) SA 601 (A) at 615A
- [30] 1923 AD 234 at 244
- [31] 1965(3) SA 367 (A) at 376D
- [32] Loc cit 614B
- [33] Ibid 616A-C
- [34] MEC for the Department of Roads and Public Works North West Province and another v LM Oosthuizen appeal number A671/07, an unreported judgment delivered on 2 April 2009 para 45(5)
- [35] Ibid para 45(6)
- [36] S v Kelly 1980 (3) SA 301 (A) at 308B
- [37] 1963 (1) SA 608 (A) at 618C and see also Snyders v Groenewald 1966 (3) SA 785 (CPD) at 790D-F

- [38] Re-partnering as a contingency deduction in claims for loss of support – comparing South African and Australian law, PER/PELJ 2007 (10) 3 at p 122 and further
- [39] Ibid, 128 & 129
- [40] Ibid at 132
- [41] Ibid, at 133
- [42] Milns v Protea Assurance Co Ltd 1978 (3) SA 1006 (C) 1014A-E; Shield Insurance Co Ltd vs Booysen 1979 (3) SA 953 (A) 966C-F; Burns v National Employers General Insurance Co Ltd 1988 (3) SA 355 (C) 364G-J; Trimmel v Williams 1952 (3) SA 786 (C) 793A-E
- [43] Steynberg’s article at 136
- [44] Ibid at 139: De Sales v Ingrilli [2002] 212 CLR 338 (HC) 397
- [45] Para 32 supra
- [46] 2017 (4) SA 461 (GP)
- [47] Ibid para 10
- [48] L D v Road Accident Fund (14606/2016) [2018] ZAGPPHC 181 (5 February 2018)
- [49] Ibid at para 34 and further
- [50] Ibid at para 37
- [51] Paras 5-11
- [52] Robert J Koch, The Quantum Yearbook 2020 at 116 & 117
- [53] Loc cit at 376
- [54] BB v RAF 11676/2017, an unreported judgment of the Western Cape Division of the High Court
- [55] Ibid para 17
- [56] Loc cit at para 8
- [57] Hulley, loc cit at 244

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