

SOUTH AFRICA / JUDGMENT

N v Road Accident Fund (9417/2009) [2017] ZAGPPHC 640; 2018 (1) SACR 20 (GP) (6 September 2017)

[2017] ZAGPPHC 640

COURT

North Gauteng High Court, Pretoria

BEFORE

HF Jacobs

CASE / FILE NUMBER

9417/2009

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IN

THE HIGH COURT OF SOUTH AFRICA

(GAUTENG

DIVISION, PRETORIA)

Case

No: 9417/2009

Date:

28 August 2017

Reportable:

Yes

Of

interest to other judges: Yes

In

the matter between: L.
L.
N.
Plaintiff
and
ROAD
ACCIDENT
FUND
Defendant

JUDGMENT

HF JACOBS, AJ:

- [1] The plaintiff, a 37 year old widow, and her husband (the deceased) were married to each other on 20 March 2004. There were two children born of the marriage, D. (born [...] 2005) and V. (born [...] 2007). The deceased was an admitted attorney and worked and practised as an attorney at the firm AV Theron & Swanepoel Incorporated where he also served his articles of clerkship before his admission. During 2006 the deceased left AV Theron & Swanepoel Incorporated and established his own attorney's firm and practised under the name and style of E. N. Attorneys at Vanderbijl Park.
- [2] On 18 May 2007 the deceased died in a motor accident. At the time the plaintiff was pregnant with V. (she was born two months after her father's death). The deceased was described by his erstwhile colleague, Mr Du Plessis, his employee Mr Matsaletsa and the plaintiff who all testified at the hearing as a person with an above average ability, a successful attorney and a person with a good business acumen. The deceased work very hard, speculated with houses, had a property firm known as 10/10 Properties, owned a soccer team (which he coached and managed) and was in the process of acquiring a fast food franchise at Kroonstad at the time of his demise. The witnesses mentioned above impressed as reliable witnesses whose evidence about the business, practice and general character of the deceased I accept despite the loyalty to him as a colleague and husband, they probably have. Their views tally in all material respects by the information recorded as findings, evidence and conclusions gleaned from the joint minute of the expert witnesses employed by the parties in these proceedings. More about joint minute presently.
- [3] Following the death of the deceased the plaintiff instituted action against the defendant for payment of damages suffered as a result of her husband's death. She claims compensation on her own behalf and on behalf D. and V.. The liability of the defendant (the merits of the claim) had been settled by the parties and I was asked to determine the quantum of the claim. Mr Van den Berg who appeared for the plaintiff and Mr Phiri who appeared for the defendant by agreement formulated a draft order omitting the amount to be determined. The balance of the draft order has been incorporated verbatim in the order in below.

[4] The plaintiff tendered in evidence an actuarial calculation based on figures set out in a joint minute of the expert witnesses. The joint minute (Exhibit "D") contains an actuarial certificate recording a calculation of the loss by the actuary employed by the plaintiff. The body of the certificate reads as follows:

14 August 2017 Past loss of support LL N. D. N. V. N. Total Past support had the accident not happened R3 080 324 R1 545 162 R1 526 624 R6 162 110 Less5% contingency deduction R 154 516 R 77 258 R 76 331 R 308 105 Net past support had the accident not happened R2 935 807 R1 467904 R1 450 293 R5 854 004 Past support now that the accident has happened R1 939 953 R 0 R 0 R1 935 953 Less5% contingency deduction R 96 798 R 0 R 0 R 96 798 Net past support now that the accident has happened R1 839 155 R 0 R 0 R1 839 155 Past loss of support Future loss of support R1 096 652 R1467904 R1450293 R4 014 849 Future support had the accident not happened Less20% contingency deduction R14 088 312 R 2 817662 R2 833 801 R 566 760 R3 595 927 R 719 185 R20 518 040 R 4 103 608 Net future support had the accident not happened R11 270 650 R2 267 041 R2 876 742 R16 414 432 Future support now that the accident has happened R10 262 236 R 0 R 0 R10262 236 Less15% contingency deduction R 1 539 335 R 0 R 0 R 1 539 335 Net future support now that the has happened R 8 722 901 R 0 R 0 R 8 722 901 Future loss of support Less remarriage deduction Less accelerated inheritance Final capitalised value of loss of support R 2 547 749 R2 267 041 R2 876 742 R 7 691 531 R 229 297 R 0 R 0 R 229 297 R 1128 696 R 458 902 R 463 721 R 2 051 319 R 2 286 408 R3 276 043 R3 863 314 R 9 425 764

[5] The dispute turns on three points, namely:

[5.1] the adjustment of the loss to be applied when taking into account the accelerated benefit the plaintiff received from the estate of the deceased or as a result of his death. Mr Van den Berg submitted that such an adjustment should not be made at all. Mr Phiri on the other hand submitted on behalf of the defendant that a deduction of 15% in respect of the plaintiff's claim should be made under this rubric;

[5.2] the adjustment of the loss by taking into account the possibility of remarriage of the plaintiff should be made was submitted by both counsel. In this respect Mr Van den Berg proposed a 9% deduction while Mr Phiri submitted that a 25% deduction should be applied.

[5.3] The general contingency deduction both counsel conceded has to be applied in the calculation differs in extent. Mr Van den Berg suggested a deduction of not more than 5% in respect of past loss and a normal contingency deduction of 15% should be applied in respect of future loss for the plaintiff. Mr Phiri submitted that a general contingency deduction of 40% should be made in respect of the plaintiff's claim for future loss.

"[1 2] The measure of damages for loss of support is, usually, the difference between the position of the dependant as a result of the loss of support and the position he or she could reasonably have expected to be in had the deceased not died: Joubert (ed) *The Law I of South Africa* (1st re-issue) vol 7 para 89, citing *Jameson's Minors v Central South African Railways* 1908 TS 575 at 603; *Hu/fey v Cox* 1923 AD 234; and *Legal Insurance Co Ltd v Bates* 1963 (1) SA 608 (A). The particular equities of the case must also be taken into account and an adjustment made if appropriate: Bates

above at 614F-H, where Holmes JA said that the trial Judge 'has a discretion to award what under the circumstances he thinks right'. Thus any addition to a dependant's income, arising from the death of the deceased, must be deducted from the total amount of the loss. In assessing the value of the benefit - and indeed the loss - the court 'may be guided but is certainly not tied down by inexorable actuarial calculations' (Holmes JA in *Bates* (supra at 614F - G). It is to be noted that in terms of s 1(1) of the Assessment of Damages Act 9 of 1969, insurance money (which includes a refund of premiums and payment of interest on premiums) and pensions do not fall to be deducted.

[13] Where property is inherited by a dependant, in determining the extent of his or her loss the court should take into account not the value of the property but that of the accelerated accrual (cf *Groenewald v Snyders* 1966

(3) SA 237 (A) at 248C - F). This entails assessing the probabilities of the dependant having inherited the property should the deceased not

have been killed through the wrongdoing of the defendant, but dying from a different cause at a later date.

[14] The assessment of loss, on the one hand, and of benefits on the other, must necessarily depend on the making of a number of assumptions, none of which can be proved at the time of making the assessment. Thus, for example, where a widow is claiming damages, the possibility of her remarrying and finding a new source of support is taken into account; the life expectancy of the deceased had he not been killed must be estimated; his future earnings must be quantified, taking into account both taxation and inflation; and his probable age of retirement must be estimated. These are all contingencies that will determine what the actual loss of the dependant is when the breadwinner is killed. The exercise is, in effect, no more than the making of an educated guess. Thus Holmes JA in *Anthony and Another v Cape Town Municipality* 1967 (4) SA 445 (A) said, in assessing such damages (at 451B - C):

'When it comes to scanning the uncertain future, the Court is virtually pondering the imponderable, but must do the best it can on the material available, even if the result may not inappropriately be described as an informed guess, for no better system has yet been devised for assessing general damages for future loss.'

And in *Southern Insurance Association Ltd v Bailey* NO 1984 (1) SA 98 (A) at 113G - 114A, dealing with loss of earning capacity rather than loss of support, but where a similar assessment must be made, Nicholas JA said:

'Any enquiry into damages for loss of earning capacity is of its nature speculative, because it involves a prediction as to the future, without the benefit of crystal balls, soothsayers, augurs or oracles. All that the Court can do is to make an estimate, which is often a very rough estimate, of the present value of the loss.'

It has open to it two possible approaches.

One is for the Judge to make a round estimate of an amount which seems to him to be fair and reasonable. That is entirely a matter of guesswork, a blind plunge into the unknown.

The other is to try to make an assessment, by way of mathematical calculations, on the basis of assumptions resting on the evidence. The validity of this approach depends of course upon the soundness of the assumptions, and these may vary from the strongly probable to the speculative.

It is manifest that either approach involves guesswork to a greater or lesser extent. But the Court cannot for this reason adopt a non possumus attitude and make no award.'

Nicholas JA went on to say (at 1140) that where the court does have material on which an actuarial calculation can be made, the first approach offers no advantage over that involving actuarial calculations.

[15] In the Court a quo the plaintiff had relied on the evidence of the actuary, Mr G W Jacobson. His approach was the following: the income of the deceased must be determined by having regard to his earnings prior to death. That amount would form the basis for assessing his income from the date of death until the time when both children were self-supporting, but would be adjusted by taking into account various factors that might affect the amount earned. Thus the total sum at the end of the period was discounted by between 20 and 25 per cent. The reduced sum is then divided into shares. The standard practice, Jacobson testified, is to allocate two shares to each adult (deceased and spouse) and one share to each child. In this case he allocated four shares to the deceased (being unmarried but living with a partner) and one each to the three children (including Anastasia). In his final report, prepared in 1999, Jacobson estimated that on this basis the total sum that would have been available to the children, Nicolle and George, amounted to close to R2 million. He then deducted from this sum the amounts of maintenance received from the executor over the period between the deceased's death and the date of winding up the estate, based upon the divorce settlement (plus the increases agreed to by the executor), as well as the amounts received by the children by way of inheritance (the value of Elba Court, the cash residue left in the estate and the value of the gold coins), which he referred to as the 'accelerated benefits,' and concluded that the balance represented the loss of the dependants. 'On this basis, he calculated that Nicolle had been deprived of some R849 738 and George of R1 095 380.

[20] The approach of the plaintiff is, in my view, also in conflict with the principle that the dependants of the deceased should be compensated only for financial loss, and that they should not profit from the wrongdoing of the defendant. See in this regard *Groenewald v Snyders* 1966 (3) SA 237 (A) at 247A-D. Moreover, there was no authority cited in support of the proposition that income generated by assets in a deceased estate does not constitute an accelerated benefit to dependent heirs. And such argument is in conflict with settled law applied at least since the decision in *Jameson's Minors*. The trial Court cited in this regard *Indrani and Another v African Guarantee & Indemnity Co Ltd* 1968

(4) SA 606 (D) where Fannin J said (at 607F- H):

'The general principle applied by the South African Courts is that a dependant plaintiff, when entitled to damages for loss of support,

should be awarded damages only for the "material loss caused ... by his death" (see *Hulley v Cox* 1923 AD H 234 at 243). It seems implicit in what was said by Innes CJ in *Hulley v Cox*, that the material loss can only be ascertained "by balancing, on the one hand, the loss to him of the future pecuniary benefit, and, on the other, any pecuniary advantage which from whatever source comes to him by reason of the death" (my emphasis).'

Fannin J also referred (at 607G - H) with approval to the work of I Professor P Q R Boberg in his series of articles dealing with actions for loss of support in (1964) 81 SALJ 198, where he had shown that our Courts have 'consistently applied this principle of the "balance of losses and gains" '. The argument of the plaintiff that the children had paid for their own support, and thus suffered a loss, must accordingly fail."

[6] I am of the view that the past loss of support in the sum of R1 096 652.00 for the plaintiff, R14 679 044.00 for D. and R1 450 293.00 for V. would be adequate compensation for the past loss in the total amount of R4 014 894.00. The contingency deductions allowed in the calculation taken up in the table above are not out of kilter with established principles and contingencies provided for in similar matters.

[7] For future loss of support I am satisfied that the deductions of R1 128 696.00, R458 902.00 and R463 721.00 in respect of the accelerated inheritance of the plaintiff and her children would be adequate but I do not agree with the 9% deduction for remarriage from the plaintiff's calculation of her future loss of support in the sum of R229 297.00. The 9% deduction is based on statistics collated by the authors of textbooks I have been referred to. Those statistics are at face value premised on research and the use of race as point of departure. What is in my view of more relevance in the present matter is the social standing of the plaintiff. She is an intelligent and articulated individual. She is qualified and has, like her late husband studied while performing her daily duties as mother and spouse. She was involved in a relationship with another man that was terminated by her. During evidence the plaintiff expressed her disappointment in the person she was romantically involved with. Those unpleasant memories would, in my view, fade away and her prospects of remarriage are, in my view, much better than the opinion she verbalised during evidence. I am of the opinion that a 25% deduction should be made from the amounts determined as future loss of support for the plaintiff and that no further deductions from those amounts are indicated in this matter.

I therefore make the following order:

1. The defendant is ordered to pay to the plaintiff the amount of R9 000 000.00 in delictual damages following the loss of support the plaintiff sustained in her personal and representative capacity from a motor vehicle accident which occurred on 18 May 2007, which amount is payable by the defendant to the plaintiff on or before 28

September 2017 by depositing same into the plaintiff's attorneys of record's trust account, the details of which are as follows:

Account holder

MacRobert Incorporated

Bank

Standard Bank

Type of account

Trust

Account Number

[...]

Branch

Pretoria

Branch Code

01 00 45

Reference

G Dreyer/2030549

2. The defendant's claims handler is ordered to request payment of the capital amount set out in prayer 1 above within a period of 7 (seven) days from the date upon which the court order has been served on the defendant and/or defendant's claims handler and to provide the plaintiff's attorney with written confirmation that payment has been requested;
3. 3.1 The defendant will not be liable for interest on the outstanding amount;
3.2 Should the defendant fail to make payment of the capital amount on or before 28 September 2017, the defendant will be liable for interest on the amount due to the plaintiff at a rate of 10,5% per annum as from the date of this order to date of final payment;
4. The defendant is ordered to pay the plaintiff's taxed or agreed party and party costs on the High Court scale for 3 August 2016, 14 August 2017 and 15 August 2017, which costs will include, but will not be limited to the following:

4.1 The costs of all expert reports, medico-legal reports, addendum medico-legal reports, and combined joint reports, RAF4 Serious Injury Assessment Report(s) and radiology reports of all experts of whom notice has been given and/or whose reports have been furnished to the defendant and/or its attorneys and/or whose reports have come to the knowledge of the defendant and/or its attorneys as well as all reports in their possession and/or contained in the plaintiff's bundle of documents. This shall include, but not be limited to the following experts of whom notice has been given, namely:

4.1.1 K Prinsloo, Industrial Psychologist;

4.1.2 E Prinsloo, Educational Psychologist;

4.1.3 P D Zeeman, Chartered Accountant;

4.1.4 K Pretorius, Actuary ;

4.2 The full fees of the plaintiff's counsel in respect of preparation, consultations, pre-trial conferences, travelling time and expenses and a day fee for 3 August 2016, 14 August 2017 and 15 August 2017;

4.3 The costs of holding all pre-trial conferences, as well as roundtable meetings between the legal representatives for both the plaintiff and the defendant, including counsel's charges in respect thereof as well as all reasonable costs, including but not limited to travelling expenses incurred by the plaintiff's attorneys and counsel in order to attend such pre-trial conferences;

4.4 The costs of and consequent to compiling all minutes in respect of pre-trial conferences;

4.5 The costs of and consequent to the holding of all expert meetings between the medico-legal experts appointed by the plaintiff;

4.6 The reasonable taxable costs of one consultation with the client in order to consider the offer of the defendant, the costs to accept it, have it made an order of court and to procure performance by the defendant of its obligations in terms hereof;

4.7 The cost incurred in obtaining payment and/or execution of the capital amount mentioned in prayer 1 above;

4.8 The costs consequent to all of the plaintiff's trial bundles, expert reports, pleadings and notices, all indexes, document bundles and witness bundles, including the cost of 6 (six) full copies thereof;

5. 5.1 Plaintiff is ordered to serve the notice of taxation of plaintiff's party and party bill of costs on defendant's attorneys of record;

5.2 The defendant is ordered to pay the plaintiff's taxed and/or agreed party and party costs within 14 (fourteen) days from the date upon which the accounts are taxed by the Taxing Master and/or agreed between the parties;

5.3 The defendant's claims handler is ordered to request payment of the taxed or agreed party and party costs within a period of 7 (seven) days from the date upon which the accounts have been served on defendant and/or defendant's claims handler and to provide the plaintiff's attorney with written confirmation that payment has been requested;

5.4 Should the defendant fail to make payment of the party and party costs within 14 (fourteen) days after service of the taxed accounts on the defendant's attorneys of record, the defendant will be liable for interest on the amount due to the plaintiff at a rate of 10,5% per annum as from the date of taxation to date of final payment.

H F JACOBS

ACTING JUDGE OF THE HIGH COURT

PRETORIA

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